

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 16-20253-JTF-tmp
)	
M. CLEVE COLLINS,)	
)	
Defendant.)	

REPORT AND RECOMMENDATION

On November 17, 2016, a federal grand jury returned a one-count indictment charging defendant M. Cleve Collins with committing major fraud against the United States, in violation of 18 U.S.C. § 1031. (ECF No. 2.) Before the court by order of reference is Collins’s Motion to Dismiss the Indictment. (ECF No. 18.) Collins asserts the indictment must be dismissed for three reasons: (1) the statute of limitations on the charged offense has run; (2) the misrepresentations he allegedly made were not material; and (3) he cannot be held criminally liable for the actions alleged in the indictment because he took those alleged actions in his capacity as an officer of a corporation. For the reasons below, it is recommended that the Motion to Dismiss the Indictment be denied.

I. PROPOSED FINDINGS OF FACT

The following proposed findings of fact are based on the allegations contained in the indictment. According to the indictment, Collins

was the Chief Operating Officer ("COO") of Don Brady Construction Inc. (also doing business as Apex 3) ["Don Brady"] of Mobile, Alabama. As COO of [Don Brady], [Collins] was the person in the company responsible for authorization of payments from company funds, including payments to subcontractors, for the daily monitoring of accounts receivable and accounts payable, and for the signing and submission of documents regarding the company's Federal contracts.

(ECF No. 2 at 1.) The indictment alleges that on or about May 14, 2009, the General Services Administration ("GSA")

awarded federal contract GS-04P-09-EX-C-0067 ("The Contract"), a prime contract, to [Don Brady] as prime contractor for the replacement of the roof and the air conditioning system at the Ed Jones Federal Courthouse and Post Office in Jackson, Tennessee. The initial value of the Contract was \$1,479,989.08. The final value of the Contract, which included change orders, was \$1,502,309.08. The sum of \$1,502,309.08 represented the total amount of money paid by the GSA to [Don Brady] for the materials, labor and final product obtained by the Contract.

[Collins] as COO of [Don Brady] thereafter hired Jesse Bryant Roofing, located in Memphis, Tennessee, as a subcontractor to perform part of the work required by the Contract. Specifically, [Collins] hired Jesse Bryant Roofing to install a new roof on the Ed Jones Federal Courthouse and Post Office in Jackson, Tennessee.

(Id. at 2.) Under the heading "Progress Payments Under the Contract," the indictment alleges that

[t]he Contract provided that the GSA would pay [Don

Brady] through progress payments after various stages of the work had been completed.

In order for [Don Brady] to obtain a progress payment, the GSA first required [Don Brady] and its subcontractors to have satisfactorily completed the portion of work as determined by a GSA inspector.

In order for [Don Brady] to obtain a progress payment, the GSA further required [Collins] as COO of [Don Brady] to certify that "payments to subcontractors and suppliers have been made from previous payments received under the contracts" and that "timely payments will be made from the proceeds of the payment covered by this certification."

(Id. at 3.) The indictment alleges the following "Scheme and Artifice":

Beginning on or about August 2009 and continuing up to on or about February 2011, in connection with the foregoing procurement of services and Contract, [Collins] devised a scheme and artifice to: 1) defraud the United States of its right under the Contract and Federal law and regulations to have subcontractors on its contracts timely and fully paid by the contractor; and 2) to obtain money by means of false and fraudulent representations.

It was part of the scheme and artifice that [Collins] would and did cause Jesse Bryant Roofing of Memphis, Tennessee to perform work in the value of approximately \$580,050 on the Ed Jones Courthouse and Post Office in Jackson, Tennessee.

It was further part of the scheme and artifice that [Collins] would not and did not pay Jesse Bryant Roofing for its work on the Contract out of the progress payments [Don Brady] received from the GSA on the Contract.

It was further part of the scheme and artifice that [Collins] would and did repeatedly cause progress payment certifications to be presented to the GSA that were false and fraudulent in that [Collins] certified that [Don Brady] had paid subcontractors on the

Contract from previous progress payments when in fact, as [Collins] well knew, subcontractor Jesse Bryant Roofing had not been paid from the previous progress payments on the Contract.

It was further a part of the scheme and artifice that [Collins] would and did repeatedly falsely represent to officers of Jesse Bryant Roofing in Memphis, Tennessee, through emails and phone calls that payments to Jesse Bryant Roofing from [Don Brady] would be forthcoming.

It was further a part of the scheme and artifice that [Collins], instead of paying Jesse Bryant Roofing what it was owed for its work on the Contract, would and did use the progress payments it obtained from the GSA on the Contract to pay other debts and expenses of [Don Brady], and to pay for his own personal debts, expenses, purchases, and spending.

(Id. at 3-4) (emphasis added).

