UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA, 18 CR 184 (RJD)

-v.-

TAE HUNG KANG,

Defendant.
----------X

Memorandum of Law in Support of Tae Hung Kang's Motions

Green & Willstatter
Attorneys for Tae Hung Kang
200 Mamaroneck Avenue, Suite 605
White Plains, New York 10601
(914) 948-5656

By: Richard D. Willstatter, Esq.
Of Counsel

Table of Contents

Introduction 1

ARGUMENT

Point One

There Should Be a Trial Severance as the Government Intends to Offer Statements of the Co-defendant That Implicate the Defendant; the Court Should Order Disclosure of the Co-defendant's Statements to Law Enforcement 1

Point Two

The Government's Seizure of the Defendant's Records from GoDaddy Was a Violation of His Fourth Amendment Rights; Those Records and the Consequently Obtained Warrant for Email from Google must Be Suppressed. 4

Point Three

The Defendant's Statements and Those of His Counsel During a Meeting with the Government Are Inadmissible Plea Discussions. F.R.E. 410. 8

Conclusion 10

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA, 18 CR 184 (RJD)

-v.-

TAE HUNG KANG,

Defendant.
----------X

Memorandum of Law in Support of Tae Hung Kang's Motions

This memorandum is submitted in support of the pre-trial motions of defendant Tae Hung Kang's (1) for a separate trial from that of his co-defendant, John Won, pursuant to Fed. R. Crim. P. 14(a) and U.S. Const., Amend. VI and for disclosure of any post-arrest statements attributed to Mr. Won, (2) for suppression of records acquired from GoDaddy.com and Google obtained in violation of Mr. Kang's Fourth Amendment rights, and (2) for suppression of statements alleged to have been made on or about August 21, 2017 in a meeting at the FBI Building in Atlanta, Georgia.

ARGUMENT

Point One

There Should Be a Trial Severance as the Government Intends to Offer Statements of the Co-defendant That Implicate the Defendant; the Court Should Order Disclosure of the Co-defendant's Statements to Law Enforcement.

At a joint trial, a defendant's Sixth Amendment confrontation rights are violated by the admission of a co-defendant's confession that implicates the defendant. In such circumstances, it cannot be presumed that the jury will follow limiting instructions not to consider the confession against the defendant. *Bruton v. United States*, 391 U.S. 123 (1968).

In the present case, the government attributes post-arrest statements to the co-defendant, John Won. On September 24, 2015, the two defendants were sued by the Commodities Futures Trading Commission in a matter captioned, *CFTC v. Safety Capital Management, et al.*, 15 CV 5551(RJD). On September 21, 2017, Mr. Won was deposed by the plaintiff in that action. John Won, the defendant, was asked many questions about Tae Hung Kang and gave many answers about Mr. Kang's involvement in the business of foreign exchange trading.

Mr. Won was, of course, arrested in this case but we do not know whether he made post-arrest statements to law enforcement. We are seeking the production of any such statements, or law enforcement reports memorializing same, and, as part of this motion, we seek such production. *See United States v. Percevault*, 490 F.2d 126, 132 (2d Cir. 1974)("Particularly in multiple defendant cases, the district judge may solicit broad disclosure to assist him in disposing of motions for severance or in detecting inadmissible confessions under *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968)."") Alternatively, the Court may order *in camera* inspection of the statements pursuant to Fed. R. Crim. P. 14(b). *See United States v. Bazezew*, 783 F. Supp. 2d 160, 165 (D. D.C. 2011)("Although a post-arrest statement may be especially relevant to a motion to sever as a source of prejudice as well as a potential constitutional violation [] the Court, in analyzing a motion under Rule 14, is entitled to review not only such post-arrest statements but rather 'any defendant's statement that the government intends to use as evidence.'")(citations omitted).

Redaction as a way of avoiding *Bruton* problems may be permissible if it is practical to redact the co-defendant's statements to omit all reference to the defendant's existence.

