

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

V.

CRIMINAL CASE NO. 3:07CR192-B-A

RICHARD F. "DICKIE" SCRUGGS,
DAVID ZACHARY SCRUGGS, AND
SIDNEY A. BACKSTROM

ORDER DENYING MOTION TO SUPPRESS

Came on to be considered this day the defendants' motion to suppress the fruits of illegal wiretaps and searches. The court has considered the arguments and authority cited by counsel and is ready to rule.

The defendants assert that the affidavits submitted by the government in support of its wiretap and search warrant applications are infected with two principal defects. The defendants set forth these alleged defects as follows:

First, while the affidavits try to paint a dark picture of a conspiracy among defendants to bribe Third Circuit District Judge Henry Lackey going back to March 2007, the affidavits omit numerous specific facts known to the government which show that no such conspiracy existed and that, in fact, it was the government that created the alleged crime here. Second, the government omitted from its supporting affidavits specific evidence from audio recordings that exculpates defendants and defeats the government's conspiracy claims.

The defendants are not alleging that a lack of probable cause exists on the face of the affidavits but that the affidavits as written by Special Agent William Delaney contain false or misleading statements which, if set aside, would negate probable cause; or conversely, omitted exculpatory statements, if included, would likewise negate probable case. The defendants assert that, because of the agent's actions and lack of probable cause, the wiretap and search warrant affidavits should be thrown out pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978).

The defendants cite a number of examples of these alleged misrepresentations. They assert, for instance, that the five defendants did not, at their initial meeting, set out to corrupt Judge Lackey and that Agent Delaney's statement that "Mr Balducci made corrupt overtures to Judge Lackey" at their March 28, 2007, meeting is false and warrants suppression of the wiretaps. The court, however, does not agree with the defendants' characterization of that first meeting among the defendants or the meeting between Balducci and Judge Lackey as not involving "corrupt overtures." Webster's Third Edition unabridged dictionary defines "corrupt" as "to change from good to bad in morals, manners, or actions" and also as "perverted into a state of moral weakness." Even though Balducci stated that the defendants did not initially discuss offering a monetary amount to Judge Lackey, it is uncontested that they did intend to send Balducci – not an attorney of record in the case – to use his friendship to persuade Judge Lackey, if he could, to rule favorably for Scruggs in the case of *Jones v. Scruggs* in a meeting unknown to Scruggs' opposing counsel. In this court's opinion, to send an attorney to a judge to get him to rule in a certain way – when that attorney is not of record in the case and professes to be a friend of the judge and when opposing counsel has no knowledge of the visit – amounts to an effort to corrupt a judge. In the same meeting with Judge Lackey, Balducci offered Judge Lackey a job as "of counsel" in Balducci's law firm when the judge chose to retire. These actions are certainly a clear and gross violation of all known codes of ethics applicable to attorneys and judicial officers. Indeed, when an act such as this occurs, perceived by the judge possibly to be an attempt to corrupt or bribe, it is incumbent on the judge to report the matter to appropriate authorities, which is what Judge Lackey did.

The defendants also assert that the affidavits do not reflect the degree of aggressiveness with which Judge Lackey pursued Balducci and the other defendants. For instance, the defendants argue that it was Judge Lackey who initiated all phone calls and contact between himself and Balducci. A specific example set forth by the defendants is Agent Delaney's statement that "On May 3, 2007, Judge Lackey had a telephone conversation with Mr. Balducci." The defendants find fault in this statement because it omits the fact "that it was Judge Lackey, with Agent Delaney sitting next to him, who called Balducci." The defendants argue that this omission is material because it shows that Judge Lackey reinitiated contact with Balducci after nearly five weeks of no contact from Balducci. This and all other contentions in this regard were negated at the February 20, 2008, hearing in this court wherein Balducci testified that he initiated various calls and visits with Judge Lackey. The court notes that, while there may have been periods of weeks without contact between Judge Lackey and Balducci, viewing the totality of the circumstances, it is clear that Judge Lackey was not inappropriately aggressive in this matter and that Balducci, often at the direction of the other defendants, initiated contact with Judge Lackey on several occasions – certainly enough to uphold Agent Delaney's affidavits as accurate.

The defendants also complain that the affidavit omitted Balducci's statement to Judge Lackey during a meeting between the two that the only persons who knew about their conversation were Lackey and Balducci and that Scruggs did not know. Special Agent Delaney explained at the hearing on this motion that he considered this statement to have been made for the purpose of putting Judge Lackey at ease in a highly unusual situation. As it turned out, Agent Delaney's perception was accurate in that Balducci testified at the hearing that Scruggs did in fact know of the meeting. The affidavit states that Balducci told Lackey at a later meeting – May

9, 2007 – that “the only person in the world outside of me and you that has discussed this is me and Dick.” The explanation given by Agent Delaney as to why the earlier statement of Balducci was not included is reasonable, and the court finds that even if the statement had been included, it would not have precluded the finding of probable cause after taking into consideration the later statement in the affidavit that “the only person in the world outside of me and you . . . is me and Dick” and ample other facts in the affidavit that substantiated probable cause.

The defendants list several more examples of allegedly misleading statements or omissions, but the court is satisfied that Agent Delaney adequately explained the bases for his various affidavits and sufficiently clarified any discrepancies between his debriefing notes and the affidavits at the February 20 hearing. Further, the court has examined all the allegedly false or misleading statements and laid them aside and has reexamined the affidavits with awareness of all the omitted statements and finds that even after this exercise, the affidavits for application of the wiretaps and search warrants provide ample evidence to cause a reasonable person to believe that a crime has been committed and that the interception of electronic conversations and the search of the Scruggs Law Firm would result in additional evidence of the offenses described in the applications.

The question arose during the hearing of this motion as to whether the affidavit of Special Agent Delaney asking for wire taps on Balducci’s and Patterson’s phones must have established probable cause not only as to Balducci and Patterson, but also as to Richard Scruggs, named in the affidavit, but whose phone was not tapped. The authorities cited by the government convince the court that the name of Richard Scruggs or of the other defendants in this case did not necessarily have to have been included. *See United States v. Figueroa*, 757 F.2d 466, 475 (2d

Cir. 1985); *United States v. Tortorello*, 480 F.2d 764, 775 (2d Cir. 1973); *United States v. Domme, Jr.*, 753 F.2d 950, 954 n.2 (11th Cir. 1985); *United States v. Pappas*, 298 F. Supp. 2d 250, 254 n.4 (D. Ct. 2004); *United States v. Trippe*, 171 F. Supp. 2d 230, 235 (S.D.N.Y. 2001); *United States v. Marcy*, 777 F. Supp. 1400, 1402 (N.D. Ill. 1991); *United States v. Rodriguez*, 606 F. Supp. 1363, 1370 (D. Mass. 1985); *United States v. Edwards*, 124 F. Supp. 2d 387, 402 (M.D. La. 2000); *United States v. Ambrosio*, 898 F. Supp. 177, 184 (S.D.N.Y. 1995). However, it is not necessary to decide that issue since probable cause was established in the affidavit that Richard Scruggs was participating in the bribery attempt on Judge Lackey.

For the foregoing reasons, the court finds that the defendants' motion to suppress should be denied. It is, therefore, **ORDERED AND ADJUDGED**

that the defendants' motion to suppress the fruits of illegal wiretaps and searches is **DENIED**.

This, the 26th day of February, 2008.

/s/ Neal Biggers

NEAL B. BIGGERS, JR.
SENIOR U.S. DISTRICT JUDGE