

FOR PUBLICATION

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal No. 2008-7
	)	
MITCHELL FRANCIS,	)	
	)	
Defendant.	)	
_____	)	

ATTORNEYS:

Delia L. Smith, AUSA
St. Thomas, U.S.V.I.
For the plaintiff.

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For the defendant.

MEMORANDUM OPINION

GÓMEZ, C.J.

Before the Court is the motion of the defendant, Mitchell Francis ("Francis"), to dismiss the indictment for alleged prosecutorial misconduct.

I. FACTUAL AND PROCEDURAL BACKGROUND

Francis and his former co-defendant, Atiba Brathwaite ("Brathwaite"), were indicted in February, 2008 on one count of conspiracy to possess and distribute a controlled substance, in violation of 21 U.S.C. § 846, and one count of possession with

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intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1). A jury trial was held in April, 2008. The record from that trial reflects, in brief, that Francis transported a controlled substance from Tortola, British Virgin Islands to St. Thomas, U.S. Virgin Islands aboard a vessel captained by a confidential law enforcement informant.

Before jury deliberations began, the Court granted Brathwaite's motion for judgment of acquittal under Federal Rule of Criminal Procedure 29 with respect to Count One, but denied the motion with respect to Count Two. The Court also denied Francis's motion for judgment of acquittal with respect to both counts. The jury found Brathwaite not guilty of the offense charged in Count Two and deadlocked on both counts with respect to Francis. The Court subsequently found that manifest necessity required the declaration of a mistrial as to Francis. A new trial date for Francis has since been scheduled.

Francis claims in his motion that law enforcement conduct exposed during his first trial requires dismissal of the indictment on due process grounds.¹ The government has not filed

¹ Normally, "a motion alleging a defect in instituting the prosecution" must be made before trial. See Fed. R. Crim. P. 12(b)(3)(A); see also *United States v. Pitt*, 193 F.3d 751, 760 (3d Cir. 1999) ("[T]he defense of outrageous government conduct is based on an alleged defect in the institution of the prosecution itself."). However, such a motion may be raised after trial if "the evidence supporting the claim of outrageous

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an opposition or any other pleading in response to Francis' motion.

II. DISCUSSION

"[A] criminal defendant may raise a due process challenge to an indictment against her based on a claim that the government employed outrageous law enforcement investigative techniques." *United States v. Nolan-Cooper*, 155 F.3d 221, 230 (3d Cir. 1998) (citing *United States v. Voigt*, 89 F.3d 1050, 1064 (3d Cir. 1996)). However, that conduct must be shocking, outrageous and clearly intolerable. The Third Circuit has noted that, while the "the 'shocking, outrageous, and clearly intolerable' standard [is] lacking in 'mathematical precision,'" it "provides sufficient guidance to courts attempting to assess whether particular government conduct is fundamentally unfair and thereby offends due process [and] how rare application of the Due Process clause is in these circumstances." *Id.* at 231 (internal citation omitted). Even so, the Third Circuit has cautioned that

we must necessarily exercise scrupulous restraint before we denounce law enforcement conduct as constitutionally unacceptable. . . . Unless the behavior of the [law enforcement] agents rose to the

government conduct is not known to the defendant prior to trial." *Pitt*, 193 F.3d at 760. In this matter, Francis contends that he did not know about the informant's involvement as a confidential source before his first trial. *Cf. United States v. Neely*, 128 Fed. Appx. 865, 867-68 (3d Cir. 2005) (unpublished).

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level of outrageousness which would bar conviction, the conduct of agents of the executive branch who must protect the public from crime is more appropriately considered through the political process where divergent views can be expressed in the ballot box.

United States v. Jannotti, 673 F.2d 578, 607, 609 (1982) (en banc).

III. ANALYSIS

The allegedly outrageous law enforcement conduct of which Francis complains begins with a confidential source agreement that the government consummated with a confidential informant. Francis asserts that, notwithstanding that agreement's prohibition on the informant's participation in unlawful activity, the government sent the informant to conduct a drug transaction in Tortola, British Virgin Islands.

Francis's motion may be distilled into two main arguments. First, Francis contends that the informant's stewardship of the vessel that Francis used to transport narcotics, translates into law enforcement control over a criminal enterprise. Second, Francis asserts that law enforcement's purported participation in a criminal enterprise in the territory of a foreign sovereign², constitutes a due process violation *per se*.

² In his motion, Francis inaccurately refers to the British Virgin Islands as a sovereign country. The British Virgin Islands is in fact an overseas territory of the United Kingdom, the sovereign in question.

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In support of his first argument, Francis relies most heavily on the decision of the Third Circuit in *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978). In that case, the Drug Enforcement Agency (the "DEA") carried out an undercover investigation of two individuals. Another individual, who had earlier pled guilty, "agreed to aid the [DEA] in apprehending illegal drug traffickers." *Id.* at 375. The undercover informant and the two individuals under investigation subsequently agreed to set up a drug laboratory. Law enforcement provided substantial help to the informant. The individuals under investigation were arrested after the laboratory began producing drugs. They were convicted of several drug-related offenses. On appeal, the Third Circuit reversed the convictions, finding that the undercover informant "was completely in charge and furnished all of the laboratory expertise" and that "[a]ny production assistance provided by [the defendants] was minor and at the specific direction of [the informant]." *Twigg*, 588 F.2d at 376.

