UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-3938

In re: Grand Jury Proceedings, CF,

Petitioner

Appeal from U.S. District Court for the Southern District of Iowa - Davenport
(3:09-mc-00004-JAJ-1)

JUDGMENT

This court has reviewed the original file of the United States District Court and the briefs of the parties. It is ordered by the court that the judgment of the district court is affirmed in accordance with the per curiam order dated January 22, 2010.

January 22, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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ORDER

Before WOLLMAN, MURPHY, and BYE, Circuit Judges.

PER CURIAM.

On November 17, 2009, petitioner refused an order of the district court[1] to testify before a federal grand jury after having been granted use immunity pursuant to 18 U.S.C. § 6002. The district court held petitioner in civil contempt, 28 U.S.C. § 1826(a), and advised her that she could purge the contempt and be released from custody by complying with the court's order. Petitioner has not since indicated her willingness to testify, but she filed a motion to vacate the contempt on November 30, 2009. The district court denied the motion, and petitioner appeals from that order.

We review a district court's contempt order for an abuse of discretion, subjecting the court's factual findings to review for clear error. Warnock v. Archer, 443 F.3d 954, 955 (8th Cir. 2006). Having carefully reviewed the record, including the portions submitted under seal, the parties' briefs, responses and replies, we conclude that the district court did not abuse its discretion in sustaining

[1]The Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa.

the contempt order. In the sealed documents the government established reason to indicate that the statute of limitations has not necessarily expired for the matter the grand jury is investigating. While an agreement to conceal a conspiracy after the purpose of the conspiracy has been achieved does not extend the statute of limitations, see Grunewald v. United States, 353 U.S. 391, 399-405 (1957), petitioner has not met her burden of showing that the current investigation involves a completed conspiracy.

Accordingly, we affirm the order of the district court. The court reserves the right to file a fuller opinion at a later date or to consider its publication at an appropriate time.

BYE, Circuit Judge, dissenting.

I respectfully dissent from our decision to affirm the order of the district court finding Carrie Feldman in civil contempt pursuant to 28 U.S.C. § 1826(a) for refusing to testify before a grand jury.

I

This case involves an investigation of a conspiracy to cause damage to the University of Iowa Spence Laboratories (the Lab). On November 14, 2004, several people broke in to the Lab and vandalized it, causing significant property damage; the vandals also released lab animals. See "Seashore Hall and Spence Laboratories," Quad City Times - http://www.qctimes.com/image_d89e1d01-61d1-5645-86dd- 678096477e34.html; "FBI takes charge of lab investigation," Quad City Times, November 16, 2004 - www.qctimes.com/news/state-and-regional/article _70a1c531 -cda8-5739-9029-0f376a36b7f6.html.

On November 18, 2009, the government obtained an indictment against Scott Demuth arising from the Lab break-in. The indictment alleges from November 9, 2004, until about November 20 or later, Demuth conspired to "commit animal enterprise terrorism and cause economic damages" in excess of $10,000 in violation of 18 U.S.C. § 43.

Carrie Feldman is Demuth's ex-girlfriend. She was fifteen years old at the time of the Lab break-in. On October 14, 2009, the government served Ms. Feldman (who lives in Minnesota) with a subpoena to testify before a grand jury in Davenport, Iowa. The government acknowledges it sought Ms. Feldman's testimony because it believes she had knowledge of "a break-in of the University of Iowa Spence Laboratories in November, 2004." Appellee's Response to Motion for Release from Custody Pending Determination of Appeal, ¶ 1, filed December 23, 2009.

Ms. Feldman appeared before the grand jury in compliance with the subpoena on October 15, 2009, however, refusing to answer questions other than her name, age, and place of birth. In refusing to answer questions, Ms. Feldman asserted her Fifth Amendment right to remain silent based on information provided by the prosecutor as to her being a target of the investigation. After Ms. Feldman refused to testify, the government served her another subpoena to reappear before the grand jury on November 17, 2009.

On November 17, 2009, more than five years after the Lab break-in which occurred on November 14, 2009, Ms. Feldman reappeared in Davenport pursuant to the subpoena. A hearing was held before the district court. At the hearing, the district court granted the government's request as to Ms. Feldman being given use immunity under 18 U.S.C. § 6002. Based on counsel's representations as to Ms. Feldman still refusing to testify, the district court found her in contempt of court and ordered her indefinite detention pursuant to 28 U.S.C. § 1826(a).

On November 30, 2009, Ms. Feldman filed a Motion to Vacate Contempt and Release Witness. The district court held a hearing on the motion on December 8, and filed an order denying the motion on December 15, 2009. Ms. Feldman thereafter filed this timely notice of appeal.