See Richardson v. Marsh, 481 U.S. 200, 211 (1987). However, redactions "that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration," *Gray v. Maryland*, 523 U.S. 185, 192-193 (1998), or that otherwise indicate that the original statement contained actual names, *see United States v. Jass*, 569 F.3d 47, 58-59 (2d Cir. 2009), are unacceptable. The Second Circuit has reversed convictions because the redactions were inadequate to protect the defendants' right to Confrontation. *United States v. Taylor*, 745 F.3d 15, 26-27 (2d Cir. 2014)("The redactions here suggest that Taylor's original statements contained actual names. . . . Moreover, the wording of the statement suffers from stilted circumlocutions").

Since Won's statements are clearly inadmissible hearsay as to Kang, admission of the proposed testimony at a joint trial would violate Tae Hung Kang's right to confront the witnesses against him. *United States v. Rivas*, 2002 U.S. Dist. LEXIS 21101(S.D.N.Y Oct. 31, 2002) citing *Ryan v. Miller*, 303 F.3d 231, 248 (2d Cir. 2002)("Testimony that indirectly includes an accusation against the defendant may violate the Confrontation Clause even if the testimony is not a direct reiteration of the accusatory assertion"); *Mason v. Scully*, 16 F.3d 38, 42-3 (2d Cir. 1994)("To implicate the defendant's confrontation right, the statement need not have accused the defendant explicitly but may contain an accusation that is only implicit").

Accordingly, there should be a trial severance and the statements attributed to the co-defendant not previously disclosed should be disclosed so that the defense can make further arguments in support of severance.

Point Two

The Government's Seizure of the Defendant's Records from GoDaddy Was a Violation of His Fourth Amendment Rights; Those Records and the Consequently Obtained Warrant for Email from Google must Be Suppressed.

On July 9, 2018, U.S. Magistrate Judge Ramon E. Reyes, Jr. granted the government's application for a search warrant for emails and other information held by Google, Inc. for the email address info@forexnpower.com ("the Google warrant"). The government thereby obtained a large volume of email traffic, subscriber information and other records Google maintained on behalf of the defendant's company.

The application for the Google warrant was submitted by FBI Special Agent Keith McLaughlin in an undated affidavit sworn before Judge Reyes. In the affidavit, the agent alleges that the subject email account was used to make material misrepresentations of fact in relation to the foreign exchange scheme charged in the Indictment. McLaughlin Aff. ¶¶ 11-12. Agent McLaughlin affirmed that he had reviewed records from GoDaddy.com that showed that a man identifying himself as Sungmi Kang[1] had been solicited by GoDaddy staff to use a free email service but Sungmi Kang "advised that his company already had free email service through Gmail, a service provided by Google." McLaughlin Aff. ¶ 13.

In July 2018, Agent McLaughlin submitted his application for a search warrant.

On August 6, 2018, the government sent a DVD of information it obtained from the Google warrant to counsel, including "Emails and other information, including address books, contact lists, calendar data and files, obtained in response to the search warrant[.]"

[1] Sungmi Kang was Tae Hung Kang's wife. She passed away last year. Sungmi Kang was a defendant in the CFTC lawsuit which alleged, among other things, that she was a controlling person of Safety Capital Management, Inc.

ECF #31.

On August 21, 2018, in response to an email request from counsel, the government revealed that the GoDaddy records were obtained by subpoena.

The government has declined to produce the subpoena it sent to GoDaddy, citing grand jury secrecy as provided in Rule 6. That Rule provides, in pertinent part, "Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Fed. R. Crim. P. 6(e)(6). Here, however, the subpoena was served to obtain evidence from GoDadddy for use at trial and those GoDaddy records have been disclosed to counsel. The disclosure of the underlying subpoena could not help prevent the disclosure of secret grand jury materials. "The touchstone [of Rule 6(e)(6)] is not what has been examined by the grand jury, but what may reveal "the essence of what takes place in the grand jury room." *United States v. Norian Corp.*, 709 F. App'x 138, 141, 2017 U.S. App. LEXIS 17382, 2017 WL 3971378 (3d Cir. 2017).

