

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

VS.

CRIMINAL NO. 2:09CR0087-B-S

ROGER WEINER

**ORDER DISMISSING CASE FOR LACK OF JURISDICTION**

This cause comes before the court upon the defendant's motion to dismiss for lack of federal jurisdiction. After due consideration of the motion, response, exhibits, and supporting and opposing authority, the court held a hearing on this motion on November 5, 2009, and, after hearing arguments from the government and the defendant, granted the defendant's motion from the bench. This order is issued in accordance with that ruling and shall set forth the rationale for the court's decision.

The defendant, Roger Weiner, was charged with two counts of violating 18 U.S.C. §2422(a), also known as "The Mann Act." The crime charged is the act or attempted act of inducing, persuading, enticing, or coercing any individual to cross a state line to engage in prostitution. Solicitation of a prostitute and prostitution itself are not federal crimes but are state misdemeanor crimes in most states, including Mississippi. Inducement or attempted inducement of another to cross the state line is the act that gives rise to the federal crime. The jurisdictional footing which converts the state law misdemeanor into a federal felony offense is the act of travel in interstate commerce. Unlike 18 U.S.C. § 2422(b), which provides that the use of the mails or any other means of interstate commerce invokes federal jurisdiction, 18 U.S.C. § 2422(a) requires that a state line be crossed. Further, "[t]o constitute a violation of the Mann Act, 'it is essential that the interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities.'" *U.S. v. Griffith*, 2000 WL 1253265, at \*3

(S.D.N.Y. Sep. 5, 2000). In *U.S. v. Griffith*, the defendants were charged with, inter alia, attempting to persuade a minor to travel in interstate commerce for the purpose of prostitution. The court, finding no evidence that the defendants' efforts ever rose to the level of "interstate" travel or persuasion, held that the defendants must be acquitted on these counts. The court stated, "The government's contention '[t]hat the defendants intended to prostitute [the minor] cannot be seriously disputed,' may be so, but that intent does not suffice in the absence of an 'interstate commerce' element." *Id.* at \*6.

"A primary purpose of the Mann Act was to protect women who were weak from men who were bad." *Wyatt v. United States*, 362 U.S. 525, 530 (1960) (quoting *Denning v. United States*, 247 F. 463, 465 (5<sup>th</sup> Cir. 1918)). The Mann Act is also known as the White Slave Traffic Act and was originally enacted to combat forced prostitution. As the defendant notes, "[i]n this case, there are no victims, no third parties, no prostitutes, no prostitution, no one crossed a state line, and no one was induced or persuaded to cross a state line to engage in prostitution," no money ever changed hands, and no minors were involved or even pretenses made about minors. Dr. Weiner was charged with crimes arising from a six-month effort by the government, acting through undercover agents posing first as "Wild Ginger" from Memphis, Tennessee, and then as "Mary" allegedly from Mobile, Alabama, who created profiles on the website "SugarDaddyForMe.com" and represented themselves to Dr. Weiner as mature ladies who were interested in dating wealthy men.

Transcripts of Dr. Weiner's communications with "Wild Ginger" and "Mary" reveal that these "women" played the role of inducers more than Dr. Weiner did. Dr. Weiner made unequivocal statements to the undercover agents posing as Mary and Ginger that he was not

interested in a “hooker” and was then informed and persuaded that the women were not hookers. For instance, during one e-mail exchange, Wild Ginger inquired of Dr. Weiner, “What’s in it for me?” Dr. Weiner responded that there is a “major difference between a sugar baby and a hooker” and that he was no longer interested in her in light of her “crass” inquiry. He stated, “I will pass . . . the talents you are promoting are ubiquitous.” After some effort, Ginger subsequently convinced Dr. Weiner that she was not a hooker and informed him that she wished to travel from Memphis, Tennessee, to Tunica, Mississippi, and *she invited him* to travel there to meet her. Mary informed Dr. Weiner that she would be traveling through Mississippi on her way home to Mobile, Alabama, from a Memphis business trip, and *she* suggested that they meet in Clarksdale, Mississippi.

