

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff(s),

CASE NUMBER: 04-80372
HONORABLE VICTORIA A. ROBERTS

v.

D-1 CARL MARLINGA,

D-2 RALPH R. ROBERTS,

D-3 JAMES A. BARCIA,

Defendant(s).

OPINION AND ORDER DENYING DEFENDANT BARCIA'S
MOTION FOR EVIDENTIARY HEARING AND
TO DISMISS BECAUSE OF VINDICTIVE PROSECUTION

I. INTRODUCTION

This matter is before the Court on Defendant James Barcia's Motion for Evidentiary Hearing and to Dismiss Because of Vindictive Prosecution (Doc. #28). The Court **DENIES** this motion.

II. BACKGROUND

Defendant James Barcia ("Barcia") is currently a member of the Michigan State Senate and former member of the United States House of Representatives. He is charged by the United States (the "Government") in a nine-count Indictment, along with Defendants Carl Marlinga ("Marlinga"), the former Macomb County Prosecuting Attorney, and Ralph Roberts ("Roberts"), a Macomb County, Michigan realtor and

owner of Ralph Roberts Realty. Barcia is charged in two counts (Five and Eight). Marlinga is charged in all counts. Roberts is charged in three counts (One, Two, and Seven). The particulars of the charges have been set forth in previous Opinions and Orders issued by the Court. See *e.g.*, Opinion and Order Regarding Motions to Dismiss, February 28, 2005.

This motion to dismiss asserts that Barcia is a victim of vindictive prosecution. He contends that he was charged in retaliation for exercising his First Amendment right to contribute to Marlinga's federal campaign. Barcia points to several factors in support of this assertion. First, the Department of Justice ("DOJ") manual¹ indicates that it is preferable that a Federal Election Campaign Act ("FECA"), 2 U.S.C. §431, *et seq.*, violation be resolved civilly, unless it was a willful violation of a core prohibition of the FECA that involved a substantial sum of money and resulted in a false campaign report to the Federal Election Commission ("FEC"). Barcia acknowledges that limits on large contributions are part of the core provisions of the FECA, but implies that his \$4,000 contribution does not qualify as "large."

Next, he points out that the DOJ manual notes that conduits are typically used as witnesses against the person who recruited them to act in that capacity. The manual also provides that it is customary for the DOJ to refer most alleged FECA violations to the FEC. The two main considerations for whether the DOJ will retain the case are the dollar amount involved and the level of criminal intent that it reflects. General guidelines state that illegal activity involving less than \$10,000 should be charged as a FEC

¹*Federal Prosecution of Election Offenses*, 6th ed.

misdemeanor, absent special circumstances which would warrant felony charges. Amounts over \$10,000 should be considered for felony prosecution.

Finally, Barcia indicates that the Government interrogated him at length on three occasions prior to the Indictment and offered him an opportunity to plead guilty to a misdemeanor offense. However, the offer was revoked after Barcia continued to deny that he and Marlinga agreed upon a scheme to funnel money in the manner alleged. And, Barcia states that the Government was aware prior to the Indictment that he took and passed a polygraph examination which included his denial to the question, "Regarding your donations to Carl Marlinga, did you impose a condition of reciprocal donation?"

Under *United States v Adams*, 870 F.2d 1140, 1145 (6th Cir. 1989), Barcia asserts that a defendant is entitled to an evidentiary hearing if he establishes that a reasonable person would think there existed a realistic likelihood of vindictiveness. He says that only objective explanations can rebut a finding of realistic likelihood of vindictiveness.

Barcia contends that he made a *prima facie* showing that there is a realistic likelihood of vindictiveness with regard to both charges brought against him. Therefore, he requests that the Court conduct an evidentiary hearing in which the Government's explanation can be formally presented and tested.

III. ANALYSIS

Defendant Barcia has not made the requisite showing to warrant discovery or an evidentiary hearing.

"The broad discretion accorded prosecutors in deciding whom to prosecute is not

'unfettered,' and a decision to prosecute may not be deliberately based upon the exercise of statutory rights." *United States v Adams*, 870 F.2d 1140, 1145 (6th Cir. 1989). A prosecution that is initiated merely out of vindictiveness -- defined as one having actual retaliatory motivation -- is constitutionally impermissible. *Id.* To establish vindictive prosecution a defendant must show: 1) exercise of a protected right; 2) a prosecutorial stake in the exercise of that right; 3) unreasonableness of the prosecutor's conduct; and 4) the intent to punish the defendant for exercise of the protected right. *United States v Suarez*, 263 F.3d 468, 479 (6th Cir. 2001), *cert. den.*, 535 U.S. 991 (2002). A defendant may be allowed to conduct discovery to gather additional evidence in support of a claim of vindictive prosecution, if he presents "some evidence tending to show the existence of the essential elements of the defense." *Adams*, 870 F.2d at 1146 (quotation marks omitted). A somewhat lower standard applies for an evidentiary hearing. A defendant must make an objective, prima facie showing of "a realistic likelihood of vindictiveness." *Id.* (quotation marks omitted).

In *Adams*, defendant Alayne Adams, a lawyer, filed a sex discrimination suit against her employer, the United States Equal Employment Opportunity Commission ("EEOC"). Four years later, Adams and her husband, Mayo Coiner, were indicted on various charges related to their failure to accurately report Adams' income years earlier, and Adams' inaccurate statements regarding those tax returns during the civil proceedings. However, prior to the indictment, defendants voluntarily amended their returns and paid the income tax deficiencies. Defendants moved to dismiss the indictment claiming that they were indicted in retaliation for Adams' discrimination suit. In support of their claim, Defendants presented an affidavit from a special agent in the

Criminal Investigative Division of the Internal Revenue Services (“IRS”), who stated that Adams’ omissions would not ordinarily result in criminal charges because of the nominal amounts of the omissions. The agent further opined that the charges were a direct response to Ms. Adams lawsuit against the EEOC. Defendants also presented the affidavit of the former director of a branch of the EEOC, who was also of the opinion that the charges were filed in revenge.

The Court gave weight to the following in finding that defendants presented “some evidence” of vindictive prosecution: 1) the fact that Ms. Adams’ lawsuit against her governmental employer would require it to defend a discrimination charge and expose the employer to potential embarrassment; 2) the record suggested that (during the preceding twenty years) no taxpayers who underreported their income, voluntarily amended their returns, and paid the deficiency had ever been prosecuted; 3) the record suggested that perjury based on testimony given in civil proceedings had not previously been prosecuted; and 4) the affidavits of the IRS special agent and the former EEOC director. The Court of Appeals held that discovery should be conducted, and that at its conclusion, the district court could decide whether an evidentiary hearing should be held.

Each claim of vindictive prosecution turns on its own facts. *Id.* However, Barcia’s claim stands in stark contrast to the defendants in *Adams* in that he offers *no* evidence “tending to show the existence of the essential elements of the defense” or “a realistic likelihood of vindictiveness.” *Id.* (quotation marks omitted). Barcia relies heavily upon DOJ guidelines, which indicate that violations under \$10,000 are typically handled as a civil matter. However, the guidelines also allow for criminal prosecution for willful