The Indictment describes the "Execution of the Scheme and Artifice" as follows:

From in or about August 2009, to in or about February 2011, in the Western District of Tennessee and elsewhere, [Collins] did knowingly execute and attempt to execute the aforesaid scheme and artifice with the intent:

- a) to defraud the United States of its right under the Contract and Federal law and regulations to have subcontractors on its contracts timely and fully paid by the prime contractor; and
- b) to obtain money by means of false and fraudulent representations.

(Id. at 4-5) (emphasis added).

II. PROPOSED CONCLUSIONS OF LAW

A. Standard of Review

Under Federal Rule of Criminal Procedure 12(b)(3)(B), a motion alleging a defect in the indictment "must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(B). The Sixth Circuit has stated that:

a motion to dismiss is "capable of determination" before trial if it involves questions of law instead of questions of fact on the merits of criminal liability. Normally, Rule 12(b) motions may appropriately raise for consideration such matters as former jeopardy, former conviction, former acquittal, statute of limitations, immunity [and] lack of jurisdiction. District courts may ordinarily make preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do not invade the province of the ultimate factfinder.

United States v. Craft, 105 F.3d 1123, 1126 (6th Cir. 1997) (internal citations and quotation marks omitted). "In deciding a motion to dismiss an indictment for failure to state an offense, a court need simply look to the facts alleged and determine whether those facts, 'if proved would establish *prima facie*, the defendant's commission of the crime.'" United States v. McDaniel, No. 1:05-CR-171, 2006 WL 839095, at *3 (W.D. Mich. Mar. 28, 2006) (quoting United States v. Superior Growers Supply, Inc., 982 F.2d 173, 177 (6th Cir. 1992)).

B. 18 U.S.C. § 1031

Under 18 U.S.C. § 1031:

(a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent-

(1) to defraud the United States; or

(2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises,

in any grant, contract, subcontract, subsidy, loan, guarantee, insurance, or other form of Federal assistance, including through the Troubled Asset Relief Program, an economic stimulus, recovery or rescue plan provided by the Government, or the Government's purchase of any troubled asset as defined in the Emergency Economic Stabilization Act of 2008, or in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of such grant, contract, subcontract, subsidy, loan, guarantee, insurance, or other form of Federal assistance, or any constituent part thereof, is \$1,000,000 or more shall, subject to the applicability of subsection (c) of this section, be fined not more than \$1,000,000, or imprisoned not more than 10 years, or both.

§ 1031(a). Section 1031(f) provides that "[a] prosecution of an offense under this section may be commenced any time not later than 7 years after the offense is committed, plus any additional time otherwise allowed by law." § 1031(f).

C. Statute of Limitations

Collins argues the indictment must be dismissed because the statute of limitations has run on the § 1031 violation. A "statute of limitations begins to run when a crime is complete,

that is, when each element of the crime charged has occurred." United States v. Grenier, 513 F.3d 632, 636 (6th Cir. 2008) (citing United States v. Lutz, 154 F.3d 581, 586 (6th Cir. 1998)). The statute of limitations for violations § 1031(a) is seven years, and the indictment was returned on November 17, 2016. Collins asserts that the alleged offense was completed on September 17, 2009, and thus the seven-year statute of limitations began to run on that date. In support of this argument, Collins relies on the exhibits attached to his motion.¹ (ECF No. 18-1.) In response, the government argues that the indictment was returned within the seven-year limitations period. It points to the indictment, which alleges that the scheme was executed "[f]rom in or about August 2009, to in or about February 2011[.]"

Section 1031(a) criminalizes "each knowing 'execut[ion]' or 'attempt[ed] execut[ion]' of a scheme or artifice to defraud or obtain money by false pretenses." United States v. Reitmeyer, 356 F.3d 1313, 1317 (10th Cir. 2004) (quoting § 1031(a)); see

¹Collins attached copies of the applications for payment, the records of payment and modifications, and the payment bond as exhibits to his motion. According to Collins, the records show that the first application for payment, for the amount of \$125,828.04, was submitted to the GSA on September 17, 2009, which is more than seven years prior to November 17, 2016. Five additional applications for payment were submitted to the GSA between December 2009 and July 2010, for amounts ranging from \$13,678.81 to \$810,071.24. The dates reflected on these five subsequent applications all fall within seven years of November 17, 2016.

also United States v. Sain, 141 F.3d 463, 469 (3d Cir. 1998). Collins relies heavily on the Tenth Circuit's decision in Reitmeyer. He argues that the court must "ascertain the contours of the scheme" alleged in the indictment to determine whether the scheme was executed more than seven years before the indictment was returned. Reitmeyer, 356 F.3d at 1318. Collins contends the alleged scheme was executed when the first application for a progress payment under the Contract was made, and "[h]ence the scheme was 'executed' on September 17, 2009, . . . and the statute of limitations began running on that date." (ECF No. 18 at 7.)