It is uncontested that neither of the agents posing as “sugar babies” traveled in interstate commerce – at least not at Dr. Weiner’s inducement. The government argues, however, that actual travel is not necessary for jurisdictional purposes. Assuming *arguendo* that the government is correct, the court would then be required to examine whether, as defense counsel termed it, “potential hypothetical interstate travel” existed in this case. The court answers this question in the negative. “Mary” came closest to “potential hypothetical interstate travel” when she told Dr. Weiner she would stop by and see him on her way back to Mobile from Memphis. Obviously realizing she had thereby negated the inducement element of the offense by informing Dr. Weiner that she would be crossing state lines for her own purposes, she called him back on the morning of their planned meeting and, in an apparent attempt to correct her previous error, told him she was not going to Mobile – she was returning to Memphis after their meeting – that is, she had made a “special trip” across state lines just to see him. Mary’s apparent attempt to

correct her earlier negating of the inducement element was unsuccessful, however, because she called Dr. Weiner when she was already in Mississippi to tell him her plans to return to Memphis after their meeting. Dr. Weiner told her that her plans were nonsensical and never did he induce her to cross the state line. As far as he knew, she was on her way back to Mobile – a trip for her own purposes – until she called and told him, while already in Mississippi, of her plans to return to Memphis after their meeting. As for Ginger, it is uncontested that *she* suggested Dr. Weiner meet her in Tunica. Just as with Mary, Dr. Weiner did not induce her or attempt to induce her to cross a state line.

The agents repeatedly played the roles of inducers in the present case. Their actions were nothing less than blatant, though unsuccessful, attempts to manufacture federal jurisdiction and are reminiscent of the behavior of the agents in one of the seminal cases on manufactured jurisdiction. In *United States v. Archer*, 486 F.2d 670 (2<sup>nd</sup> Cir. 1973), which involved a prosecution under the Travel Act, 18 U.S.C. § 1952, defendants were charged with using a facility in interstate commerce to commit bribery. The facility relied upon by the government to give rise to federal jurisdiction was the use of the telephone to make three out-of-state or foreign telephone calls between the defendants and the government informers. The first call was made by a government agent who traveled from New York over into New Jersey solely in order to make a call to the defendants back in New York. The court stated, “Whatever Congress may have meant by §1952(a)(3), it certainly did not intend to include a telephone call manufactured by the government for the precise purpose of transforming a local bribery offense into a federal crime.” *Id.* at 681.

Applying *Archer*, the Fourth Circuit held in *United States v. Coates*, 949 F.2d 104 (4<sup>th</sup> Cir. 1991), in which a defendant was convicted of arranging a murder-for-hire through interstate commerce in violation of 18 U.S.C. § 5861(d), that jurisdiction was manufactured when an agent crossed the Maryland line into Virginia for the sole purpose of making an interstate telephone call to the defendant. During the Virginia telephone call, the agent discussed with the defendant the murder scheme in general. In dismissing the case, the court held, “We rely entirely on the fact that the only reason the sole jurisdictional link occurred here was that it was contrived by the government for that reason alone.” *Id.* at 106. If Mary and Ginger had been successful in their attempts to coax Dr. Weiner to induce them to cross state lines, the jurisdictional nexus would have been created solely by the government. “[W]hen the federal element in a prosecution . . . is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves.” *United States v. Clark*, 62 F.3d 110, 112 (5<sup>th</sup> Cir. 2009). Despite the standard applied – be it stringent or lenient – the federal nexus to interstate commerce necessary to create federal jurisdiction simply is not present in the case at bar.

The government has repeatedly argued that the “attempt” element of the statute confers jurisdiction in this case. The government’s position is that jurisdiction is established by proof that Dr. Weiner “acted with the culpability required to commit the underlying substantive offense, and took a substantial step toward its commission.” *See United States v. Barlow*, 568 F.3d 215, 219 (5<sup>th</sup> Cir. 2009). The defendant correctly argues, however, that “[t]his is an erroneous position because the government is confusing the elements required to prove the

[elements] of an ‘attempted crime’ with the subject matter jurisdictional requirements for the court initially to acquire jurisdiction even to hear the case.”

The court finds this case analogous to an imagined scenario presented in open court at the oral argument hearing on this motion, to wit: a Memphis resident asks a female friend to travel to Oxford, Mississippi, in order to engage in prostitution there. In this scenario, we will imagine the residents of Memphis sitting in their living room, and one says to the other, “Well, you know, I think I’ve found a good place for us to set up our business. Let’s go down to Oxford. You’ve got all those college boys down there; they’re looking for somebody like you. They’d really be impressed by you. So let’s go down there and set up in a motel there, and we can really make some money.” The female responds, “Well, I’m not really sure I want to do that. I like it up here.” The male says, “No, let’s go down there. I want to. I want to go down there and take you down there.” He attempts back and forth to entice her to come down here to Oxford, but she says, “Well, I just don’t want to go.” The court asked the government at the November 5 hearing whether this hypothetical conversation would be a violation of the Mann Act and a federal offense subject to up to twenty years imprisonment (and in the present case would result in loss of a medical license). Specifically, the court asked the prosecutor, “Has he [the male from Memphis] committed a federal crime?” The prosecutor responded, “Under the statute, yes, Your Honor.” The court disagrees.

