

EXHIBITS OF DECISIONS BELOW

Exhibit A: Order of United States District Court, District of Hawaii dated June 16, 2021

Exhibit B: Order of United States District Court, District of Hawaii dated August 19, 2021

Exhibit C: Order of the United States Court of Appeals for the Ninth Circuit dated February 18, 2022

Exhibit D: Mandate of United States Court of Appeals for the Ninth Circuit dated March 14, 2022

EXHIBIT A

MINUTE ORDER

CASE NUMBER: CRIMINAL NO. 10-00384-6 LEK

CASE NAME: USA vs. Wesley Mark Sudbury

JUDGE: Leslie E. Kobayashi

DATE: 06/16/2021

COURT ACTION: EO: ORDER DENYING DEFENDANT'S MOTION FOR RELIEF UNDER 18 U.S.C. 3504(a)(1), FILED 4/26/21 [DKT. NO. 1334]

Before the Court is Defendant Wesley Mark Sudbury's ("Sudbury") Motion for Relief Under 18 U.S.C. 3504(a)(1) ("Motion"), filed on April 26, 2021. [Dkt. no. 1334.] Plaintiff United States of America ("the Government") filed its opposition to the Motion on April 30, 2021 ("Opposition"), and Sudbury filed his reply on June 1, 2021 ("Reply"). [Dkt. nos. 1337, 1340.] The Motion came on for hearing on June 15, 2021 by videotelephone conference. Present at the hearing were Sudbury, his counsel, Jason Z. Say, Esq., and Assistant United States Attorneys Thomas Muehleck and Margaret Nammar.

In his Motion, Sudbury argues that evidence obtained by the Government through a confidential informant is inadmissible because it is the product or was obtained by the exploitation of an unlawful act and, pursuant to 18 U.S.C. § 3504(a)(1), the Government is required to provide a sworn declaration or affidavit that affirms or denies the occurrence of the alleged unlawful act. [Motion at 1-2.] The Government denies that an unlawful act took place and argues that the Court has already ruled on the admissibility of the evidence in prior motions. [Opposition at 2-3.]

According to 18 U.S.C. § 3504(a),

[i]n any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States--

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act[.]

An "aggrieved party" is "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed[.]" 18

U.S.C. § 2510(11). This statutory provision “provides a procedure through which the Government can be requested to disclose information relating to possible illegal electronic surveillance that has been utilized against a defendant.” United States v. Yagman, CR 06-227(A) SVW, 2007 WL 9724370, at *1 (C.D. Cal. July 17, 2007).

Sudbury argues that a confidential informant

worked at entering the private areas of the home of Roger Christie and Sherryanne Christie, and in the private areas of their ministries, and surreptitiously photographing, videoing, and recording conversations of everyone present for a period in excess of five (5) years, with no knowledge or consent of anyone present. This information and evidence were used in his application for search warrants to record the conversations on the phones of Roger Christie and Sherryanne Christie.

[Reply at 13.]

First, Sudbury has failed to demonstrate that he is an “aggrieved party” as defined in 18 U.S.C. § 2510(11). His arguments center around recorded conversations of “everyone present” by a confidential informant, and wiretapped conversations taken from the telephones of Roger Christie and Sherryanne Christie. He has not established that he was a party to any intercepted communication or a person against whom the interception was directed. See United States v. Alter, 482 F.2d 1016, 1026 (9th Cir. 1973) (movant must “make a prima facie showing that good cause exists to believe that” he was subjected to illegal surveillance).

Second, Sudbury has already challenged the admissibility of the evidence at issue. See Motion to Exclude Evidence Pursuant to 18 U.S.C. § 2515, filed 9/16/19 (dkt. no. 1239) (“9/16/19 Motion”). Although the Motion relies on a different statute than the 9/16/19 Motion, both motions assert the same position that the Government cannot rely upon any evidence obtained through improper use of a confidential informant. This Court has found otherwise. [Entering Order: Court Order Denying Defendant’s Motion to Exclude Evidence Pursuant to 18 U.S.C. § 2515, filed 12/05/19 (dkt. no. 1254).]

