

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ST-12-CR-434
	)	
C'QUAN J. CELESTINE,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM OPINION

Pending before the Court is Defendant C'Quan J. Celestine's February 11, 2013, Motion to Dismiss the Amended Information Dated January 24, 2013, and March 1, 2013, Motion to Have His Motion to Dismiss Deemed Conceded. Defendant's Motions will be denied.¹

FACTUAL AND PROCEDURAL HISTORY

Defendant was arrested on August 14, 2012, for allegedly shooting at Emile Kitnurse on two separate occasions on September 11, 2011, and September 28, 2011. Defendant was charged in a fifteen (15) count Information with the following: two (2) counts of attempted murder in the first degree (Counts I and IX); four (4) counts of unauthorized use of a firearm during the commission of a crime of violence (Counts II, IV, VI, and VIII); two (2) counts of assault in the first degree (Counts III and XI); two (2) counts of assault in the third degree (Counts V and XIII); discharging a firearm (Count VII); three (3) counts of using a dangerous weapon during the commission a crime of violence (Counts X, XII, XIV); and reckless endangerment in the first degree (Count

¹ The People opposed the Motion on March 4, 2013.

XV). A trial was held on January 10, 2013, and on January 11, 2013, the jury returned a partial verdict finding Defendant “NOT GUILTY” on Counts I, II, III, IV, IX, X, XI, XII, XIII, XIV, and XV, and “GUILTY” on Count V, third degree assault. The jury could not reach a verdict on Counts VI, VII, and VIII, and the Court declared a mistrial on those three Counts.

On January 16, 2013, Defendant filed a Motion to Further Modify the Terms of His Bail Pending Imposition of Sentencing,² to which the People responded on January 24, 2013. On January 24, 2013, the People also filed an “Amended Information” charging Defendant with the three offenses upon which the jury could not reach a verdict, all of which allegedly occurred on September 11, 2011: unauthorized use of a firearm during the commission of a third degree assault in violation of 14 V.I.C. § 2253(a) (Count I); discharging a firearm in violation of 23 V.I.C. § 479(a) (Count II); and unauthorized use of a firearm during the commission of a discharge of a firearm in violation of 14 V.I.C. § 2253(a) (Count III). In a February 19, 2013, Order, the Court denied Defendant’s Motion to Further Modify the Terms of his Bail because the Court found Defendant to be a flight risk and danger to the community. The Court further canceled the sentencing hearing that was originally scheduled for February 25, 2013, due to the filing of the Amended Information. On February 11, 2013, Defendant filed a Motion to Dismiss the Amended Information based on allegations of prosecutorial vindictiveness.

STANDARD

Allegations of prosecutorial vindictiveness implicate serious Fifth Amendment due process considerations because prosecutorial vindictiveness can discourage a

² Defendant also orally moved for a modification of bail on January 11, 2013.

defendant from exercising his or her constitutional or statutory rights.³ However, the burden remains on the defendant to demonstrate actual vindictiveness or provide sufficient facts to show a presumption of vindictiveness, which the prosecutor must subsequently rebut by objective evidence. Specifically, “[a] finding of actual vindictiveness requires ‘direct’ evidence, such as evidence of a statement by the prosecutor”⁴ demonstrating “a prosecutor’s retaliatory motive,”⁵ while “[a] presumption of vindictiveness arises when the circumstances of the case create a ‘realistic likelihood’ of prosecutorial vindictiveness.”⁶

ANALYSIS

Generally, Defendant alleges that the “prosecution filed the Amended Information to punish Celestine for his decision to seek his immediate release.”⁷ Defendant does not argue actual vindictiveness because he declines to “delve into the prosecution’s actual motivations.”⁸ Instead, Defendant focuses on the sequence of events and “circumstances” of the case that allegedly gives rise to a presumption of vindictiveness.⁹ Defendant specifically argues that (1) “the [prosecutor’s] indication given at the conclusion of the

³ See *Gov’t of the Virgin Islands v. Diaz*, 40 V.I. 110, 117, 1998 WL 1013892 (Terr.V.I. 1998) (“[W]hen a prosecutor retaliates against a defendant for the defendant’s exercise of his rights, the prosecutor offends due process.”)

⁴ *U.S. v. Johnson*, 171 F.3d 139, 140-41 (1999).

⁵ *Diaz*, 40 V.I. at 118.

⁶ *Johnson*, 171 F.3d 139 at 141; see *U.S. v. Esposito*, 968 F.2d 300, 303-04 (3d Cir. 1992) (“Since a presumption may produce harsh results for which society ultimately bears the burden, courts must be cautious in adopting it. . . . Where . . . the prosecutor has done nothing to deter the exercise of one’s right during the case or proceeding, and the prosecution has come to a natural end, no presumption of vindictiveness applies.”)