The court is aware from arguments and briefs submitted to the court that Dr. Weiner has acted as a strong advocate for quality healthcare in Clarksdale and the surrounding area. As part of this advocacy, Dr. Weiner has been an outspoken critic of the health care organization which manages the local hospital there – a publicly-held company which Dr. Weiner holds responsible

for various deficiencies in the provision of healthcare at the hospital. As a result of his criticism, Dr. Weiner is apparently not in good favor with that company as evidenced by statements such as that made by an agent of the company, a former hospital administrator in Clarksdale, who defense counsel advise allegedly stated prior to Dr. Weiner's arrest that the corporation was "going to get Dr. Weiner out of there even if it had to do it in handcuffs" (or words to that effect). An e-mail from this same administrator reveals his reaction to the arrest of Dr. Weiner. When advised that Dr. Weiner's office computer was searched, that the search revealed that Dr. Weiner communicated with persons he thought were women visiting the SugarDaddyForMe website, and that information was taken which, inter alia, led to the indictment herein, the administrator responded in an e-mail, "Alright!!!!!!!" The court is also advised that another official in this management company with whom Dr. Weiner has had numerous conflicts is a retired veteran of the Federal Bureau of Investigation. The court is further advised that SugarDaddyForMe.com receives thousands of hits a day; yet, according to the information from defense counsel herein, the government has prosecuted not one other individual besides Dr. Weiner for an alleged Mann Act violation accomplished via this website.

The Mann Act was used, in the opinion of many, for improper purposes when John Arthur "Jack" Johnson, the first African-American heavyweight boxing champion, was one of the first persons to be charged under the 1910 Act. Johnson was charged in 1913 with transporting a prostitute from Pittsburgh to Chicago. He was convicted under the Mann Act and sentenced to federal prison. Critics have long believed that Johnson's case was racially motivated. He had beaten a white heavyweight boxing champion, and the "prostitute" was his

white girlfriend whom he subsequently married. Eric Weiner, *The Long, Colorful History of the Mann Act*, <http://www.npr.org>, March 11, 2008.

Charlie Chaplin was prosecuted under the Act in 1944 in a case arising from a paternity suit involving the actress Joan Barry. It has been speculated that the prosecution was motivated by Chaplin's outspoken radical political views. Chaplin was ultimately acquitted. *Id.*

The Department of Justice has set forth its policy of stricter guidelines in bringing prosecutions than were present when Jack Johnson and Charlie Chaplin were indicted. The guidelines state the following:

Unless minors are victims, prosecutions under 18 U.S.C. §§ 2421 and 2422 should generally be limited to persons engaged in commercial prostitution activities, even though commerciality is not an element of the offense.

*United States Attorney Manual*, § 9-79.100. In this case the court is not ruling on whether prostitution was never discussed and would never have been engaged in. If state or local prosecutorial authorities want to pursue a state law prosecution of solicitation of prostitution, that is their prerogative. Such a violation carries a misdemeanor maximum sentence of six months in the county jail and a fine of \$200.00<sup>1</sup>; but this court finds there is an insufficient interstate connection to create federal jurisdiction under the Mann Act, which carries a fine and as much as twenty years in federal prison, and as far as this defendant is concerned, almost certain loss of his medical license. In this case the undercover agents, who told Dr. Weiner their names were "Wild Ginger" and "Mary," were more likely the pursuers of Dr. Weiner than vice versa.

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<sup>1</sup>Miss. Code Ann. Section 97-29-53.



For the foregoing reasons, the court finds that the defendant's motion to dismiss for lack of federal jurisdiction should be and the same is hereby **GRANTED**.

The court further **ORDERS** the government to return any property seized in connection with this prosecution and hereby authorizes the United States Marshal to release the 2005 BMW 654 CI automobile and any other property belonging to Dr. Weiner which may be in the marshal's custody. Any costs incurred as a result of the storage and maintenance of this property shall be paid by the United States Marshal.

**SO ORDERED AND ADJUDGED** this, the 9<sup>th</sup> day of November, 2009.

*/s/ Neal Biggers*  
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**NEAL B. BIGGERS, JR.**  
**SENIOR U.S. DISTRICT JUDGE**