Upon a review of the indictment, the court finds that the facts alleged, if proven, would establish *prima facie* a violation of § 1031(a) within the limitations period. The indictment alleges that as part of his scheme and artifice to defraud the government, Collins caused subcontractor Jesse Bryant Roofing to perform approximately \$580,050 in work on the Ed Jones Courthouse in Jackson, did not pay Jesse Bryant Roofing for this work, repeatedly caused progress payments to be submitted to the GSA falsely certifying that Don Brady had paid its subcontractors, falsely represented to Jesse Bryant Roofing that payments for the work it performed would be forthcoming, and instead of paying Jesse Bryant Roofing the money it was owed, used that money to pay for other expenses for both Don

Brady and himself. The indictment further alleges that Collins knowingly executed and attempted to execute this scheme “[f]rom in or about August 2009 to in or about February 2011[.]” (ECF No. 2 at 4-5.) Accordingly, the indictment returned by the grand jury sufficiently alleges a violation of § 1031(a) that occurred within the seven-year limitations period.² It is recommended that the motion to dismiss on statute of limitations grounds be denied.

D. Materiality and Criminal Liability

Collins makes two additional arguments as to why the indictment should be dismissed. First, he contends that his alleged misrepresentations were not material. Second, he argues that he cannot be held criminally liable for the charged violation because even if he took the acts alleged in the

²The court recognizes that in certain exceptional cases it may be appropriate in deciding a pretrial motion to dismiss to consider facts outside of the four corners of the indictment that relate to the merits of criminal liability. For example, in United States v. Levin, 973 F.2d 463 (6th Cir. 1992), the Sixth Circuit upheld the district court’s grant of a pretrial motion to dismiss upon concluding that the “*undisputed extrinsic evidence*” established that “the government was, as a matter of law, incapable of proving beyond a reasonable doubt the intent required to convict” the defendants. Id. at 470 (emphasis in original); see also Reitmeyer, 356 F.3d at 1318 n.5 (quoting United States v. Hall, 20 F.3d 1084, 1087 (10th Cir. 1994) (“Absent an exception not relevant here . . . ‘[c]ourts should refrain from considering evidence outside the indictment when testing its legal sufficiency.’”). Because those circumstances are not present in this case, the court declines to consider the exhibits attached to the motion.

indictment, he did so in his capacity as COO of Don Brady. Neither argument has merit. As to materiality, Collins asserts that because "the GSA required neither [Collins's] certification to be notarized, nor even a signature from their own representative before payments were made, it seems clear that GSA was treating the certifications that subcontractors had been paid as mere formalities" and "[w]ithout reliance on a material misrepresentation, the United States was not defrauded nor was there an attempt to defraud the GSA." (ECF No. 18 at 12-13.) As stated above, in assessing the sufficiency of the indictment, the court declines to consider facts outside of the four corners of the indictment. Moreover, while the argument that the GSA treated progress payment certifications as "mere formalities" may be an appropriate one to make at trial, the court at the pretrial stage only considers the sufficiency of the indictment. See, e.g., United States v. Andrews, 803 F.3d 823, 824 (6th Cir. 2015) ("The existence of a scheme to defraud and its duration are fact questions for the jury."). The court finds that the indictment sufficiently alleges that Collins knowingly executed a scheme and artifice with the intent to defraud the United States and obtain money by means of false and fraudulent representations.

As to Collins's theory that he cannot be held criminally liable for violating § 1031(a), he cites cases relating to the

requirements of piercing the corporate veil to hold corporate officers, shareholders, agents, or employees liable for the obligations of the corporation. However, none of the cases support the proposition that an individual who violates the law while acting as a corporate officer cannot be charged criminally.³

III. RECOMMENDATION

For the reasons described above, it is recommended that the Motion to Dismiss the Indictment be denied.

Respectfully submitted,

s/ Tu M. Pham

TU M. PHAM
United States Magistrate Judge

May 18, 2017

Date

NOTICE

WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THIS REPORT AND RECOMMENDED DISPOSITION, ANY PARTY MAY SERVE AND FILE SPECIFIC WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS. FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.

³Collins also contends that "[t]he Government has only shown that [Collins's] scanned signature, in his capacity as DBC's COO was affixed by another employee to non-notarized certifications for Applications for Progress Payments. This is not enough to establish that [Collins] personally failed to pay Jesse Bryant Roofing for its work on the Contract out of the progress payments DBC received from the GSA on the Contract." (ECF No. 18 at 15.) As stated above, this argument goes to the merits of the case, and not to the sufficiency of the indictment.