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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 11-20032-STA**
	)	
DERRICK DOWDY, et al.,	)	
	)	
Defendants.	)	

ORDER DENYING DEFENDANTS' MOTION TO DISMISS THE INDICTMENT

Before the Court are Defendant Charol Neal's Motion to Dismiss the Indictment (D.E. # 108) filed on October 31, 2011; Defendant Derrick Dowdy's Motion to Dismiss the Indictment (D.E. # 112) filed on November 17, 2011; Defendant Derek Lucas' Motion to Dismiss the Indictment (D.E. # 114) filed on November 21, 2011; Defendant Darnell Wallace's Motion to Dismiss the Indictment (D.E. # 119) filed on December 15, 2011; and Defendant Aric Scott's Motion to Dismiss the Indictment (D.E. # 122) filed on December 18, 2011. Each Motion and memorandum in support appears to be identical and raise identical arguments for the dismissal of the indictment against each Defendant. The United States has filed identical responses in opposition to each Defendant's Motion to Dismiss. For the reasons set forth below, the Motions to Dismiss are **DENIED**.

BACKGROUND

Defendants' Motions to Dismiss contain the following statement of the facts in this case. A federal grand jury returned a two count indictment against each Defendant, charging each with

conspiracy to possess with intent to distribute 5 kilograms of cocaine, in violation of 21 U.S.C. §846, and possession of firearms in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). Each Defendant has entered a plea of not guilty to the indictment and requested discovery from the United States pursuant to Rule 16 of the Federal Rules of Criminal Procedure. The United States has responded to that request.

Based on the information provided in the indictment and the discovery responses produced by the government, ATF Special Agent Brent Beavers ("SA Beavers") received information from a confidential informant ("CI") that Defendant Derrick Dowdy ("Dowdy") was interested in doing a home invasion robbery. SA Beavers had ATF Special Agent Chris Rogers ("SA Rogers"), in an undercover capacity, meet with the CI and Defendant Dowdy at Tops Bar-B-Q on Macon Road in Memphis, Tennessee on December 9, 2010. At that meeting, SA Rogers told the CI and Defendant Dowdy that he was assisting a Mexican narcotics trafficking organization that shipped cocaine to a location in Memphis once per month. Defendant Dowdy agreed to recruit a team of four to five men to assist them in a home invasion robbery to seize the Mexican cocaine.

Over the course of the next few weeks, SA Rogers met with the CI, Defendant Dowdy, and Defendant Derek Lucas ("Lucas") as well as two other individuals, Luis Holmes and Donnell (last name unknown) (collectively "the crew") at a Days Inn on Macon Road in Memphis. At the meeting, SA Rogers told the crew that there were normally three to four armed men at the Mexican stash house. The crew told SA Rogers that they had access to firearms and would use force and the element of surprise to successfully rob the stash house when it received its next cocaine shipment from Mexico.

On January 13, 2011, SA Rogers met the CI and Defendant Dowdy to discuss the recruitment

of others and the tactics to be used in the robbery. By January 18, 2011, Defendant Dowdy told SA Rogers that Holmes was no longer willing to participate in the robbery, but he had been replaced by another individual. On January 31, 2011, SA Rogers called Defendant Dowdy and told him to have the crew ready to execute the robbery the next day.

On February 1, 2011, SA Rogers met the CI in the parking lot of the International House of Pancakes on Sycamore View Road in Memphis. The CI was driving a 2006 Pontiac Grand Prix, in which Defendant Charol Neal ("Neal") was in the front passenger seat and Defendant Darnell Wallace ("Wallace") was in the backseat. SA Rogers claims that he asked Defendant Neal and Defendant Wallace whether they were ready to participate in the robbery and that they replied yes. A second car, a 2001 Pontiac Sunfire driven by Defendant Aric Scott ("Scott") then arrived in the parking lot, with Defendants Dowdy and Lucas as passengers. SA Rogers then drove his vehicle and led the Sunfire driven by Defendant Scott and the Grand Prix driven by the CI to Extra Space Storage at 5675 Summer Avenue in Memphis. Extra Space Storage is a facility of rows of storage units located next to, and shares a driveway and parking lot with a commercial property housing the retail offices of an auto insurance company and a security door company. Across the street is a similar strip of commercial property. Prior to the arrival of SA Rogers and Defendants, members of the ATF conducted a security "walkthrough" of the Extra Space Storage facility with negative results.