Sudbury appears to seek discovery in that he requests “an order directed to the United States to disclose all sources of their evidence, or schedule an evidentiary hearing, where the Defendant can develop the sources of evidence from witnesses produced by the United States.” [Reply at 14.] If this is the object of the Motion, then Sudbury is directed to Rule 16, Federal Rules of Criminal Procedure, and his duty to demonstrate materiality:

To obtain discovery under Rule 16, a defendant must make a prima facie showing of materiality. United States v. Little, 753 F.2d 1420, 1445 (9th Cir. 1984); United States v. Cadet, 727 F.2d 1453, 1468 (9th Cir. 1984). Neither a general description of the information sought nor conclusory allegations of materiality suffice; a defendant must present facts which would tend to show that the Government is

in possession of information helpful to the defense. See Little, 753 F.2d at 1445; Cadet, 727 F.2d at 1466–68.

United States v. Mandel, 914 F.2d 1215, 1219 (9th Cir. 1990).

For the foregoing reasons, the Motion is DENIED.

IT IS SO ORDERED.

Submitted by: Agalelei Elkington, Courtroom Manager

EXHIBIT B

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY MARK SUDBURY,

Defendant.

CR. NO. 10-00384 LEK

ORDER CLARIFYING COURT'S ORDER AND DENYING RECONSIDERATION

On June 16, 2021, this Court issued its Order Denying Defendant's Motion for Relief under 18 U.S.C. § 3504(a) ("6/16/21 Order"). [Dkt. no. 1343.] Defendant Wesley Mark Sudbury ("Sudbury" or "Defendant") requests clarification, and the Court hereby clarifies that Sudbury failed to establish that he was a party to any intercepted communication.

BACKGROUND

This matter arises out of the original indictment filed on June 24, 2010 against Sudbury and thirteen other defendants involving a conspiracy to distribute and possess with intent to distribute marijuana involving 100 or more marijuana plants as well as harvested and processed marijuana and products containing marijuana and, as against Sudbury individually, the manufacture of, and possession with intent to distribute, marijuana involving 100 or more marijuana plants. [Indictment,

filed 6/24/10 (dkt. no. 1), at 2-5, 6-7.] The allegations arise out of the operation of the "THC Ministry" or "Hawaii Cannabis Ministry" formerly operating in Hilo, Hawai`i and directed by Roger Cusick Christie ("Christie") with the assistance of Sherryanne L. St. Cyr ("St. Cyr").¹ [Id. at 2-3.] At this time, all the defendants except Sudbury have entered guilty pleas and have been sentenced.

On April 26, 2021, Sudbury filed his Motion for Relief Under 18 U.S.C. 3504(a)(1) ("Underlying Motion"). [Dkt. no. 1334.] A court hearing was held on June 15, 2021, and the Underlying Motion was denied in the 6/16/21 Order. [Dkt. no. 1343.]

Sudbury files the instant motion asking for clarification, but it essentially is a motion for reconsideration of the 6/16/21 Order. For instance, Sudbury states he

also requests the Court's clarification why the [6/16/21] Order did not consider that the illegally obtained evidence by the unidentified person, working for [the Hawai`i Police Department ("HCPD")] as a paid employee of HCPD, that was proven by [Drug Enforcement Administration ("DEA")] Agent Clement Sze's affidavits in support of his 3 application for search warrants, that the evidence was illegally obtained by the state, and that it was evidence

¹ Christie and St. Cyr subsequently married, and St. Cyr is also referred in this case as Sherryanne L. Christie. See, e.g., First Superseding Indictment, filed 1/17/13 (dkt. no. 509), at 2.

that was prohibited from being used by DEA Agent Clement Sze's affidavits in support of his 3 application for search warrants by the United States Supreme Court decision in *Elkins v. United States*, 364 U.S. 206 (1960), where the US Supreme Court decision held the "**silver platter doctrine**", which allowed federal prosecutors to use evidence illegally gathered by state police, to be a violation of the Fourth Amendment to the United States Constitution.

[Request for Clarification of Court's Order ("Motion"), filed 7/27/21 (dkt. no. 1346), at 5 (emphasis in Motion).] Similarly, he states:

Defendant also seeks clarification on the Court's reliance on *United States v. Alter*, 482 F.2d 1016, 1026 (9th Cir. 1973).

Defendant believes the Court's reliance on *United States v. Alter*, 482 F.2d 1016, 1026 (9th Cir. 1973) was misplaced, where the court used it to show (movant must "make a prima facie showing that good cause exists to believe that" he was subjected to illegal surveillance).

[Id. at 6.] The Court therefore construes the Motion as a motion for reconsideration.

STANDARD

There is no rule in the Federal Rules of Criminal Procedure expressly authorizing the filing of motions for reconsideration. However, many courts - including the Ninth Circuit - have recognized that motions for reconsideration may be filed in criminal cases. See, e.g., United States v. Hee, Cr. No. 14-00826 SOM, 2015 WL 6510345, at *11 (D. Hawai'i Oct. 27, 2015) (listing cases). "[M]otions for reconsideration

in criminal cases are governed by the rules that govern equivalent motions in civil proceedings." Id. (alteration in Hee) (citations and quotation marks omitted). Thus, Local Rule 60.1 also applies in criminal cases to motions for reconsideration of non-dispositive orders. See, e.g., United States v. Naeem J. Williams, CR. No. 06-00079 DAE, 2007 WL 1294519, at *3 (D. Hawai'i Apr. 30, 2007). Local Rule 60.1 states, in pertinent part:

Motions seeking reconsideration of case-dispositive orders shall be governed by Fed. R. Civ. P. 59 or 60, as applicable. Motions for reconsideration of interlocutory orders may be brought only upon the following grounds:

- (a) Discovery of new material facts not previously available;
- (b) Intervening change in law; and/or
- (c) Manifest error of law or fact.

In the instant case, Sudbury does not allege newly discovered evidence, an intervening change in the controlling law, or that allowing the 6/16/21 Order to stand would result in manifest injustice. Sudbury's Motion is based upon alleged errors of law and errors in the application of the law to the facts of this case. Whether to grant or deny a Local Rule 60.1 motion for reconsideration "is committed to the sound discretion of the court." Abbey v. Haw. Emps. Mut. Ins. Co., 760 F. Supp. 2d 1005, 1023 (D. Hawai'i 2010) (quotation marks and some

citations omitted) (citing Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003)). Sudbury apparently contends that he is entitled to reconsideration based on manifest error of law or fact. A motion for reconsideration based on manifest error of law or fact must be filed within fourteen days after the written order is issued. Local Rule LR60.1 ("Motions asserted under subsection (c) of this rule must be filed and served within fourteen (14) days after the court's order is issued.").

DISCUSSION

In the Underlying Motion, Sudbury argued: that there was a "conspiracy of retribution" and DEA Special Agent Clement Sze's testified that a confidential source entered Christie's home without consent and recorded conversations; [Underlying Motion at 3;] and that conversations between Sudbury and Christie were recorded, [*id.* at 6]. Sudbury also filed an *Ex Parte* Motion to Seal Exhibit "A" of Defendant Wesley Sudbury's Motion for Relief Under 18 U.S.C. §3504(a)(1) on April 26, 2021 ("Motion to Seal") in which he sought to file Special Agent Sze's Affidavit in Support of Application ("Sze Affidavit") as Exhibit "A". [Dkt. no. 1335 at 1.] The Sze Affidavit was submitted "in support of an application to intercept wire communications" and sworn to on April 8, 2009. [Motion to Seal, Exh. A (Sze Aff. (dkt. no. 1335-1)) at pgs. 89-90.] The targets

of the wire communication interception were identified as Christie, Robert Armitage, William Canfield, Pauly Lnu, St. Cyr, Jordan Scambos, and Nathaniel Griswold. [Id. at pg. 5.] Sudbury was not identified as a target nor is he mentioned by name in the Sze Affidavit.

The crux of Sudbury's argument is that he believes, without any specific reference, that he was recorded by a confidential informant for law enforcement while he was in the private home of Christie and St. Cyr:

DEA Agent Clement Sze also provided proof by three (3) separate affidavits that the unidentified person was hired by HCPD to intentionally invade the private areas of the home of Roger Christie and Share Christie, and private areas of the Christie's ministry, a religious organization, for the purpose of surreptitiously recording private conversations, and photographing and videoing everyone present without their knowledge or consent for a period believed to be in excess of five years.