To obtain grand jury material, a defendant must show a "particularized need" for it that outweighs the need for secrecy, showing it is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed. *United States v. Ulbricht*, 858 F.3d 71, 107 (2d Cir. 2017). That standard is easily met here because the terms of the subpoena are unquestionably relevant to the determination of the defendant's motion to suppress and controvert the search warrant obtained as a result, because there is no actual need for the subpoena itself to be sealed, and because it is only the subpoena itself that is sought. Accordingly, the Court should require the disclosure of

the subpoena.

It is improper to utilize a Grand Jury for the sole or dominating purpose of preparing an already pending indictment for trial. Grand jury subpoenas are presumed to have had a proper purpose and, accordingly, a defendant has the burden to prove that a grand jury subpoena was issued for an improper purpose. *United States v. Punn*, 737 F.3d 1, 6 (2d Cir. 2013). It appears that the GoDaddy subpoena may have been issued after the indictment was filed on April 11, 2018, but because the government is declining to produce it, the defendant is prevented from carrying his burden of proof.

In any event, the fact that a third party holds confidential information for a person does not mean he has no reasonable expectation of privacy in that information. In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the Supreme Court held that a cell phone subscriber has a reasonable expectation of privacy in cell site location information stored by the cellular provider such that the government must obtain a search warrant before seeking such information from the provider. 138 S. Ct. at 2217. To hold otherwise, the Court reasoned, would be to subject cell phone users—a majority of Americans—to "tireless and absolute surveillance." *Id*. at 2218. The *Carpenter* decision was issued on June 22, 2018. The Google warrant was issued on July 9, 2018, more than two weeks later. The agent and the government knew or should have known of the *Carpenter* decision by then.

The Google warrant was issued based on private, confidential information held by GoDaddy on behalf of Mr. Kang. The agent did not reveal to Judge Reyes how he obtained the GoDaddy records–but he knew as did the prosecutors. GoDaddy's website says. "GoDaddy powers the world's largest cloud platform dedicated to small, independent ventures. With 18M customers worldwide and 77M domain names under management,

GoDaddy is the place people come to name their idea, build a professional website, attract customers and manage their work." https://aboutus.godaddy.net/about-us/default.aspx (Last visited February 26, 2019). There are 18 million customers using GoDaddy domain names and other services. The government apparently thinks it can access all of those records at any time by subpoena. But that practice violates the Fourth Amendment right to be free of unreasonable searches and seizures. They could have applied for a search warrant, but chose not to.

Indeed, "subpoenas trigger Fourth Amendment concerns and may be challenged under Fourth Amendment grounds." *See Grand Jury Subpoena v. Kitzhaber*, 828 F.3d 1083, 1088 n.1 (9th Cir. 2016); *see also Carpenter*, 138 S. Ct. At 2221 ("[T]his Court has never held that the Government may subpoena third parties for records in which the suspect as a reasonable expectation of privacy.").

The information held by GoDaddy included "Shopper Lists," "Domain Lists," "Domain Information," notes of interactions with customers, audit logs, and billing records. This information includes the identity of the persons who use GoDaddy to host websites, the sites, the dates the domains were created and ended, payment history and their communications with GoDaddy. Although this information is held by a third-party, Mr. Kang had an expectation of privacy in it.

The agent later relied on the confidential GoDaddy information that Kang was using Gmail as a basis to obtain Google's records. The records obtained from that warrant should be suppressed because they were obtained in violation of the Fourth Amendment.

Point Three

The Defendant's Statements and Those of His Counsel During a Meeting with the Government Are Inadmissible Plea Discussions. F.R.E. 410.

