



## USA v. Robles Padilla et al

2014 | Cited 0 times | E.D. California | April 11, 2014

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

Plaintiff, v. NELSON MAURICIO PONCE VASQUEZ,

Defendant.

CR. NO. 2:11-101 WBS MEMORANDUM AND ORDER RE: MOTION TO DISMISS INDICTMENT

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Defendant Nelson Mauricio Ponce Vasquez is charged with one count of distribution of at least fifty grams of methamphetamine in violation of 21 U.S.C. § 841(a)(1). (Docket No. 1.) Presently before the court is to dismiss the Indictment for violation of his Sixth Amendment right to a speedy trial. The federal grand jury returned the Indictment in this case on March 3, 2011, and it was unsealed on April 13, 2011. (Docket Nos. 1, 10.) Defendant was not arrested, however, until June 18, 2013, when he attempted to travel from Oakland to Mexico. Defendant contends that the passage of twenty-six months between the time he was indicted and his arrest prejudiced his defense in violation of his Sixth Amendment right to a speedy trial and therefore mandates dismissal of the Indictment.

The Sixth Amendment guarantees that in all criminal prosecutions the accused shall enjoy the right to a speedy trial. *United States v. Beamon*, 992 F.2d 1009, 1012 (9th Cir. 1993) (quoting *Doggett v. United States*, 505 U.S. 647, 651 (1992)). Speedy trial challenges are assessed under a four-part balancing test that evaluates: (1) whether delay before trial was uncommonly long, (2) whether the government or the criminal defendant is more to blame for that delay, (3) whether, in due course, the defendant asserted his right to a speedy trial, and (4) whether he suffered prejudice because of the delay. *Id.* (quoting *Doggett*, 505 U.S. at 651).

1. Length of Delay before Trial U allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay *Doggett*, 505 U.S. at 651-52. If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the



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claim the presumption that pretrial delay has prejudiced the

accused intensifies over time. Id. Depending on the nature of the charges, the lower courts have generally found postaccusation at least as it approaches one year. Id. at 652 n.1; see also *United States v. Gregory*, 322 F.3d 1157, 1161- courts generally have found that delays approaching one year are presumptively prejudicial

Here, it is undisputed that the twenty-six-month delay<sup>1</sup> is more than two times the threshold to show presumptive prejudice and thus triggers the presumption of prejudice under the first factor. (Docket No. 93 at 7:21-24.)

2. *Attributing Blame for the Delay* som to pursue a defendant and bring him to trial. *United States v. Mendoza*, 530 F.3d 758, 762-63 (9th Cir. 2008) (quoting *United States v. Sandoval*, 990 F.2d 481, 485 (9th Cir. 1993)). If the defendant is not attempting to avoid detection and the government makes no serious effort to find him, the government is considered negligent in its pursuit. Id. at 763 (citing *Doggett*, 505 U.S. at 653). In *Mendoza*, the Ninth Circuit held that the government was negligent when it knew the defendant lived out of the country and relied exclusively on put[ting] a warrant out on the law

<sup>1</sup> For the first time in his reply and relying on an Eleventh Circuit case, defendant contends that the eight-month pre-indictment delay should be added to the twenty-six-month post-indictment delay, thereby resulting in a total delay of almost three years. See *United States v. Ingram*, 446 F.3d 1332, by trial analysis is triggered, it is appropriate to consider inordinate pre-indictment delay in determining how heavily post-indictment that the Ninth Circuit would follow this approach, eight months of pre- adding pre-indictment delay without knowing the reasons for the delay would be inconsistent with the balancing test. enforcement database the defendant to inform him of the indictment. Id. The second inquiry seeks to assess whether the is more to blame for th[e] delay *Doggett*, 505 U.S. at 651. Blame is not necessarily the same as negligence in the classic sense. By employing the terms the court does not understand the caselaw to require a defendant to show professional negligence by the government in the sense of showing efforts fell below the established standard of police practice in the community. The court would have to be blind to reality not to recognize that law enforcement agencies must often make choices, based on limited resources, to investigate some matters less thoroughly than others and search less diligently for some individuals than for others. It is not for the court to fully understand or second-guess those decisions. However, what the court does understand the caselaw to conclude is that when law enforcement decides not to diligently search for a particular defendant, the government may have to bear the responsibility for any prejudice the defendant suffers as a result of that decision.

