IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX: KINGSHILL

GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiff,	CRIMINAL NO. 80/1986
v.	POSSESSION OF A CONTROLLED SUBSTANCE (HEROIN) AND TRAFFICKING IN HEROIN
JOSE A. GARCIA, Defendant.	

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PETERSEN, Judge

MEMORANDUM OPINION
(September 4, 1987)

Defendant Garcia moved to dismiss the information dated January 17, 1986 and the Government filed a response in opposition to the motion. For the reasons stated below, the motion to dismiss is denied.

FACTS

On February 28, 1986 Jose A. Garcia was arrested for possession of a controlled substance and trafficking of same which purportedly occurred on January 22, 1983 and January 23, 1985 respectively. Defendant Garcia filed a motion to dismiss which was granted June 26, 1986. Upon the Government's appeal to the District Court of the Virgin Islands, the Appellate Court remanded for further proceedings on March 9, 1987.

DISCUSSION

The present case was remanded for further consideration under the Due Process Clause of the Fifth Amendment, and the teachings of U.S. v. McDonald 456 U.S. 1 (1982) and U.S. v. Lavasco, 431 U.S. 783 (1977).

In MacDonald supra, the Supreme Court noted that a delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment or to a claim under any applicable statute of limitations.

To successfully involve the due process clause, a defendant must prove prejudice and intentional delay by the government to gain a tactical advantage. U.S. v. Marion, 404 U.S. 307 (1977). As far as the actual prejudice component is concerned, defendant Garcia claims that he has no recollection of the alleged occurrences and no potential witnesses available for his defense. But these contentions fall short of meeting the actual prejudice requisite. Marion, supra concerned the prosecution of two defendants for alleged fraudulent business practices. The appellees, claiming that the government had knowledge of crimes, the circumstances, and their identities for over three years, moved to dismiss on the ground that the indictment was returned at "an unreasonably oppressive and unjustifiable time" after the alleged offenses and that the delay deprived them of their Fifth Amendment right to due process of law. To bolster this argument, appellees noted that memories dim, witnesses become inaccessible, and evidence is often lost over such delays. In reversing the case, the court found that these due process claims were speculative and premature, for in light of the applicable statute of limitations, these possibilities are not in themselves enough to demonstrate that appellees can not receive a fair trial and to therefore justify the dismissal of the indictment. Marion, supra at 325, 326. As defendant herein alleges the same harm, his actual prejudice claim is similarly extinguished.

Defendant must also prove that the delay was an intentional one created by the government to gain a tactical advantage. Defendant Garcia labels the government conduct "arbitrary and capricious," contending that the question of the disclosure of informant's identity should have been decided by the court. In opposition, the government argues that the very nature of the undercover activity [and that particular informant's utility] that led to defendant's arrest precluded it from filing criminal charges against the defendant immediately upon the commission of the acts alleged. Where a delay was caused by the government's efforts to identify persons in addition to respondent who may have participated in the offenses and there is no evidence of bad faith, the Supreme Court has ruled that such a delay does not deprive one of due process, even if his defense might have been somewhat prejudiced by the lapse of time. In United States v. Lovasco, 431 U.S. 796 (1977) where more than 18 months had elapsed after federal criminal offenses were alleged to have occurred, the Supreme Court noted that prosecutors do not deviate from "fundamental conceptions of justice" when they defer seeking an indictment until they have probable cause to believe an accused is guilty. Similarly, "the due process clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment." Lovasco, supra at 783. As there is no evidence of prosecutorial bad faith and the governmental delay for reasons of preserving the utility of undercover informants is both sound and legitimate, this court finds that defendant can not prevail within the "the intentional delay for tactical advantage" component.

A pre-trial delay can also be measured under the applicable statute of limitations. As it serves to prod law enforcement officials to investigate suspected criminal activity in a prompt manner, the statute of limitations serves as the primary guarantee against the lodging of stale criminal charges, United States v. Ewell, 383 U.S. 116, 120 (1966); Toussie v. United States, 397 U.S. 112, 114-115 (1970). In the present case, the defendant is charged with possession of a controlled substance (Heroin) in violation of 19 V.I.C. §607 and trafficking in Heroin in violation of 19 V.I.C. §614(a)(a)(5)(a). While the crime of possession is a misdemeanor with a one year statute of limitation, the crime of trafficking is a felony which must be commenced within 3 years (applicable statute of limitations period) after its alleged commission. As the charges were brought a year and 5 days after the commission of the crime, time has ran out on the "possession of a controlled substance" charge and thus the court will dismiss this count. However, time has not ran out on the felony charge for only 13 months have elapsed [the statute requires 36 months to have passed to eclipse consideration of this charge].

CONCLUSION

To successfully invoke the due process clause, a defendant must prove an intentional delay by the government and actual prejudice. As the government's reasons for the delay concerned the potential utility of an undercover informant, the court finds that the delay was a sound and legitimate one. Concerning the actual prejudice claim, the possible dimming of memories and loss of witnesses are not in themselves enough to demonstrate that defendant can not receive a fair trial. The applicable statute of limitation stands constant guard over the right of an individual to have his case heard promptly. In this case, its application dismisses the possession charge but preserves the trafficking charge.

Eileen R. Petersen

EILEEN R. PETERSEN
Judge