SA Rogers drove his vehicle into the Extra Space Storage property down one of the rows of units and parked the vehicle next to a rental car. The CI followed in his vehicle and parked directly behind SA Rogers. Defendant Scott followed in his vehicle and parked directly behind the CI. SA Rogers, Defendant Dowdy, and Defendant Lucas got out of the vehicles. Defendant Scott remained

inside his vehicle. SA Roger then gave the signal for the ATF to deploy and arrest everyone. Defendant Scott was arrested while still inside his vehicle. The other Defendants ran but were caught a short distance away. According to the ATF Report of Investigation Number 25, approximately 11 ATF agents, 4 ATF task force officers, 2 DEA agents, 7 DEA task force officers, and an unknown number of ATF Special Response Team and Shelby County Sheriff's Office SWAT team assisted in the execution of the arrest of the Defendants.

In their identical Motions to Dismiss, Defendants argue that the Court should dismiss the indictments against them in light of the outrageous conduct of law enforcement in this case. Specifically, Defendants argue that law enforcement's outrageous conduct in this case was so egregious as to violate their Fifth Amendment due process rights. Defendants contend that the United States Supreme Court and the Sixth Circuit have recognized outrageous conduct as grounds for dismissal of an indictment. Defendants urge the Court to apply the Sixth Circuit's four-factor test in *United States v. Barger* for determining whether the government's conduct violated fundamental fairness and shocks the conscience. Furthermore, Defendants assert that all four factors weigh in favor of dismissal in this case. Defendants emphasize that SA Rogers' insistence that all members of the crew arrive at the scene heavily armed particularly shocks the conscience and should be deemed outrageous. For these reasons Defendants move the Court to dismiss the charges against them.

The government has responded in opposition that the Sixth Circuit has not recognized the theory of outrageous conduct. To the extent that the Sixth Circuit has discussed the defense, the Court of Appeals has specifically concluded that the defense is not available when a defendant alleges inducement. Additionally, the Sixth Circuit has consistently rejected the defense under the

facts presented in case after case. The government also argues that the Sixth Circuit has held that the police conduct Defendants label as outrageous, i.e. directing suspects to carry firearms to the scene of a takedown, is not outrageous. Therefore, the government asks the Court to deny Defendants' Motions to Dismiss.

ANALYSIS

The Court holds that the defense of outrageous conduct asserted by Defendants is not a recognized defense in this Circuit. Other courts grappling with the doctrine of outrageous conduct have ably reviewed the history of the doctrine, particularly the Supreme Court's plurality decisions in *United States v. Russell*, 411 U.S. 423 (1973) and *Hampton v. United States*, 425 U.S. 484 (1976).[1] After reviewing these and other relevant opinions, the Sixth Circuit in *United States v. Tucker* declined to recognize the defense of outrageous conduct based on the due process clause of the Fifth Amendment.[2] The *Tucker* panel offered three reasons in support of its conclusion. First, police actions that induce a defendant to commit a crime, even if deemed "outrageous," do not violate the defendant's constitutional right of due process.[3] As a result, any claim that the government's conduct induced a defendant to commit a crime must be analyzed as an entrapment defense.[4] Second, the *Tucker* court reasoned that a district court had no authority to conduct an objective assessment of police conduct and dismiss an indictment where a defendant had not

[1] *E.g. United States v. Tucker*, 28 F.3d 1420, 1423 (6th Cir. 1994); *United States v. Shaw*, 684 F. Supp. 2d 914 (W.D. Ky. 2010).

