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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA)
)
) CRIMINAL NO. 82-0114-A
)
BOBBY J. SURFACE)

MEMORANDUM OPINION

The defendant Bobby J. Surface moves to dismiss the indictment pending against him in federal court. See Fed. R. Crim. P. 6. The indictment charges Surface with violation of section 1 of the Sherman Act and the federal mail-fraud statute. See 15 U.S.C. § 1 (1976); 18 U.S.C. § 341 (1976). The defendant claims that the government obtained some of the evidence leading to the indictment in violation of his fifth and sixth amendment rights.

I. FACTUAL BACKGROUND

Superior Paving Corporation ("Superior") has been the target of a price-fixing investigation by a federal grand jury impaneled on September 9, 1981. Surface is an officer of Superior. He and several other high-ranking Superior officials also have been under investigation by the grand jury. At the beginning of the grand jury process, Peter Davis and Charles Shaffer represented the corporation, as well as all of the investigated employees. The government's counsel has been Hays Gorey, Jr.

The government subpoenaed Surface and fellow officer Ronald White to testify before the grand jury on September 9, 1981. Upon the advice of Davis, both men invoked their fifth amendment privilege and refused to testify. Later that day, Gorey appeared before this court seeking orders granting use immunity to Surface and White. The court granted this immunity to the defendants. It instructed them that they now must testify fully and truthfully before the grand jury. At this

time, Davis withdrew from his representation of the two defendants, because of the conflict with his representation of the other non-immunized defendants. The court then suspended further grand jury proceedings the following day, so that Surface and White could find new counsel.

On the same day, Surface retained Donald Bucklin to represent him for the duration of the grand jury proceedings. White also obtained new counsel. At this point, both defendants believed that they had immunity from further prosecution, as long as they testified fully and truthfully. Surface and White thought that Gorey would call both of them to testify before the grand jury. Gorey scheduled White to testify on the following day.

The two defendants met on the next morning to discuss White's upcoming testimony. They refreshed each other's memory and discussed Superior's past pricing arrangements. Counsel for the two defendants were not present during this meeting. Later that day, White testified before the grand jury. Gorey postponed and ultimately cancelled Surface's scheduled appearance. The grand jury later indicted Surface based in part on White's testimony.

II. LEGAL ANALYSIS

Surface argues that Gorey's actions deprived him of his sixth amendment right to counsel in two ways. The court begins by noting that the sixth amendment right to counsel does not apply before arrest or indictment. See United States v. Mandujano, 425 U.S. 564, 581 (1976); Kirby v. Illinois, 406 U.S. 682, 688 (1972). The due process clause, therefore, is the source of any right to counsel at the grand jury stage.

Surface first alleges that Gorey failed to inform Davis of the upcoming conflict in interest, despite Davis' repeated requests for this information. The defendant contends that the prosecutor had an obligation to disclose any conflicts that were imminent. See In Re Gopman, 531 F.2d 262, 265-66 (5th Cir. 1976). Davis' request for this information, how-

ever, was simply a disguised attempt to discover which Superior employees the government planned to call before the grand jury. Requiring the prosecution to make a binding disclosure of this information would interfere with the government's investigative function. Thus, defense counsel must bear the burden of anticipating conflicts of interest in this situation. The court, therefore, rules that Gorey's failure to reveal any upcoming conflict does not violate the due process clause under the circumstances.

Surface next contends that Gorey deprived him of effective assistance of counsel by obtaining the immunity order. The issuance of this order created the conflict that forced the defendant's original counsel to withdraw. The mere fact that his counsel had to withdraw, however, does not violate any right to counsel that he may have had. See In Re Investigation Before February, 1977, Lynchburg Grand Jury, 563 F.2d 652, 658 (4th Cir. 1977). Surface can defeat the indictment on this ground only if he can show that Gorey obtained the immunity order in bad faith with the intent of forcing the withdrawal of counsel. The defendant has not met this burden. As a consequence, the court DENIES Surface's motion on effective assistance of counsel grounds.

Finally, Surface complains that the use of White's testimony to indict him violates his fifth amendment privilege against self-incrimination. He asserts that White based most or all of his testimony on information provided by Surface after issuance of the immunity order. Surface acted reasonably in believing that he was immune from further prosecution and that the government would call him to testify. See United States v. Society of Independent Gasoline Marketers of America, 624 F.2d 461, 473-74 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1981). Thus, the use of any testimony that White derived from his post-immunity discussions with Surface does violate Surface's fifth amendment right. See id. Pre-immunity discussions with White, of course, were at Surface's own risk.

The one remaining question is the appropriate remedy for this violation of the defendant's fifth amendment rights. Dismissing the indictment is too harsh a remedy in this case, because the government obtained the evidence necessary to indict Surface from sources other than the post-immunity discussions in question. The court, however, will suppress at trial any evidence or statements derived from these post-immunity conferences.

The court also advises the government to handle the problems created by immunity properly in the future. In particular, the government's counsel should have informed Surface and White at the time of the immunity grant of the possibility that only one of them would testify before the grand jury. The government should routinely issue this caveat at the time that the court signs the immunity orders.

UNITED STATES DISTRICT JUDGE

Date: _____