Here, although defendant originally argued that the government failed to take any efforts to locate him after he was indicted, the government submitted evidence showing otherwise. Supervisory Special Agent Tehran Palmer of the Bureau of Alcohol, Tobacco, Firearms, and Explosives submitted



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an affidavit detailing the efforts made to arrest defendant. Agent Palmer was the lead agent in this case, participated in the controlled methamphetamine purchases charged in the Indictment, and led the efforts to locate defendant. (Docket No. 93-1 ¶ 3.) Agent Palmer indicates that, after the Indictment was returned on March 3, 2011, he placed the arrest warrant for defendant in the National Crime Information Center on March 4, 2011. (Id.) At that point, the government believed defendant lived at 1052 Weldon Lane, which was a unit in the Mission Bay apartments in Bay Point, California. (Id. ¶¶ 4-5.)

In April 2011, Agent Palmer conducted surveillance at the Mission Bay apartments on six separate days from approximately 6:00 to 9:00 or 9:30 a.m. and again from approximately 3:00 to 6:00 p.m. (Id. ¶¶ 5, 9.) During the surveillance, Agent Palmer did not see defendant or either of the two vehicles that had been associated with him. (Id. ¶¶ 8, 10.) In May 2011, Agent Palmer conducted an updated search of commercial databases to ascertain whether defendant had moved and discovered a new address associated with defendant, which was actually just a different unit within the same relatively small apartment complex. (Id. ¶ 11.)

On May 13, 2011, another agent returned to the Mission Bay apartments in attempt to locate the car registered to defendant, but the attempt was unsuccessful. (Id.) On June 30, ECS system utilized by the United States Custom and Border Protection. (Id. ¶ 13.) On August 3, 2011, Agent Palmer and another agent returned to the apartment complex and spoke with the onsite fairly well and was familiar with the family, but would not provide their apartment unit number. (Id. ¶ 14.)

On August 13, 2011, Agent Palmer and other agents, for the first time in uniform, attempted to arrest defendant at the apartment complex at the last known unit associated with him. (Id. ¶ 16.) Agent Palmer knocked approximately six to ten times and announced the police presence, but no one answered and the arrest attempt was ultimately discontinued due to the lack of response and lack of movement in the unit. (Id. ¶ 18.) On September 30, 2011, Agent Palmer and another agent again conducted surveillance at the apartment complex from approximately 2:00 to 5:30 p.m., but did not see defendant or any vehicle associated with him. (Id. ¶ 19.) After September 30, 2011, Agent Palmer ceased surveillance at the apartment complex due to the prior unsuccessful efforts and because the unit associated with defendant did not appear occupied. (Id. ¶ 20.)

During the six-month period when the government unsuccessfully attempted to locate defendant, it is undisputed that he lived in a unit at the Mission Bay apartment complex. It is also undisputed that he was employed with Bayview Environmental, which the government could have discovered through a more thorough investigation. 2

There is no evidence or 2 Defendant received his wages from Bayview Environmental via check and federal income and social security taxes were withheld. (Docket No. 95-10 ¶ 3.)

Defendant was also a member of the Laborers Local Union affiliation with that union until after the



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instant motion was filed when Agent Palmer noticed for the first time that the shirt defendant had on in the picture from the charged drug transaction had the Laborers Local Union 67 logo on it. (See Docket No. 103- suggestion that defendant was aware of the Indictment or trying to evade government detection. - clandestine lifestyle, the government was unable to locate him.

After September 30, 2011, the government ceased all active efforts to locate defendant and relied exclusively on the entry of the arrest warrant in its various databases. When all

defendant lived in a relatively small apartment complex and the onsite manager of that complex confirmed with the agents that defendant lived there, ceasing its efforts to locate defendant after only nine visits to the complex during daytime hours cannot be considered diligent. If federal law enforcement had elected to allocate sufficient resources to search for defendant, it would be shocking to imagine that they could not have located him when they knew where he lived and he maintained a regular job.

For approximately twenty months, however, the government did not make a single effort to locate defendant. He was arrested on June 17, 2013 only because his scheduled flight to Mexico flagged him in the TECS system. (Id. ¶ 21.) The Ninth Circuit has held that such a passive investigation relying only on entry of the arrest warrant in a government database is not

1.) Defendant argues that the government could have noticed the logo in the picture back in 2010 and contacted the union to (See Docket No. 104-1 ¶¶ 2-4.) These efforts would have unquestionably been superior detective work that one would hope to see from the government.

was not diligent in its search for defendant. diligent. See Mendoza, 530 F.3d at 763; see also Beamon, 992 F.2d at 1013.

For all of the foregoing reasons, in assessing the relative blame for the delay in arresting defendant after indictment, none of that blame can be assessed to the defendant. There is no reason to believe he knew of the Indictment or took any action to avoid arrest or detection. To the contrary, all of the blame for the delay lies exclusively with the government. Despite knowing the complex where defendant lived, it ceased all efforts to locate him and simply put the case on the back burner.