[2] *Tucker*, 28 F.3d at 1423.

[3] *Id.* at 1427.

[4] *Id.* (citing *Hampton*, 425 U.S. at 490).

demonstrated a violation of an independent constitutional right.[5] Third, the Sixth Circuit determined that such a defense invited courts to violate the separation of powers, treading "the province of the Executive Branch . . . [and] the Legislative Branch as well."[6] For these reasons, the Sixth Circuit in *Tucker* concluded that an "outrageous conduct" defense was not available.[7]

While it is true that the Sixth Circuit's subsequent decisions have continued to refer to the theoretical possibility of an outrageous conduct defense,[8] the Court holds that *Tucker* controls the case at bar. Therefore, Defendants' Motions to Dismiss must be denied. Defendants urge the Court to apply pre-*Tucker* case law in which the Sixth Circuit analyzed the question of outrageous conduct under a four-factor test.[9] The *Tucker* panel, however, determined that prior cases addressing the outrageous conduct defense did so only in *dicta* because they did "nothing more than 'assume' the

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[5] *Id.* (concluding that *United States v. Payner*, 447 U.S. 727, 737 n.9 (1980) "lays to rest whatever modicum of *Russell*'s dicta may have survived *Hampton*").

[6] *Id.*

[7] Subsequent decisions of the Sixth Circuit have followed *Tucker*'s holding. *See United States v. Al-Cholan*, 610 F.3d 945, 952 (6th Cir. 2010) (following *Tucker* and commenting that even if the defense was available in theory, courts have "rejected its application with almost monotonous regularity" leading the court to describe the defense as "moribund"); *United States v. Blood*, 435 F.3d 612, 629 (6th Cir. 2006); *United States v. Warwick*, 167 F.3d 965, 975 (6th Cir. 1999).

[8] *See United States v. Allen*, 619 F.3d 518, 525 (6th Cir. 2010); *Woods v. United States*, 398 F. App'x 117, 127–28 (6th Cir. 2010); *United States v. Strickland*, 342 F. App'x 103, 107 (6th Cir. 2009); *United States v. Kuehne*, 547 F.3d 667, 694 (6th Cir. 2008). In each of these decisions, the Sixth Circuit concluded on the facts of each case that the government had not engaged in outrageous conduct.

[9] The relevant factors are (1) the need for the police conduct as shown by the type of criminal activity involved; (2) the impetus for the scheme or whether the criminal enterprise preexisted the police involvement; (3) the control the government exerted over the criminal enterprise; and (4) the impact of the police activity on the commission of the crime. *See United States v. Barger*, 931 F.2d 359, 363 (6th Cir. 1991).

existence of such a defense while 'holding' that it would not apply under the present facts."[10] As a result, the *Tucker* panel held that whether the outrageous conduct defense even existed was an issue of first impression for this Circuit.[11] As already discussed, *Tucker* went on to hold that the defense did not exist where the theory sounded in inducement. Based on the reasoning set forth in *Tucker*, the Court finds Defendants' argument for the application of the four-factor test unpersuasive.

Defendants implicitly argue that their claims of outrageous conduct are not based on government inducement but rather on the fact that the government's conduct was so outrageous as to shock the conscience.[12] More specifically, Defendants argue that the police knew Defendants would be heavily armed at the takedown, making the scene of the arrest a "powder keg of firearms."[13] Defendants highlight that the police nevertheless chose to conduct the takedown at a self-storage business adjacent to other businesses in a high traffic, commercial area. According to Defendants' Motions, the DEA report indicated that no fewer than twenty-four (24) law enforcement agents were on the scene to make the arrest. In short, the police orchestrated a sting involving many individuals, which under the circumstances had a high probability of gun play and collateral injuries. Therefore, the Court should conclude that based on these facts, the police's conduct was so outrageous as to shock the conscience and bar prosecution.