Francis's reliance on *Twigg* is misplaced. In addition to being "the only case in which the Government's conduct has offended due process[,]"³ *Lakhani*, 480 F.3d at 182, the facts

³ Indeed, three judges of the Third Circuit's en banc decision in *United States v. Jannotti*, 673 F.2d 578 (1982) (en banc), opined that *Twigg* should be directly overruled. See *id.* at 610 n.17.

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presented in *Twigg* bear little, if any, resemblance to the facts of this matter. Furthermore, "in order for the claim of outrageous government conduct to succeed, a government agent has to initiate the criminal conduct with the goal of obtaining a conviction and must draw the defendant into the illegal activity to bring about that goal." *United States v. Pitt*, 193 F.3d 751, 761 (3d Cir. 1999) (citations omitted).

Here, Francis does not contend, nor does the record reflect, that law enforcement instigated, or was substantially involved in, unlawful activity. See, e.g., *United States v. Nieman*, 520 F.3d 834, 838 (8th Cir. 2008) (finding no due process violation where "the government did not direct or encourage [the informant's] drug use; her misconduct can not be attributed to the government"); *United States v. Pedroni*, 45 Fed. Appx. 103, 108 (3d Cir. 2002) (unpublished) (rejecting the defendant's due process claim where "[t]he Government did not initiate the criminal activity and [the defendant] actively and willingly participated in it"); *United States v. Evans*, 941 F.2d 267, 270 (5th Cir. 1991) (finding no due process violation where DEA agents approached the defendant and offered to help him produce drugs, called him to pursue the arrangement, supplied the expertise, sold the equipment to the defendant, and supplied him with the location for the laboratory); see also *United States v.*

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Barrera-Moreno, 951 F.2d 1089, 1092 (9th Cir. 1991) ("Due process is not violated unless the conduct is attributable to and directed by the government."). Consequently, Francis's allegations do not bring him within *Twigg's* narrow, fact-specific holding.

Francis's second argument is that his due process rights were violated when the government sent the informant to a foreign sovereign to participate in illicit activity without notifying or seeking permission from that sovereign. Francis points to no authority to substantiate that argument. The Court has unearthed no authority for such a proposition.

In *Hampton v. United States*, the Supreme Court stated that "[t]he limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the *defendant*." 425 U.S. at 490 (emphasis in original). Here, Francis does no more than claim that the government's conduct violated foreign law. Importantly, he does not allege that such conduct infringed his own rights. That deficiency is fatal to his claim. See, e.g., *United States v. Engler*, 806 F.2d 425, 429 (3d Cir. 1986) (rejecting a due process argument based on allegations of outrageous government conduct where the defendant "merely characterizes the undercover activities of the government as

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outrageous; he fails to make even the requisite allegations that 'the Government activity in question violate[d] some protected right of the *defendant*.'" (alteration and emphasis in original) (quoting *Hampton*, 425 U.S. at 490).

Even assuming Francis adequately alleged a due process violation, as noted above, to show such a violation, "the challenged conduct must be shocking, outrageous, and clearly intolerable." *Pitt*, 193 F.3d at 761 (citation omitted). A survey of cases, in this circuit and others, provides certainty enough that Francis's allegation falls far short of that very high standard. See, e.g., *Hampton v. United States*, 425 U.S. 484, 489 (1976) (finding no due process violation where law enforcement supplied the contraband at issue in an investigation); *Rochin v. California*, 342 U.S. 165 (1952) (vacating a conviction and dismissing an indictment where law enforcement pumped the stomach of a suspected drug trafficker to obtain incriminating evidence); *United States v. Barbosa*, 271 F.3d 438, 469 (3d Cir. 2001) (finding no due process violation where government agents helped the defendant swallow drug pellets and smuggle them into the United States, even though the defendant's "life was arguably placed in danger by the Government's sting operation"); *Nolan-Cooper*, 155 F.3d at 234-35 (finding no due process violation where a government agent had sexual intercourse with

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the defendant during an undercover sting operation); *United States v. Simpson*, 813 F.2d 1462, 1464-65 (9th Cir. 1987) (finding no due process violation where the government informant was a heroin-using prostitute whose own conduct was under investigation and who engaged in sexual intercourse with the defendant).

In short, the Court need not even “exercise scrupulous restraint,” *Jannotti*, 673 F.2d at 607, in rejecting Francis’s arguments because the conduct of which Francis complains quite clearly neither violates “fundamental fairness” nor is “shocking to the universal sense of justice.” See *United States v. Russell*, 411 U.S. 423, 431-32 (1973).

IV. CONCLUSION

For the reasons given above, Francis’s motion to dismiss for alleged prosecutorial misconduct will be denied. An appropriate order follows.

S_____
CURTIS V. GÓMEZ
Chief Judge