3. Defendant Assertion of his Right to a Speedy Trial The third factor evaluates whether the defendant has asserted his right to a speedy trial. The Supreme Court has assertion of his speedy trial right[] is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right Barker v. Wingo, 407 U.S. 514, 531 (1972); see also Barker, 407 U.S. at 532 ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. The strength of efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, Id. at 531.



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Here, there is no evidence that defendant was aware of the Indictment prior to his arrest, thus he cannot be faulted for failing to seek a speedy trial prior to his arrest. Cf. *Doggett*, 505 U.S. at 653 (indicating that third factor, concerning invocation of the right to a speedy trial, would be weighed heavily against one who knew of his indictment years before he was arrested). After he was arraigned on June 25, 2013, (Docket No. 66), the government and defendant jointly requested two continuances of the October 16, 2013 trial date, which had been set for co-defendant Dionisio Robles Padilla. (Docket Nos. 71, 73, 88, 89.) In *United States v. Corona-Verbera*, the Ninth Circuit concluded that, because the defendant asserted his right to a speedy trial after requesting eight continuances, the third factor of the 509 F.3d 1105, 1117 (9th Cir. 2007). Here, the government does not argue that defendant failed to assert his right to a speedy trial, but contends this factor is essentially a wash because defendant sought continuances.

Although defendant did not file this motion asserting his constitutional right to a speedy trial until 210 days after his arraignment and after seeking two continuances counsel points out that the motion was filed immediately upon learning that defendant suffered prejudice from the delay because certain phone records were unavailable due to the lapse of time. See *Barker*, 407 U.S. at 532. Under these facts, the court finds that defendant sufficiently asserted his right to a speedy trial, and his assertion is entitled to strong evidentiary weight in determining whether [he] *Id.* at 531.

4. Actual Prejudice Traditionally, actual prejudice can be shown in three ways: oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the defense will be impaired. *Beamon*, 992 F.2d at 1014. Defendant does not claim prejudice under either of the first two categories. Rather, defendant seeks to show actual prejudice based on the ground that his defense will be impaired because of the delay. In evaluating prejudice, the court must assess how much the defense was actually impaired, recognizing that prejudice of this sort cannot be proved easily then balance that impairment with diligence. *Id.* The burden must be definite and not speculative *United States v. Manning*, 56 F.3d 1188, 1194 (9th Cir. 1995) (quoting *United States v. Butz*, 982 F.2d 1378, 1380 (9th Cir. 1993)).

Defendant in this case contends the twenty-six-month delay in his arrest will impair his defense because certain phone records relevant to the charge against him are no longer available. Specifically, the government seeks to prove that, on August 18, 2010, Agent Palmer ordered methamphetamine from Padilla while meeting with Padilla at an auto repair shop and defendant delivered the methamphetamine to Padilla. The evidence suggests that Padilla ordered the drugs by placing a call on a landline in the auto repair shop that had the number (707) 652- 2603 (the (707)- Defendant does not deny that he was at the auto repair shop at the time of the charged methamphetamine transaction, but contends that he was there only to discuss repairs Padilla had performed to his truck and that he did not deliver the methamphetamine. To effectively present this theory, it would strongly assist defendant if he can identify the number Padilla called from the (707)-line to order the methamphetamine and show that the number and person called have no connection to him.



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Of course, if defendant is in fact guilty, it could be argued that it is speculative to assume that he would benefit from identifying that telephone number. Although defendant has presented evidence that his cell phone did not receive a call from the (707)-line on the date in question, the number called could have belonged to someone else associated with him. But in assessing the relevance of that information, the court, consistent with the presumption of innocence, must assume the defendant is innocent. 3

Making that assumption, identifying the phone number Padilla called would be of substantial value to to ultimately show that he is not connected with the number or person Padilla called to order the methamphetamine and thus that he did not deliver the drugs. The government could still argue that the

3 directed are readily identified. It is intended to spare an accused those penalties and disabilities--incompatible with the presumption of innocence--that may spring from delay in the Dickey v. Florida, 398 U.S. 30, 41 (1970) (Brennan, J., concurring); see also Kaley v. United States, --- U.S. ----, ----, 134 S.Ct. 1090, 1110- presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our Whatever serious crimes the grand jury alleges the [defendants] committed, they are presumptively Estelle v. Williams, 425 U.S. 501, 503 (1976))). person called was somehow associated with defendant, but without some evidence beyond pure speculation to connect defendant to that person it is difficult to imagine how the government could sustain a conviction.

The records from the (707)-line are therefore integral that he was simply in the wrong place at the wrong time.