[Motion at 4.] Sudbury however neglects to point to any recording, transcript or other evidence that he was recorded, photographed or captured on video.

Sudbury asserts that he "has made a prima facie case showing that electronic surveillance occurred in this case, which is proven by the application for three separate search warrants" [Reply to United States' Response to Defendant's Request for Clarification of Court's Order ("Reply"), filed 8/16/21 (dkt. no. 1349), at 6.] He has not.

What he fails to perceive is that his right to protection against an unreasonable search is premised on the search having yielded evidence against him. See, e.g., United States v. Pulliam, 405 F.3d 782, 786 (9th Cir. 2005) (finding that "a person seeking to exclude evidence allegedly obtained in violation of the fourth amendment must have standing to challenge the illegal conduct").

Lastly, Sudbury continues to raise the so-called "silver platter" doctrine pertaining to fruit of unreasonable state searches. This doctrine no longer exists:

The silver-platter doctrine was based on the fact that the state searches to which it applied did not at that time violate federal law. Once the Fourth Amendment was incorporated against the States, the status of those state searches changed. Now they did violate federal law, so the basis for the silver-platter doctrine was gone. See Elkins, 364 U.S. at 213, 80 S. Ct. 1437 ("The foundation upon which the admissibility of state-seized evidence in a federal trial originally rested – that unreasonable state searches did not violate the Federal Constitution – thus disappeared [with incorporation]").

Gamble v. United States, 139 S. Ct. 1960, 1979 (2019)

(alteration in Gamble).

Sudbury's Motion is untimely because it was filed more than fourteen days after the 6/16/21 Order was issued. Even though untimely, the Court has reviewed the arguments made in the Motion and Reply, and finds that Sudbury merely rehashes

arguments previously raised and again fails to provide evidence that he was illegally recorded, photographed or captured on video. “[A] motion for reconsideration should not be granted, absent highly unusual circumstances” Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003) (quotation marks and citation omitted). Merely disagreeing with a previous order is insufficient for reconsideration, and reconsideration may not be based on evidence and legal arguments that could have been presented in connection with the underlying motion. See United States v. Anthony T. Williams, CR NO. 17-00101(01) LEK, 2019 WL 984273, at *3, *5 (D. Hawai`i Feb. 28, 2019).

For the foregoing reasons, the Motion is DENIED.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, August 19, 2021.



/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

USA V. WESLEY MARK SUDBURY; CR 10-00384-06 LEK; ORDER CLARIFYING COURT'S ORDER AND DENYING RECONSIDERATION

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 18 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WESLEY MARK SUDBURY,

Defendant-Appellant.

No. 21-10300

D.C. No. 1:10-cr-00384-LEK-6
District of Hawaii,
Honolulu

ORDER

Before: FERNANDEZ, TASHIMA, and FRIEDLAND, Circuit Judges.

Appellee’s motion (Docket Entry No. 7) to dismiss this appeal for lack of jurisdiction is granted. A review of the record and appellant’s responses to this court’s November 17, 2021, order to show cause and appellee’s motion demonstrates that the court lacks jurisdiction over this appeal because the district court’s order clarifying and denying reconsideration of its order denying appellant’s motion for relief under 18 U.S.C. § 3504(a) is not a final judgment or an order that comes within the collateral order doctrine. *See* 28 U.S.C. § 1291; *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (in criminal cases, finality requirement generally “prohibits appellate review until after conviction and imposition of sentence”).

To the extent that this appeal can be construed as a petition for a writ of mandamus, the petition is denied because appellant has not shown that he is

entitled to the extraordinary remedy of mandamus relief. *See Bauman v. United States Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977).

DISMISSED.

EXHIBIT D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 14 2022

MOLLY C DWYER, CLERK
U S COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WESLEY MARK SUDBURY,

Defendant - Appellant.

No. 21-10300

D.C. No. 1:10-cr-00384-LEK-6

U.S. District Court for Hawaii,
Honolulu

MANDATE

The judgment of this Court, entered February 18, 2022, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: David J. Vignol
Deputy Clerk
Ninth Circuit Rule 27-7