IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA	CASE NO. 1:06 CR 00367
Plaintiff	ORDER
-vs-	
FAYEZ "ALEX" DAMRA, et al.,	
Defendants	

UNITED STATES DISTRICT JUDGE LESLEY WELLS

The United States requests the Court consider the admissibility of evidence of acts and statements of co-defendant, Fawaz Damra, as they relate to the two Counts in the Indictment brought against defendant Fayez "Alex" Damra ("Alex Damra") for conspiracy to defraud the United States in violation of 18 U.S.C. § 371 (Count One) and tax evasion in violation of 26 U.S.C. § 7201 (Count Two). (Doc. 59). Alex Damra, appearing pro se, has not filed a response to the government's Memorandum in Support of its evidentiary request.

For the reasons discussed below, the Court will find that the evidence of acts and statements of Fawaz Damra will be admissible against Alex Damra in the trial of this case.

I. Background

On 25 July 2006, a federal grand jury indicted Alex Damra and his brother Fawaz Damra in a three-count Indictment for conspiracy to defraud the United States in violation of 18 U.S.C. 371 (Count I), against Alex Damra for tax evasion in violation of 26 U.S.C. § 7201 (Count II), and against Fawaz Damra for aiding and assisting in the preparation and presentation of a tax return which is false as to a material matter, in violation of 26 U.S.C. 7206(2) (Count III). (Doc. 1).

The government represents that a central aspect of the conspiracy alleged in Count I, and the evasion scheme in Count II, involved the receipt by Fawaz Damra of $100,0000 from Applied Innovation Management, Inc. ("AIM"), the corporation both owned and controlled by Alex Damra. The government maintains that Alex Damra sent Fawaz Damra two $50,000 checks, drawn on the AIM checking account, in late 1999 and, in turn, fraudulently deducted $100,000 from AIM's 1999 corporate tax return as consulting expense.

The government further represents that Fawaz Damra then sought to convince his regular tax return preparer, Mir Ali, to fraudulently report the money received in 1999 from Alex Damra as income from a computer consulting job. The government alleges it has proof that Fawaz Damra eventually admitted to Mir Ali that the $100,000 came from a family member who wished to shift income to Fawaz Damra in an effort to evade a

higher tax bracket. The government argues that Mir Ali refused to prepare Fawaz Damra's 1999 tax return.

The government maintains that after securing another tax preparer, Bernard Niehaus, Fawaz Damra filed for an extension on his 1999 tax return. Government evidence is said to indicate that Fawaz Damra had Mr. Niehaus report the $100,000 on a Schedule C tax form for a consulting business after providing the preparer with a list of expenses to deduct against the $100,000 in gross receipts. The IRS Service Center received Fawaz Damra's 1999 tax return on 7 August 2000.

Fawax Damra is an unavailable defendant. On 2 January 2007, Fawaz Damra was deported by Immigration and Customs Enforcement ("ICE") to the West Bank, by way of Jordan, pursuant to his request following his previous conviction for unlawfully obtaining United States citizenship. (Doc. 46).

II. Law and Analysis

The Sixth Amendment's Confrontation Clause provides that, "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [or her]." U.S. Const. Amend. VI. The Confrontation Clause applies to "'witnesses' against the accused – in other words, those who 'bear testimony.'" Crawford v. Washington, 541 U.S. 36, 51 (2004).[1] Crawford's requirement that the

[1]In Crawford, the Court examined the "bedrock procedural guarantee" of an accused's right to confront witnesses who testify against him. The Court in Crawford struck down an evidentiary ruling that dispensed with a defendant's right of confrontation simply because the challenged testimony had been found reliable by a judge. The Court made it abundantly clear that "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford, 541 U.S. at 68. The Court found that testimonial statements of witnesses absent from trial may be admitted (1) only where the declarant is unavailable, and (2) only

defendant must have the opportunity to cross-examine the person giving the statement applies only to testimonial statements. The Crawford Court identified "testimony" as typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " Id.

Central to the case at hand is the recognition that statements made by a co-conspirator are not testimonial in nature. Crawford, 541 U.S. at 55-56; see also United States v. Sexton, 119 Fed. Appx. 735, 743 (6th Cir.2005) (unpublished) (statements of co-conspirators were admissible under Crawford).

Consonant with the strictures of the Confrontation Clause, the Federal Rules of Evidence disallow "hearsay" testimony. Fed. R. Evid. 802. "'Hearsay' is a statement, other than one made by the declarant at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Id. at 801(c). A statement is not hearsay if it is made "by a coconspirator during the course and in furtherance of the conspiracy." Id. at 801(d)(2)(E).

To be admissible under Rule 801(d)(2), the party offering a co-coconspirator statement must show by a preponderance of the evidence that: (1) the conspiracy existed, (2) the defendant was a member of the conspiracy, and (3) the co-conspirator's statements were made in furtherance of the conspiracy. See United States v. Lora, 210 F. 3d 373, 2000 WL 353742, * *3 (May 29, 2000 6th Cir.) (unpublished opinion) (citing, United States v. Wilson, 168 F.3d 916, 920 (6th Cir.1999). This three-part test is often referred to as an "Enright finding." See United States v. Enright, 579 F.2d 980 (6th

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where the defendant has had a prior opportunity to cross-examine the witness. Id. at 59.

Cir.1978). Whether the offering party has made the showing is a question of fact for the court to decide. Fed. R. Evid. 104(a); United States v. Maliszewski, 161 F.3d 992, 1007 (6th Cir.1998), cert. denied, Villareal v. United States, 119 S.Ct. 1126 (1999).

The Sixth Circuit has approved three potential procedures for resolving this issue: (1) holding a pretrial hearing, (2) requiring at trial that the government present evidence of the conspiracy before presenting the co-conspirator's statement, and (3) allowing the government to present the statement before proving the conspiracy at trial but instructing the jury that the government must prove the conspiracy before it can consider the statement. United States v. Vinson, 606 F.2d 149, 152-53 (6th Cir. 1979).

The government maintains the alleged conspiracy involves the attempt by Alex Damra to convey corporate money to family members while fraudulently representing that money as deductible consulting expense. If established, alleged statements by Fawaz Damra to his return preparers effectuated that conspiracy and Alex Damra's evasion scheme and were made in the course of, and in furtherance of, the conspiracy.

In addition, the IRS Service Center's receipt of Fawaz Damra's 1999 tax return on 7 August 2000 has implications for the statute of limitations in this matter. To the extent that Fawaz Damra's act of filing a tax return which falsely reported AIM corporate funds as personal consulting income was an act in furtherance of the conspiracy to defraud the United States (Count I) and the AIM corporate tax evasion scheme (Count II), then the six-year statute of limitations clock did not begin to run until 7 August 2000. Accordingly, the 25 July 2006 Indictment against Alex Damra would be regarded as timely pursuant to 26 U.S.C. § 6531.

III. Conclusion

Pursuant to the procedures established in Vinson, supra, evidence of Fawaz Damra's acts and statements may be introduced without running afoul of Alex Damra's Sixth Amendment right to confront Fawaz as a witness against him. Accordingly, the Court finds that evidence of acts and statements of Fawaz Damra are admissible against Alex Damra in the trial of this case.

IT IS SO ORDERED.

/s/Lesley Wells
UNITED STATES DISTRICT JUDGE