⁷ Defendant’s Motion to Dismiss Amended Information, Feb. 11, 2013, page 3.

⁸ Defendant’s Motion to Dismiss Amended Information, Feb. 11, 2013, page 7.

⁹ *Id.* Defendant cites a Harvard Law Review note to support the proposition that the problem of actual prosecutorial vindictiveness is “all too real.” While the Court acknowledges that prosecutorial vindictiveness is a serious concern for the courts when it occurs, there is no basis for concluding from this sweeping and general reference that prosecutorial vindictiveness is common practice in the Virgin Islands. Defendant’s Motion to Dismiss Amended Information, Feb. 11, 2013, page 6.

trial that the People would likely not re-prosecute if the jury hung on some charges;” that (2) the prosecutor filed the Amended Information after the expiration of the People’s time to reply to Defendant’s January 16, 2013, Motion to Further Modify the Terms of His Bail Pending Imposition of Sentencing; and, that (3) the prosecution has chosen to further prosecute Defendant on the same conduct that underlies his conviction for third degree assault, but on charges that carry much higher penalties, all give rise to a presumption of prosecutorial vindictiveness. The Court finds none of Defendant’s allegations, individually or collectively, compelling.¹⁰

Defendant’s claim that the prosecutor indicated the People “would likely not re-prosecute if the jury hung on some charges,” is not dispositive. Even assuming *arguendo* that the prosecutor so implied, that implication is not binding and was made prior to hearing the partial verdict, the result of which would no doubt largely influence the People’s decision whether to retry Defendant. Defendant cannot now use a nonbinding insinuation as evidence that conclusively demonstrates the prosecution’s thinking or motive after the partial verdict was announced. Additionally, the Court clearly indicated, both before and after the partial verdict was announced, that the People were free to determine whether to further pursue the counts upon which the jury could not reach a verdict.

¹⁰ Defendant also attempts to draw parallels between the present case and *Government of the Virgin Islands v. Diaz*. *Diaz* is entirely distinct from the circumstances here because, in *Diaz*, the court found evidence of actual prosecutorial vindictiveness in addition to a “chronology of events” which supported the defendant’s allegation of prosecutorial vindictiveness. Specifically, in *Diaz*, the Assistant Attorney General admitted to strategizing with the Assistant U.S. Attorney to develop a plan to circumvent a defendant’s impending order of release. *Diaz*, 40 V.I. at 118-20. Here, even when reading all of defendant’s allegations, the Court finds no evidence in the totality of the circumstances that the People have acted vindictively.

The Court recognizes that the People missed the Court imposed deadline to respond to Defendant's January 16, 2013, Motion to Further Modify the Terms of His Bail Pending Imposition of Sentencing by two days, and also recognizes that the Amended Information was filed after Defendant moved orally for a modification of bail on January 11, 2013. However, this "sequencing" alone, without more, does not give rise to a presumption or a "realistic likelihood" of prosecutorial vindictiveness.¹¹ After hearing the jury's partial verdict, in addition to providing deadlines for the filing of motions on the modification of bail, the Court also set a date for sentencing, February 25, 2013, and further instructed the People to give written indication of their intentions with regard to the counts upon which the jury could not reach a verdict, albeit without a specific deadline. The People filed both their Notice of Intent to Refile and the Amended Information on January 24, 2013, well before February 25, 2013, and only eight business days after hearing the partial verdict on January 11, 2013. There is no indication that the prosecutor filed the Amended Information simply in retaliation for Defendant seeking a modification of his bail.

The fact that the prosecution has chosen to retry Defendant on the charge of unauthorized use of a firearm during the commission of a third degree assault,¹² an offense that carries a much higher penalty than third degree assault,¹³ the offense of which Defendant was found guilty, also does not give rise to a presumption of

¹¹ *Johnson*, 171 F.3d 139 at 141 (noting that a newly commenced prosecution following an acquittal on entirely separate charges, without more, does not give rise to a presumption of prosecutorial vindictiveness).

¹² Unauthorized use of a firearm during the commission of a third degree assault in violation of 14 V.I.C. § 2253(a) carries a minimum sentence of Fifteen (15) years incarceration to a maximum of Twenty (20) years incarceration and a mandatory Twenty-five thousand dollar (\$25,000.00) fine.