Under Rule 410, "evidence of . . . a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea. . . ." Fed. R. Evid. 410(a)(4). *See* Fed. R. Crim. P. 11(f).

> "Ordinarily, statements made by a defendant during plea negotiations, including proffer sessions, are inadmissible at trial." *United States v. Velez*, 354 F.3d 190, 194 (2d Cir. 2004) (citing Fed. R. Evid. 410); *United States v. Barrow*, 400 F.3d at 116 ("[s]tatements made by defendants in proffer sessions are covered by Rule 410").

United States v. Riedman, No. 11-CR-6083CJS, 2014 U.S. Dist. LEXIS 23936, at *80 (W.D.N.Y. Feb. 18, 2014).

Here, the FBI report concerning the August 21, 2017 meeting indicates that Mr. Kang was interviewed in the presence of his attorney and an Assistant U.S. Attorney at the FBI Building in Atlanta. Initially, the AUSA explained that Kang could "make things right" and then proceeded to explain what he viewed as the defendant's criminal conduct. The report says that Mr. Kang asked for a statement of what specific misrepresentations he was alleged to have made. The AUSA described three alleged schemes and showed financial analyses of certain bank accounts. According to the report, Mr. Kang explained what he knew about a recycling business, but the AUSA told Kang that the recycler received money from foreign exchange. Kang is claimed to have explained that these were commissions.

Then, the report shows that counsel for Kang conferred with his client. Subsequently, Kang's lawyer asked the AUSA whether the matter could be settled without prosecution if Kang paid back whatever money was owed and promised not to work in the foreign exchange industry.

According to the agent's notes, the prosecutor responded that Kang would have to be willing to cooperate and come up with money. In contrast, the written report says that the AUSA advised "that would not be possible, but depending on KANG's discourse involving cooperation with the prosecution against [another person] as part of a plea agreement, some consideration can be made." The 302 says that Mr. Kang "advised that, if anyone were to charged with the scheme, 'I should be charged by myself.'" According to the report, the AUSA suggested that if Kang were to take full responsibility, the result would be unfavorable for him. Kang allegedly responded that he did not make a profit from "these people" but he might have "violated a few regulations here and there."

The 302 indicates that the "plea bargain system" including the applicable sentencing guidelines range was explained to Tae Hung Kang. The prosecutor also advised him that he could attain a less severe sentence by cooperating with the government. The agent's notes state that a potential plea agreement was discussed.

There is nothing in the report or handwritten notes that indicate the defendant waived his Rule 410 rights. No proffer agreement waiving such rights was signed.

The apparent purpose of the meeting (as far as the government was concerned) was to convince Tae Hung Kang to cooperate with the government. Once the government laid out some of its case against the defendant and suggested that Kang could "make things right," defense counsel took a break to speak to his client. When the meeting reconvened,

defense counsel attempted to negotiate a settlement. The prosecutor surely understood the meeting was a "plea discussion" within the meaning of Rule 410. He launched into a proposal that the defendant should cooperate with the government's investigation and plead guilty. The defendant's response was within that context. The prosecutor went on to explain how plea bargaining works (at least in the Northern District of Georgia) and how a plea agreement could be struck. In any event, no matter what the prosecutor thought, the statements made at the meeting qualify as plea discussions. Their objective purpose was to explore the potential settlement of a federal criminal investigation.

Under these circumstances, the defendant's statements at the August 21, 2017 meeting should be excluded and suppressed pursuant Fed. R. Evid. 410.

CONCLUSION

For the reasons stated herein, defendant's motions should be granted.

Dated: February 27, 2019
White Plains, New York

/s/ Richard D. Willstatter

RICHARD D. WILLSTATTER
Attorney for Tae Hung Kang
GREEN & WILLSTATTER
200 Mamaroneck Avenue - Suite 605
White Plains, New York 10601
(914) 948-5656
willstatter@msn.com