Whether Padilla in fact used the (707)-line to order methamphetamine on August 18 has been a source of disagreement between the parties and ultimately the catalyst for the court motion to reveal the identity of the confidential informant and holding an evidentiary hearing. A report Agent Sarah Mauricio prepared after a second purchase of methamphetamine from Padilla on August 31, 2010 states: [Confidential informant] also provided the phone number (707) 652-2603, which was identified as the phone line PADILLA uses

95-2.) Although defendant was not involved in the sale on August 31, he claims this statement showed Padilla customarily uses the (707)-line to order methamphetamine. The government argues that the statement about the use of the 707-line to order narcotics was limited to the sale on August 31.

At the hearing, the confidential informant denied knowledg tell any of the agents that Padilla uses the 707-line to order narcotics. 4

Agent Mauricio testified that she could not recall 4 For numerous reasons, including his demeanor





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while testifying, prior multiple felony convictions, and inconsistent whether Agent Palmer or the confidential informant told her about the (707)-line, but that one of them gave her that number as the . Although the government provided Agent handwritten notes from August 31 to show that there was no notation about the use of that line, the last entry of her notes states -652-2603 Agent Palmer credibly testified at the hearing that he observed Padilla order the methamphetamine from a landline in the auto repair shop on August 18. In his report from the August 18 transaction, he also [confidential informant] received an incoming call from phone number 707-652-2603. [Confidential informant] recognized the -4.) The August 2010 Comcast phone bill for the auto repair shop also identifies the 707-line as one of two lines on that account. 5

(Docket No. 107 at 12.) After considering all of the evidence presented, the court has no reason to doubt that Padilla ordered the methamphetamine on August 18 by placing a call on the (707)-line.

To show that Padilla did not call him or anyone connected to him to order the methamphetamine on August 18, defendant sought and the court granted a Federal Rule of Criminal Procedure 17(c) subpoena to Comcast Cable Communications, LLC

testimony, the court did not find the confidential informant credible.

5 Although the Comcast bill identifies two lines for the account, neither of the parties suggested that this second line was used and, even if it was, the court assumes the records for the second would similarly be unavailable due to the lapse of time. -line during 2010. (Docket No. 78.) Complete phone records for the 707-line, however, are no longer available due to t because Comcast retains its complete records for only two years. 6 The actual prejudice defendant claims rises above claims of prejudice based on speculation and generalized assertions that the Ninth Circuit has found insufficient. For example, in Corona-Verbera, the based on generalized speculation as to what lost or deceased witnesses would have said evidence showing how the witnesses would have testified at trial and how that evidence would have aided the defendant. 509 F.3d at 1113; accord United States v. Sherlock, 962 F.2d 1349, 1354 (9th Cir. 1989). Similarly, the Ninth Circuit rejected a claim

credit card recor Manning, 56 F.3d at 1194.

6 In its response to the subpoena, Comcast represented that after an extensive off-site search, it could three incoming and three outgoing calls on the (707)- -9; see also Docket No. 107 at 3.) None of the identified calls occurred in August. The Comcast bill for the auto repair shop, however, indicates that domestic calls were made on at least one of the two lines in August, (see memorializes a call being made on the (707)-line on August 18, (Docket No. 95-4). Although defendant could have offered more direct evidence to show that the Comcast records are incomplete, the government has not suggested that they are complete and the evidence indicates they are not. Defendant has therefore sufficiently shown that the Comcast records for the (707)-line in August 2010 Here, defendant has presented sufficient evidence showing that Padilla ordered methamphetamine using the (707)-line



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and that the destroyed Comcast records would have identified the number Padilla called. If he had the records showing which numbers were called from that number during the relevant time period, defendant would be able to show that it was not his phone or the phone of any one associated with him. If he had been arrested reasonably soon after indictment, there is good reason to believe those records could have been produced in response to his subpoena. Because of the delay caused by the government, those records are unavailable. This is neither speculation nor some generalized assertion of prejudice.

This prejudice strikes at the core of decision to cease what should have been a relatively simple effort to locate him. When balancing all of the factors, the only one that weighs slightly in favor of the government is that the delay was twenty- six months and did not reach an extreme duration exceeding five years as in other cases. The length of the delay alone, which was still more than double the minimal threshold, cannot alone save the day for the government if the Sixth Amendment is to have any meaning outside of cases with extreme delays. Here, the government was not diligent in searching for defendant and the caused him actual prejudice by depriving him of evidence that would undeniably tend to prove his innocence.

Although defendant has not advanced a flawless theory of actual prejudice, he does not rely on speculation alone and, when balanced against the other factors, has made a sufficient showing of prejudice under the facts of this case. Accordingly,

motion to dismiss the Indictment.

dismiss the Indictment be, and the same hereby is, GRANTED; and the Indictment is hereby DISMISSED as against defendant Nelson Mauricio Ponce Vasquez only. Dated: April 11, 2014