II

"We review the District Court's decision to enter a contempt order for abuse of discretion, giving plenary review to conclusions of law and reviewing factual findings for clear error." Wright v. Nichols, 80 F.3d 1248, 1250 (8th Cir. 1996).

"A district court abuses its discretion when it fails to consider a significant relevant factor, gives significance to an improper or irrelevant factor, or considers proper factors, but in weighing the factors commits a clear error of judgment." United States v. Clay, 579 F.3d 919, 930 (8th Cir. 2009) (citing United States v. Saddler, 538 F.3d 879, 890 (8th Cir. 2008).

The district court abused its discretion when it found Ms. Feldman in contempt of court because it failed to consider a significant relevant factor, i.e., whether the statute of limitations had run on the crime for which the government seeks Ms. Feldman's testimony.

The government does not dispute the crime under investigation involved a conspiracy to cause damage to the Lab in violation of 18 U.S.C. § 43. The goal of the conspiracy was a fait accompli as of November 14, 2004, the day the Lab was vandalized. The statute of limitations for a violation of 18 U.S.C. § 43 is five years. See 18 U.S.C. § 3282. Thus, the statute of limitations had run on the conspiracy in question as of November 14, 2009, prior to the district court's order finding Ms. Feldman in contempt on November 17, 2009.

The government contends Ms. Feldman has failed to demonstrate the statute of limitations for the conspiracy has expired. In so contending, the government makes vague and generalized assertions suggesting overt acts in furtherance of the conspiracy (including acts of concealment) may have taken place after November 14, 2004. Such an argument has no merit. The government completely fails to address controlling Supreme Court precedent which specifically holds a possible agreement to conceal a conspiracy after the offense has been completed does *not* extend the conspiracy for statute of limitations purposes. Grunewald v. United States, 353 U.S. 391, 399-405 (1957); Krulewitch v. United States, 336 U.S. 440, 443-44 (1949).

> The crucial teaching of Krulewitch and Lutwak is that after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. . . . Sanctioning the Government's

> theory would for all practical purposes wipe out the statute of limitations in conspiracy cases[.]

Grunewald, 353 U.S. at 401-02.

The government also contends Ms. Feldman cannot rely upon the statute of limitations to refuse to testify because the statute of limitations is an affirmative defense to a crime that a defendant must raise, and affirmative defenses can be waived. The government faults her for citing no authority for the proposition that she cannot be compelled to testify because the statute of limitations for the crime under investigation has expired. In response, however, the government itself cites no authority for the proposition it can abuse the grand jury process to compel a witness to testify regarding a crime for which the statute of limitations has expired. Furthermore, the government's vague and generalized assertions in response to Ms. Feldman's concrete and objective assertions regarding the statute of limitations have failed to convince me any attempt by the government to pursue additional indictments in this matter would or could be pursued in good faith. The government's position would allow it to use the powers of the grand jury – and coercive powers of contempt – to further investigate a specific offense which occurred years ago without any colorable basis to prosecute anyone for such offense.

Finally, I am concerned by the necessary implication raised in this matter that the government is seeking Ms. Feldman's testimony for the sole purpose of gathering additional information to support its indictment against Mr. DeMuth. "[T]he government should not use the grand jury for the sole purpose of pretrial discovery in cases in which an indictment has already been returned." United States v. Star, 470 F.2d 1214, 1217 (9th Cir. 1972). It is an abuse of the grand jury process to seek to acquire information or discovery from a grand jury witness where the sole or dominant purpose is to use the information to support an already pending indictment. Id.; see also United States v. Jenkins, 904 F.2d 549, 559 (10th Cir. 1990); In re Grand Jury Subpoena Duces Tecem (Simels), 767 F.2d 26, 29 (2nd Cir. 1985); United States v. (Under Seal), 714 F.2d 347, 349 (4th Cir. 1983); In re Grand Jury Proceedings (Johanson), 632 F.2d 1033, 1039-40 (3d Cir. 1980); United States v. Gibbons, 607 F.2d 1320, 1328 (10th Cir. 1979); United States v.

Beasley, 550 F.2d 261, 266 (5th Cir. 1977); United States v. Woods, 544 F.2d 242, 250 (6th Cir. 1976).

III

For the reasons stated herein, I disagree with the decision to affirm the district court's order finding Ms. Feldman in contempt and confining her. I would reverse the order and remand this matter to the district court with directions to immediately release her from jail confinement.

January 22, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans