

**FILED**

JAN - 6 2004

LARRY W. PROPPS, CLERK  
COLUMBIA, SC

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

**ENTERED**

JAN - 6 2004

UNITED STATES OF AMERICA, )  
)  
)  
v. )  
)  
BRETT A. BURSEY, )  
)  
Defendant. )  
\_\_\_\_\_ )

Criminal No. 3:03-309

**ORDER  
AND  
VERDICT**

The Defendant has been charged with a violation of Title 18 U.S.C. § 1752(a)(1)(ii), which makes it unlawful for any person or group of persons to willfully and knowingly enter or remain in any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporary visiting, in violation of the regulations governing ingress or egress thereto. This matter came for trial before the Court, non-jury, on November 12 - 13, 2003, following which a final decision in the case was taken under advisement pending filing of post-trial briefs.

This case arises out of a visit to Columbia, South Carolina by the President of the United States on October 24, 2002. On that date, the President's plane landed at Columbia Metropolitan Airport, where the President then disembarked to attend a rally being held in a hanger

*RM*  
*P2*

located at the airport. Following the rally, the President left the airport by motorcade to attend to other matters in the Columbia area. The Defendant was present at the airport that day for the purpose of protesting against some of the President's policies. During the course of these events, Defendant was arrested by law enforcement officers, and was subsequently charged by the United States in a one count information with a violation of § 1752 (a)(1)(ii).

Issues to be resolved are whether the Government has proved beyond a reasonable doubt that the Defendant violated the statute at issue, and also whether the Government has attempted to enforce the statute in an unconstitutional manner, and/or whether the Defendant has been the subject of a selective prosecution. Defendant also has a pending motion for judgment of acquittal pursuant to Rule 29, Fed.R.Cr.P. In rendering a decision in this case, the Court must state its specific findings of fact in open court or in a written decision or opinion. Rule 23(c), Fed.R.Cr.P.

After consideration of the evidence and testimony presented at trial, as well as the additional arguments presented both at trial and by way of post-trial briefs, the Court finds and rules as follows:

**I.**

**(Violation of Statute)**

In order to obtain a conviction under 18 U.S.C. § 1752(a)(1)(ii), the Government must prove beyond a reasonable doubt that the Defendant

- 1) willfully and knowingly entered or remained in,
- 2) any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporary visiting,
- 3) in violation of the regulations governing ingress or egress thereto.

There are several issues which must be addressed in determining whether the Defendant violated this statute, with the main issue argued at trial being whether the Defendant was even in a restricted area at the time of his arrest. After careful consideration of the facts and evidence presented, the Court finds that the Defendant was in a restricted area as defined by the statute at the time of his arrest. The testimony and evidence establishes that the area around the hanger where the President was to be speaking, and from where his motorcade would be leaving, was staffed by law enforcement officers beginning several hours prior to the President's arrival. Once members of the public began arriving for the event, they were advised of where to park and where to get in line to enter the building for the rally. The event was restricted to ticket holders only. The evidence further showed that, because the main road in and out of the airport ran right next to the hanger, vehicles were allowed to traverse up and down the road prior to the arrival of Air Force One, but that only through traffic was allowed. Automobiles were not allowed to stop in this area, they could only pass through, and once Air Force One had landed, all vehicular traffic through the area was halted. Similarly, while foot traffic was allowed through the area, with ticket holders for the event being directed where to go to get in line to enter the hanger, there was no evidence presented that anyone identified by law enforcement as not having a ticket for the event was allowed to remain or, in effect, "hang out" in the area around the hanger where the President would be speaking. The evidence also showed that, once the President had arrived, the area where the President would be approaching the hanger was cleared even of ticket holders waiting to get into the building. The area around the hanger also remained cleared upon the President's departure, as the evidence established the President's motorcade would be moving slowly from the building and around an adjoining intersection before proceeding out to the main road down Airport Boulevard. Again, this evidence clearly establishes

181  
p3

beyond a reasonable doubt that the area around the hanger was a restricted area under the statute.

The Court also finds beyond a reasonable doubt that the Defendant both willfully and knowingly remained in this restricted area after he had been instructed to leave. The testimony and evidence shows that the Defendant was initially in a grassy area near the sidewalk located right next to the hanger and right next to the area where the President's motorcade would pull up for the President to exit his car to enter the hanger. Defendant was literally within a few yards of where the President's automobile would be parked. When the Defendant was advised that he could not remain in that location, he proceeded to cross Airport Boulevard diagonally to the far corner of the intersection across from the hanger. However, even in this location, the Defendant remained in close proximity to the hanger, as well as being on the corner of the intersection where the President's automobile would have to exit the parking lot and make a slow u-turn onto Airport Boulevard before being able to speed up and travel down the boulevard to the main road. The evidence before this Court establishes that the Defendant was again advised that he could not remain in that location and would have to leave the area, and that he refused to do so. Therefore, the Court finds that the Government has established beyond a reasonable doubt that the Defendant willfully and knowingly refused to leave that location and remained therein.

Finally, the Court finds beyond a reasonable doubt that the Defendant knowingly remained in this restricted area in violation of the regulations governing ingress or egress thereto. The regulations governing ingress or egress provide that, in order to remain in a restricted area, a person must be either an invitee; a member of the protectee's family or staff; military or communications personnel assigned to the Office of the President; federal, state or local law enforcement personnel engaged in the performance of their official duties; or holders of grants of easement to the property

81  
P4

with proper authorization. 31 C.F.R. § 408.3. The only category in which the Defendant could possibly have belonged under the facts of this case was that of an invitee.<sup>1</sup> However, the evidence clearly establishes that the Defendant was not a ticket holder for the event, nor was he there to attend the event. Hence, it was a violation of the regulations governing ingress or egress thereto for the Defendant to have remained in the restricted area.

Therefore, the Court finds that the Government has proved the Defendant's violation of each element of the statute beyond a reasonable doubt.

## II.

### (Constitutionality of Enforcement)

The next question to be addressed by the Court is whether the Government's prosecution of the Defendant has been conducted in an unconstitutional manner and/or whether sufficient evidence has been submitted to justify an evidentiary hearing on the issue of selective prosecution. The Court is careful to note, however, that this does not mean the Court has a role in deciding whether this case, or any case, should have been prosecuted. Whether the Government should have, in the exercise of its discretion and under the facts of this case, charged the Defendant with a violation of this statute and pursued prosecution of this case is a decision solely reserved for the Government to make, and for the public to debate. Borden Kircher v. Hayes, 434 U.S. 357, 364 (1978); Oyler v. Boles, 368 U.S. 448, 456 (1962). Once the Government chooses to prosecute a charge, the Court (when acting as factfinder) must then decide whether the elements of the charge have been proven beyond a reasonable doubt, and also whether in this particular case the government

---

<sup>1</sup>Invitees are defined as "persons invited by or having appointments with the protectee, the protectee's family, or members of the protectee's staff." 31 C.F.R. § 408.3(a)(1).

B1  
P5

has enforced the statute in an unconstitutional manner or subjected the Defendant to a selective prosecution. Id.

With respect to the question of enforcement, the Court has already determined that the statute itself is constitutional; see order filed October 20, 2003; nevertheless, like any statute, § 1752(a)(1)(ii) cannot be enforced in an unconstitutional manner. In making this assertion, the Defendant argues that enforcement of this statute against him under the facts presented is unconstitutional because the parameters of the restricted area were “vague and ambiguous”, that he was never told what the boundaries of the restricted area were, and since there was no way for him to know where he could go to exercise his right to protest, the vague application of this statute is what led to his having been charged. Defendant also argues that individuals with signs favorable to the President were allowed to remain in the supposedly restricted area, and that the only reason he has been charged in this case is because he was protesting against the President. The evidence presented at trial does not support these arguments.

First, the evidence shows that the Defendant was arrested because he refused to leave the area immediately adjacent to where the President would be arriving and departing in his vehicle, not because the boundaries of the restricted area were “vague” or because he didn’t know what the boundaries of the restricted area were. The site agent for the President’s visit testified that the restricted area consisted of an area about 100 yards up from the hanger to the parking lot, to the right of the hanger down Airport Boulevard to the intersection of Airport Boulevard with the main highway (Hwy. 302), and to the left of the hanger down Airport Boulevard for about 100 yards to the next intersection. The area immediately below the hanger was the tarmac and runway for the airport. While the Defendant correctly notes there were no barriers or other indicia of a boundary surrounding

RS  
p6

this area, and that both vehicular and pedestrian traffic traveled through this area leading up to the President's arrival, these facts in and of themselves do not provide a basis for a claim of unconstitutional enforcement of the statute. Both foot and vehicular traffic by necessity had to travel through this area for people to come to the event, and it was also necessary to keep the area open for travel to and from the airport itself. Nevertheless, the evidence showed that law enforcement agents were stationed at the perimeters of the area and were patrolling inside the area. The Secret Service's policy, as testified to at the trial, was that no one other than ticket holders were supposed to come into this area and remain, as opposed to just passing through. Then, upon the President's actual arrival at the airport, the area, and in particular the area immediately around the hanger, were to be cleared of even "pass through" vehicular and pedestrian traffic. The Court can find nothing unreasonable about this policy under the facts and circumstances of this case, nor is the alleged "vagueness" of the restricted area's boundaries what led to the Defendant's arrest.

The Defendant also complains that the parameters of the restricted area were too broad, and that to allow the Secret Service to set up a restricted area of this size denies citizens the right to effectively protest and assert their first amendment rights. The Court is sympathetic to these concerns, and agrees with the Defendant that the Government may not, under the guise of performing a security function, seal off government officials from criticism or unduly restrict the First Amendment rights of citizens to engage in peaceful protest. *Cf. Zwicker v. Koota*, 389 U.S. 241, 250 (1967) [Protection "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms"]. However, the issue in this case is not whether the outer boundaries of this restricted area were unreasonable. The Defendant was not at the outer boundaries, or even close to those boundaries. Rather, he was initially in a grassy area right next to where the

RA  
P 7

President's car would be pulling up and where the President would be exiting the vehicle, following which he moved across the street right next to where the President's limousine would be slowly making a u-turn when he left the rally. The site agent testified that this area needed to be secured because it was the emergency egress for when the President's motorcade departed, was in close proximity to the arrival area, and was close enough that someone standing there could cause harm from "[a]nything from pistol fire to throwing rocks to introducing a chemical or biological agent in the air in that area." In this age of suicide bombers, where people are willing to strap explosives to themselves to literally become walking bombs, the Secret Service's concern with allowing unscreened persons to stand in such close proximity to a slow moving vehicle carrying the President of the United States is not just understandable, but manifestly reasonable. *Cf. United States v. O'Brien*, 391 U.S. 367, 377 (1968) ["[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."]. The Defendant does not dispute that it is within the constitutional power of the federal government to protect the President of the United States, and concedes that protection of the President furthers an important or substantial governmental interest. *See Defendant's Reply Brief*, pp. 1-2 ["Aside from the defense of this country by military, there is no greater obligation for the federal government than the protection of the President."] While the Defendant argues that he posed no danger to the President, and indeed there was no evidence presented at trial to show that the Defendant intended any harm or at any point ever posed an actual danger to the President, the Secret Service does not have the luxury of assuming such to be the case

18  
p 8

with respect to any individual during the unfolding of an actual event.<sup>2</sup>

This is not to say that the Secret Service's power to restrict the area around the President is absolute. Nor are protestors required to go to designated demonstration areas, as long as they do not otherwise remain in a properly restricted area. The Court also does not accept the Government's argument (presented in an earlier brief) that Courts in general should not be second guessing security decisions made by the Secret Service and law enforcement personnel. By bringing prosecutions under this Statute, the Government is by necessity drawing the Courts into the debate over how far the Government can go in restricting the rights of protestors and others in the exercise of their constitutional rights; *cf. Sherill v. Knight*, 569 F.2d 124, 128 n. 14 (D.S.C. 1977); and the further away a protestor is from where the President or any other protectee is located, the more he or she will be able to effectively argue that the balance between security for the protectee and the right of the individual to engage in protest tips in the protestor's favor. Hence, if the Defendant had chosen to keep moving further and further away from the hanger, and if he had still been arrested, not at the location where he was, but at a much further distance from the hanger, he would have had a stronger case that the Government's actions were unreasonable and therefore unconstitutional. Again, however, that is not what happened in this case. The Defendant effectively sealed his own fate when he chose to make his principled stand in a location manifestly reasonable for the Secret Service to make secure.

Nor does the evidence support Defendant's claim that the only reason he was charged

---

<sup>2</sup>Even if the Defendant contends he could have been screened at that location, that is not the point. The Defendant is not an island, with rights unto himself not shared by others. If the Defendant had a constitutional right to stand in that location, and the Secret Service did not have the power and authority to require him to move, then the Service similarly would not have had the power and authority to move other citizens who also wanted to stay in that location.

R1  
✓  
p9

in this case was because he was protesting against the President. There was no evidence presented at the trial to show that any other persons, either supporting the President or opposing him, were allowed to remain in the area around the hanger for the purpose of demonstrating, pro or con, upon the President's arrival. The evidence did show that there were many people, some of whom may have had signs supporting the President, who were there that day to attend the rally inside the hanger. However, the evidence shows that these people either went through the screening into the hanger for the rally, or were themselves cleared from the area prior to the President's arrival at the hanger.<sup>3</sup>

Finally, Defendant has failed to present any evidence to show that he was the victim of selective prosecution in this case. In order to succeed on this claim, "[t]he defendant bears the burden of proving a 'colorable entitlement,' ...to the claim of selective prosecution. Some credible evidence must be adduced indicating that the government intentionally and purposely discriminated against the Defendant by failing to prosecute other similarly situated persons." United States v. Torquato, 602 F.2d 564, 569-570 (3d Cir.), cert. denied, 444 U.S. 941 (1979).

To support a defense of selective or discriminatory (sic) prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

---

<sup>3</sup>Defendant also presented evidence at the trial to show that signs supporting the President had been placed in the ground inside the restricted area along the route of Airport Boulevard. No evidence was presented, however, that the Defendant or any of the Defendant's other witnesses attempted or even wanted to place their signs on the ground alongside these other signs. Indeed, when the other individuals who were there to protest against the President decided to leave when they were instructed they could not remain in that area (Defendant being the only one who stayed and refused to leave), the testimony was that these individuals purposely took their signs with them so they could use them in another location.

Id., at 569, n. 8 (quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). See also United States v. Olvis, 97 F.3d 739, 743 (4th Cir. 1996); United States v. Richardson, No. 96-4445, 1997 WL 342610 at \*\*2 (4th Cir. June 23, 1997), cert. denied, 522 U.S. 1006 (1997); United States v. Culliton, 328 F.3d 1074, 1081 (9th Cir. 2003); United States v. Kelley, 152 F.3d 881, 885-886 (8th Cir. 1998); United States v. Olvis, 97 F.3d at 746.

Further, the focus of the selective prosecution inquiry is on the federal prosecutor, and the Defendant must therefore show that the federal prosecutor has purposefully and intentionally discriminated.

United States v. Conley, 859 F.Supp. 909, 937-938 (W.D.Pa. 1994); see also United States v. Schoolcraft, 879 F.2d 64, 68 (3rd Cir. ), cert. denied, 493 U.S. 995 (1989). Defendant has made no such showing in this case.

Defendant has presented no evidence to show that *any other person*, either supporting the President or opposing his policies, entered and remained in the restricted area with no ticket and no intention of attending the rally, and then refused to leave the restricted area when so instructed. Specifically, there was no evidence presented to show that any supporter of the President was present that day who did not have a ticket and did not enter the building to attend the rally, but nevertheless was allowed to remain in the secure area without being prosecuted, nor was there any evidence presented to show that other individuals who were there to demonstrate against the President received such favorable treatment. The Defendant was the only one who refused to leave the area when instructed to do so. "While the decision to prosecute an individual cannot be made in retaliation for his exercise of his first amendment right to protest..., the prosecution of those protestors who publicly and with attendant publicity assert an alleged personal privilege . . . as part of their protest is not selection on an impermissible basis." United States v. Catlett, 584 F.2d 864, 867 (8th Cir. 1978).

Under these facts, there is no evidence that the Defendant is a victim of selective prosecution, because there is no evidence that others similarly situated have not generally been

proceeded against for engaging in like conduct, nor has Defendant presented any evidence that the prosecutor in this case brought this prosecution out of a desire to prevent the Defendant from exercising his constitutional rights. Indeed, the evidence presented at trial shows that the Defendant has engaged in this exact same conduct (protesting against the President's policies) during other Presidential visits to this state, without incident or interference from the federal government in general or the United States Attorney's office for South Carolina in particular. This claim is without merit. United States v. Catlett, 584 F.2d at 866; Wayte v. United States, 470 U.S. 598, 604-609 (1985). See also United States v. Greenwood, 796 F. 2d 49, 52 (4th Cir. 1986).

### III.

#### (Pending Motion for Judgment of Acquittal)

In moving for a judgment of acquittal at the close of the prosecution's case, defense counsel argued that the Government had failed to present sufficient evidence to prove its case. However, the evidence shows that during the Government's case in chief, witnesses were presented who testified that agents arrived on the scene that morning to secure the area, a security sweep was performed, and the site was otherwise readied for a presidential visit. Agents were posted interspersed throughout the restricted area, with the public being told where to park for the event and where to go to get in line to enter the hanger for the rally. Witnesses further testified that through traffic was permitted up until the arrival of the President, at which time even through traffic was prohibited. The Government's witnesses also testified that the Defendant was present in the area immediately adjacent to the hanger that day, that he was advised he could not remain in that area and would have to leave, and that the Defendant ultimately refused to leave the area as instructed. The Government's witnesses also testified that the Defendant was not there to attend the rally, nor did he

181  
p12

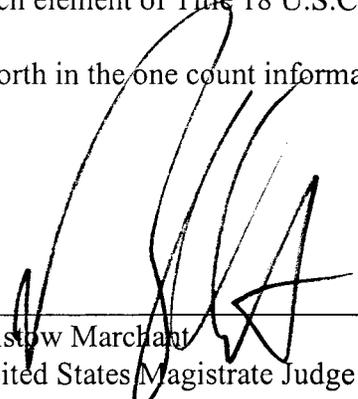
have a ticket to attend the rally, but was there to protest.

The Court does not find that the Defendant is entitled to a judgment of acquittal under Rule 29, Fed.R.Cr.P., based on this evidence, and his motion is therefore denied. Cf. United States v. Moran, 312 F.3d 480, 488 (1st Cir. 2002); United States v. Abner, 35 F.3d 251, 253 (6th Cir. 1994).

**Conclusion**

Based on the foregoing, the Court finds that the Government has proved beyond a reasonable doubt that the Defendant violated each element of Title 18 U.S.C. § 1752(a)(1)(ii), and he is therefore adjudged guilty of the charge set forth in the one count information filed in this case.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
Bristow Marchant  
United States Magistrate Judge

Columbia, South Carolina

January 5, 2004