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United States District Court, D. Massachusetts.

UNITED STATES of America

v.

Alfred W. TRENKLER.

Crim. A. No. 92-10369-Z.

Oct. 25, 1993.

Nancy Gertner, Dwyer, Collora & Gertner, Boston, MA, Jefferson W. Boone, Allston, MA, for Thomas A. Shay.

Terry Philip Segal, Boston, MA, for Alfred W. Trenkler.

Paul V. Kelly, U.S. Atty., U.S. Attorney's Office, Boston, MA, for U.S.

MEMORANDUM OF DECISION

ZOBEL, District Judge.

*1 The defendant, Alfred W. Trenkler ("Trenkler"), moves to suppress out- of-court identifications made by Edward Carrion on February 25 and 27, 1992.

Trenkler's motion to suppress is untimely. Rule 12(c) of the Federal Rules of Criminal Procedure vests the trial court with the discretion to "set a time" by which all pretrial motions must be filed. Magistrate-Judge Bowler originally ordered Trenkler to file all pretrial motions by January 8, 1993, a date she later extended to February 19, 1993. Trenkler filed this motion on August 30, 1993.

Despite its untimeliness, the Court may hear the motion if there is good cause for its tardiness. Fed.R.Crim.P. 12(f); *United States v. Leal*, 831 F.2d 7, 10 (1st Cir.1987). Trenkler offers two reasons for the delay: the

government's ongoing failure to provide him with a report discussing the showing of a photo spread; and information learned during the trial of Trenkler's co-defendant, Thomas Shay, which took place during the Summer of 1993.

In order to show good cause, Trenkler must show that information concerning the Carrion identification was unknown to him before the pretrial motion deadline. See *United States v. Levasseur*, 699 F.Supp. 995, 1007 (D.Mass.1988) (motion denied because it is untimely and fails to raise any previously unknown information). This is not the case. Although it appears that Trenkler never received the awaited government report, he had been given in late 1992 investigative reports filed by Alcohol, Tobacco, and Firearm ("ATF") Agents Dennis Leahy and Victor Palaza that describe the challenged identification.

Furthermore, the government correctly asserts that Carrion's trial testimony is not new. To the extent it is inconsistent with his statements as set forth in the ATF reports, that is a matter best left to cross-examination; it does not require suppression.

Even if Trenkler had satisfied the good cause requirement, his motion to suppress would be denied under the two-step analysis for determining when an identification violates a defendant's due process rights. See *United States v. De Jesus-Rios*, 990 F.2d 672, 677 (1st Cir.1993). First, the defendant bears the burden of proving that the identification procedure was impermissibly suggestive. Second, the Court will suppress the identification only if there is "a very substantial likelihood of irreparable identification." *United States v. Bouthot*, 878 F.2d 1506, 1514 (1st Cir.1989). The trial court will consider: (1) the witness's opportunity to see the defendant; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the defendant; (4) the witness's level of certainty at the confrontation; and (5) the time lag between the event and the confrontation. *De Jesus-Rios*, 990 F.2d at 677. If, under the totality of the circumstances, the identification is nonetheless reliable, the motion to suppress will be denied. *De Jesus-Rios*, 990 F.2d at 677.

*2 Trenkler fails to allege a single fact in support of his claim that the

Carrion identification was impermissibly suggestive. In fact, he fails even to complain about the way in which the government conducted the identification procedure. All he does is argue that because Carrion's trial testimony was a more detailed and polished version of his pretrial statements, it should be suppressed.

Accordingly, Trenkler's motion to suppress the Carrion identification and request for evidentiary hearing (# 295) are denied.

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