IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
****

PEOPLE OF THE VIRGIN ISLANDS, Plaintiff,	) CASE NO. ST-10-CR-122
	) V.I. CODE ANN. 14, § 834(2)
v.	)
JANICE D. REY, Defendant.	)

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Janice Rey's Motion to Dismiss the Superseding Information in this case based upon her conviction in the District Court of the U.S. Virgin Islands. Rey alleges that the present local prosecution should not go forward because any prosecution for the charges proffered in the Superseding Information would be prohibited by the terms of the Fifth Amendment Double Jeopardy Clause and the Revised Organic Act of the Virgin Islands. The People counter that the charges in the Superseding Information are not the same charges as those under which Rey was convicted in the District Court, and for that reason, the Double Jeopardy Clause is not a bar to the prosecution.

The People also contend that the single sovereign rule no longer has any viability, and for that reason, the bar of double jeopardy does not apply to successive prosecutions by the federal and territorial governments. The Court is bound by precedent to follow the single sovereign rule, and will, therefore, determine whether the prosecution of Rey is barred by the Double Jeopardy Clause. Because the Court cannot determine whether Count 1 of the Federal Indictment is the same charge for double jeopardy purposes using the totality of the circumstances test, the Court will set this matter down for an evidentiary hearing to make that determination. Counts 2 through 20 are clearly not the same charge for double jeopardy purposes as the conspiracy count in the Federal Indictment, and the Motion to Dismiss as to those counts will be denied.

Facts Relative to Double Jeopardy Claim of Rey

Rey was arrested on March 12, 2010, based upon a warrant issued by this Court and a Superseding Information dated December 10, 2009. An Amended Superseding Information was filed on December 3, 2010. The Information charges Rey with violating provisions of the Virgin Islands Criminal Code relating to an alleged fraudulent investment scheme in which she had allegedly fraudulently obtained over one million dollars. The Information has 24 counts charging Rey with violation of the criminally influenced and corrupt organizations act (1 count), with obtaining money under false pretenses (19 counts), drawing and delivering worthless checks (1 count), securities fraud (1 count), and broker-dealer registration violations (1 count). The Information also asks for forfeiture of some of Rey's assets.

On September 13, 2012, Rey was also charged with conspiracy to commit wire fraud and other crimes in violation of the Federal Criminal Code in the District Court of the U.S. Virgin Islands. On March 28, 2013, Rey was convicted on all counts of the Federal Indictment in District Court. At issue now is whether the prosecution of Rey in Superior Court is barred under the Double Jeopardy Clause of the Fifth Amendment, which prohibits being placed twice in jeopardy for the "same offense."

In Count 1 of the Amended Superseding Information, the charge under the CICO statute alleges that between January 1, 2007 and May 30, 2010, Rey, while associating with Rey Financial, LLC and Paramount Group, LLC knowingly and designedly by false pretenses, defrauded numerous investors of money valued in excess of one hundred dollars. This count alleges that Rey obtained thousands of dollars from investors utilizing investment contracts referred to as private placement agreements and loan agreements. Rey allegedly represented that the contracts were risk-free and secure; that they had high interest, profits, or returns; and that the investors' money would be returned to them in a specified amount of time. Instead, Rey failed or refused to return the investments, and issued worthless checks to the investors, knowing that there were insufficient funds to pay the checks.

Count 1 of the Federal Indictment charges Rey with conspiring, combining, confederating, and agreeing with each other and others from July 2005 to May 2009 to devise a scheme and artifice to defraud investors and to obtain money and property by materially false and fraudulent pretenses, representations and promises by the use of wire communications in interstate commerce. Count 1 of the Federal Indictment also alleges various overt acts in furtherance of this scheme.

The other counts of the Amended Superseding Information allege 19 instances of taking money by false pretenses involving individual investors, whose names are not mentioned in the Federal Indictment. Counts 21 through 24, the remaining counts of the Amended Superseding Information, are not in issue in Rey's Motion.

The Court reserves decision regarding whether trial on Count 1 of the Superior Court Information violates the Double Jeopardy Clause and will deny the Motion to Dismiss as to Counts 2 through 20 of the Superior Court Information.

After having reviewed the two charging documents, the Court does not believe it is clear whether Count 1 of the Federal Indictment and Count 1 of the Superior Court Amended Superseding Information are distinct and separate charges for double jeopardy purposes. The Court will, therefore, schedule this matter for hearing to determine whether the two charges are the same or different offenses using the totality of the circumstances test. The Court will deny Rey's Motion to Dismiss as to Counts 2 through 20 of the Superior Court Information.

The Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution[1] provides for three separate protections to a criminal defendant. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."[2] Since Rey was convicted in the District Court of the U.S. Virgin Islands of offenses similar to the ones for which she is being prosecuted in the Superior Court, we are concerned with the second protection afforded by the Double Jeopardy Clause, namely whether or not Rey can be prosecuted in the Superior Court on the charges in the Amended Superseding Information after being convicted in the District Court on similar charges.

The courts have not precluded successive prosecutions or multiple punishments for the same offense when the federal and state governments are involved, but the double jeopardy bar does apply to multiple prosecutions by the federal government and a territorial government, such as the Government of the U.S. Virgin Islands. With respect to the states, "the rule precluding separate sentences would not apply since, as an independent sovereign, [ ] a state is free to punish criminal conduct even though the federal government has successfully prosecuted the same individual under the federal law for a similar offense growing out of the same occurrence."[3] This concept does not apply to the Territory of the U.S. Virgin Islands because it does not have independent sovereignty; instead, it derives its power directly from the Federal Government under Article IV, Section 3 of the U.S. Constitution.[4] Because of this, successive prosecutions by the Federal and Territorial Governments for the same offense are prohibited under the Double Jeopardy Clause. The People suggest that, because of recent changes in the status of the Territory and its judiciary, the so-called "single sovereignty" principle no longer applies. However, this Court is bound by the precedent of the Third Circuit's holding in *Government of the Virgin Islands v. Dowling*,[5] stating that the single sovereignty principle is applicable and the protection of the double jeopardy clause to successive prosecutions between federal and territorial cases involving the same offense is, therefore, applicable.

---

[1] The protections of the double jeopardy clause apply to the Virgin Islands by virtue of the Revised Organic Act of 1954. Section 3 of the Revised Organic Act provides that:

> No person shall be held to answer for a criminal offense without due process of law, and no person for the **same offense** shall be twice put in jeopardy of punishment. (Emphasis supplied.)

The United States Constitution Amendment 5, states that:

> [No person shall] be subject for the **same offence** to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . . (Emphasis supplied.)

[2] *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)); *United States v. Halper*, 490 U.S. 435, 440 (1989); *Government of the Virgin Islands v. Olivierie*, No. 172/1993, 1995 WL 696622, at *1 (Terr. Ct. Nov. 17, 1995); *People v. Vergile*, 50 V.I. 127, 134 (Super. Ct. 2008).
[3] *United States v. Wheeler*, 435 U.S. 313, 316-17 (1978).
[4] *Government of the Virgin Islands v. Dowling*, 633 F.2d 660, 669 (3d Cir. 1980).
[5] *Id.*

The protection of the double jeopardy clause for successive prosecutions applies when the two offenses for which the defendant is being tried cannot survive the "same elements" or "*Blockburger*" test.[6] With the *Blockburger* test, the Court must inquire whether "each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution."[7]

Although lesser included offenses are considered the "same offense" as the greater offense in the double jeopardy context,[8] the alleged overt acts of a conspiracy are not considered to be the same offense as the larger conspiracy, and a conviction or acquittal in a conspiracy case would not bar the subsequent prosecution for one or more of the acts alleged as an overt act in a conspiracy.[9] With respect to successive prosecutions for similar conspiracies, the Third Circuit has adopted the "totality of the circumstances" test, which is considered to be preferable to the *Blockburger* test in evaluating a double jeopardy claim concerning a defendant charged with conspiracy.[10] In this test, a conspiracy defendant can make out a non-frivolous showing of double jeopardy by 1) showing that the *locus criminis* of the two offenses is the same; 2) that there is a sufficient amount of temporal overlap between the two conspiracy charges; 3) that there is an overlap of personnel including indicted and unindicted conspirators; and 4) that the overt acts and the role played by the defendant are similar.[11] The courts have suggested that when a defendant makes a non-frivolous showing of double jeopardy involving conspiracy claims, a pretrial hearing is helpful.[12]

Based upon this analysis, Rey's contention that Count 1 of the Federal Indictment is the same as Counts 2 through 20 of the Superior Court Amended Superseding Information charging taking money by false pretenses, must be rejected. Count 1 of the Federal Indictment charges conspiracy to commit the crime of wire fraud which is separate and distinct from the individual local offenses of taking money or property by false pretenses. As noted above, the offense of conspiracy is separate and distinct from the individual overt acts of the conspiracy, and is not considered to be the same offense for double jeopardy purposes. Certainly if this is true, individual criminal acts which are not alleged in the conspiracy are separate and distinct, and cannot be considered the same offense for double jeopardy purposes.

A more difficult question is presented in comparing Count 1 of the Federal Indictment to Count 1 of the Superior Court Information. Although Count 1 of the Federal Indictment charges a conspiracy, while Count 1 of the Superior Court Information charges a violation of the CICO statute and not conspiracy, the essence of the Superior Court Information involves Rey's associating with entities and using fraudulent and false pretenses to take money. The object of

---

[6] *See, e.g., Brown*, 432 U.S. at 168-69; *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (multiple punishment); *Gavieres v. United States*, 220 U.S. 338, 342 (1911) (successive prosecutions).
[7] 284 U.S. at 304.
[8] *Brown*, 432 U.S. at 166 n. 6.
[9] *United States v. Felix*, 503 U.S. 378, 389 (1992).
[10] *United States v. Liotard*, 817 F. 2d 1074, 1078 (3d Cir. 1987).
[11] *Id.*
[12] *Id.* at 1079.

the federal conspiracy is to violate the wire fraud statute, but the federal conspiracy charge also involves Rey confederating and agreeing with her codefendant and other unnamed co-conspirators to "defraud investors and to obtain money and property by materially false and fraudulent pretenses." As part of the federal wire fraud conspiracy, Rey is alleged to have associated with the same entities that are mentioned in the Superior Court Information in Count 1. Since Rey has made a non-frivolous showing of double jeopardy regarding Count 1 of the Federal Indictment and Count 1 of the Superior Court Information, she is entitled to a pretrial hearing to determine the merits of her double jeopardy claim.

Conclusion

The Court will hold an evidentiary hearing to determine whether Count 1 of the Federal Indictment and Count 1 of the Superior Court Amended Superseding Information are the same offense for double jeopardy purposes under the totality of the circumstances test. The conspiracy count in the Federal Indictment is not the same offense for double jeopardy purposes as the individual counts of taking money under false pretenses in the Superior Court Amended Superseding Information in Counts 2 through 20, and, therefore, prosecution for those offenses is not barred by double jeopardy. The Court also rejects the People's contention that the single sovereign principle is not the law in the Virgin Islands for double jeopardy analysis, since this Court is bound by the precedent of the Third Circuit in *Dowling*.

DATED: August 6, 2013

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST:

VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court

BY:
LORI BOYNES-TYSON
Court Clerk Supervisor 8 / 7 / 13

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
****

PEOPLE OF THE VIRGIN ISLANDS, Plaintiff, v. **JANICE D. REY,** Defendant.	**CASE NO. ST-10-CR-122** **V.I. CODE ANN. TIT. 14, §§ 605(a), 604(e)(16); 834(2) (19 COUNTS); 835(a)(1) (2 COUNTS); tit. 9, § 651(3); 631(a)**

ORDER

AND NOW, for the reasons stated in the Court's Memorandum Opinion of the same date, it is hereby

ORDERED that the Court **RESERVES DECISION** on Defendant's Motion to Dismiss the Superseding Information Based on Her Federal Conviction as to Count 1 of the Amended Superseding Information; and it is further

ORDERED that the parties shall appear for a hearing **on August 28, 2013 at 2:00 p.m. in Courtroom III**; and it is further

ORDERED that the Defendant's Motion to Dismiss the Superseding Information Based on Her Federal Conviction is **DENIED** as to Counts 2 through 20 of the Amended Superseding Information; and it is further

ORDERED that copies of this Order shall be directed to counsel of record.[1]

DATED: August 6, 2013

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST:
VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court
BY: **LORI BOYNES-TYSON**
Court Clerk Supervisor 8/7/13

[1] Denise George-Counts, Esq., Assistant Attorney General, represents the People of the Virgin Islands. Michael C. Quinn, Esq., of Dudley, Topper, and Feuerzeig, LLP, represents Defendant Janice D. Rey.