¹³ Third degree assault in violation of 14 V.I.C. § 297 carries a maximum sentence of Five (5) years incarceration, a fine of not less than Five hundred dollars (\$500.00) nor more than Three thousand dollars (\$3,000.00), or both.

prosecutorial vindictiveness. This case is most similar to *United States v. Johnson* in which the United States Court of Appeals for the Second Circuit found no indication of prosecutorial vindictiveness where the defendant was first acquitted of RICO charges and subsequently indicted for firearm charges. In part, the *Johnson* court reasoned that “when a State brings another indictment supported by evidence against a defendant after an acquittal, the acquittal is a legitimate prosecutorial consideration because the State is not levying punishment for a right exercised but rather for the crimes the defendant committed.”¹⁴ In other words, the decision to pursue charges which carry a higher maximum sentence, as is the case here, do not give rise, without more, to a presumption of prosecutorial vindictiveness.

Finally, the prosecutor’s decision to file an Amended Complaint following a mistrial clearly does not give rise to a presumption of prosecutorial vindictiveness.¹⁵ “Courts have consistently held that no realistic likelihood of vindictiveness is found when a jury is deadlocked and both parties agree that a declaration of mistrial is a necessity.”¹⁶ Here, Defendant did not object to a mistrial on the three counts upon which the jury could not reach a verdict. Further, unlike *Johnson* and *United States v. Rodgers*, in which the courts did not find any presumption of prosecutorial vindictiveness where a defendant was indicted on a second occasion with entirely new and additional charges following an

¹⁴ *Id.* at 141-42 (quoting *Esposito*, 968 F.2d at 304) (internal citations omitted).

¹⁵ Defendant also states that evidence of the prosecutor’s vindictiveness is the fact that the prosecutor has chosen to “re-prosecute” Defendant during a period of scant financial resources, when Defendant was acquitted on the most serious charges against him. The Court strongly disagrees. That a prosecutor has chosen to devote financial resources for a specific purpose during a period of economic difficulty does not give rise to a presumption of prosecutorial vindictiveness. Defendant’s Motion to Dismiss Amended Information, Feb. 11, 2013, page 1. The People are charged with the responsibility to justly enforce the law, not to pursue prosecutions in the most cost efficient manner.

¹⁶ *U.S. v. Rodgers*, 18 F.3d 1425, 1430 (1994).

acquittal or mistrial, here, the Amended Information only re-charges Defendant with the three offenses upon which the jury could not reach a verdict. Under Fed. R. Crim. P. 31, applicable to the Virgin Islands under Super. Ct. R. 7,¹⁷

If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree.¹⁸

Thus, here, the People have simply chosen to retry Defendant, a commonplace practice after a mistrial.¹⁹

Finally, as Defendant alleges in his March 1, 2013, Motion to Have His Motion to Dismiss Deemed Conceded, the Court acknowledges that the People failed to respond to Defendant's Motion to Dismiss the Amended Information by February 25, 2013, the deadline set forth in the Court's February 19, 2013, Order. Because the Court prefers to base its decisions on an adjudication of the merits, Defendant's Motion will be denied. Of course, the Court does not condone the People's failure to abide by the Order of this Court, but the People's failure to do so does not give rise to a presumption of prosecutorial vindictiveness.

¹⁷ The Federal Rule of Criminal Procedure and Rules of the District Court apply to matters before this Court whenever they are not inconsistent with the Superior Court Rules. SUPER. CT. R. 7.

¹⁸ Fed. R. Crim. P. 31.

¹⁹ See *Gov't of Virgin Islands v. Scatliffe*, 580 F. Supp. 1482, 1484 (D.V.I. 1984) ("The law is clear, however, that a retrial after mistrial due to a hung jury does not violate the constitutional guarantee against double jeopardy.")

Accordingly, Defendant's Motion to Dismiss the Amended Information Dated January 24, 2013, and Motion to Have His Motion to Dismiss Deemed Conceded are denied. An Order consistent with this Memorandum Opinion shall issue.

Dated: March 12, 2013

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by:

Lori B. Tyson

Court Clerk Supervisor

3/13/2013


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
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PEOPLE OF THE VIRGIN ISLANDS,

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ST-12-CR-434

ORDER

The Court having issued a Memorandum Opinion on this date, it is

ORDERED that Defendant's February 11, 2013, Motion to Dismiss the Amended Information Dated January 24, 2013, is DENIED; and it is

ORDERED that Defendant's March 1, 2013, Motion to Have His Motion to Dismiss Deemed Conceded is DENIED; and it is

ORDERED that copies of this Order and accompanying Memorandum Opinion shall be directed to counsel of record.

Dated: March 12, 2013

ATTEST: Venetia H. Velazquez, Esq.

Clerk of Court / /

by

Lori B. Tyson

Court Clerk Supervisor

3 / 13 / 2013


HON. MICHAEL C. DUNSTON

JUDGE OF THE SUPERIOR COURT
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