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[10] *Tucker*, 28 F.3d at 1424–25 (citations omitted).

[11] *But see id.* at 1429–30 (Martin, J., dissenting) ("I cannot agree with the majority's characterization of this repeated treatment [of the outrageous conduct defense] as *dicta*.").

[12] *See e.g.* Def. Neal's Mot. Dismiss 6 (D.E. # 108). Defendant Neal filed his Motion to Dismiss first, and it appears to the Court that the remaining Defendants simply filed identical Motions patterned on Defendant Neal's brief.

[13] *Id.* at 8.

Even accepting this characterization of their "outrageous conduct" theory, the Court finds Defendants' theory to be without support. Defendants have failed to cite any authority, binding or persuasive, recognizing such a doctrine. In fact, the only post-*Tucker* decision Defendants cite, *United States v. Pipes*, 87 F.3d 840 (6th Cir. 1996), declined to recognize an outrageous conduct defense of the very kind Defendants raise.[14] Having found that the defendant in *Pipes* was not asserting the violation of a specific right, the Sixth Circuit concluded that "Defendant appears to be arguing then for a broader due process right: a right to be free from outrageous governmental conduct even when such conduct does not deprive individuals of a specific liberty interest."[15] The Sixth Circuit described the argument as "a novel and wide-ranging theory of due process" but did not adopt the doctrine under the facts presented because the defendant in *Pipes* had "not come close to alleging outrageous police conduct that shocks the conscience."[16] As a result, the *Pipes* court did not discuss the issue further.

Defendants like the defendant in *Pipes* have not argued that the police conduct deprived them of a specific liberty interest. To the extent that Defendants in this case invite the Court to recognize a heretofore unrecognized "right to be free from outrageous governmental conduct even when such

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[14] The Court would add that *Pipes* actually undermines Defendants' argument for the application of the four-factor test for outrageous conduct. The *Pipes* panel found *Barger* and the line of cases applying a four-factor test for outrageous conduct inapposite under the facts of the case. *Pipes*, 87 F.3d at 842. ("But defendant does not claim that the government's allegedly outrageous conduct caused him to be entrapped despite his predisposition. Thus, cases like *Barger* are inapposite."). Likewise, Defendants appear to concede that theirs is not an entrapment or inducement defense. *See e.g.* Def. Neal's Mot. Dismiss 6 (D.E. # 108) ("When the defendant claims no government inducement, but rather that the government conduct was so outrageous as to shock the conscience, the defense remains.").

[15] *Id.* at 843.

[16] *Id.*

conduct does not deprive individuals of a specific liberty interest," the Court declines to do so. Not only has the Sixth Circuit not adopted such a doctrine, the Supreme Court has stated that "[t]he limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the Defendant."[17] The *Tucker* court specifically relied on this language to conclude that a district court had no authority to conduct an objective assessment of police conduct and dismiss an indictment where a defendant had not demonstrated a violation of an independent constitutional right.[18] Based on this precedent, the Court holds that Defendants cannot show a due process violation without the deprivation of some specific liberty interest. Here Defendants have argued that the police conduct at issue shocks the conscience because of the apparent risks created by the sting, risk of injury to Defendants but also to the general public going about its business in the vicinity of the takedown. However, Defendants have not shown how the *potential* risk attendant to effectuating the arrest of armed and possibly violent suspects implicates the liberty interests of the suspects themselves. Without some showing that the police conduct deprived Defendants themselves of a specific liberty interest, the Court concludes that there can be no due process violation. Therefore, Defendants' Motions to Dismiss are **DENIED**.

IT IS SO ORDERED.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

Date: February 21, 2012.

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[17] *Payner*, 447 U.S. at 737 n.9 (quoting *Hampton*, 425 U.S. at 489).

[18] *See* note 5 *supra*.