

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : Criminal No. 00-419
: :
vs. : :
: :
JEFFREY HUNT, ET AL. : :
: :
Defendants. : :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

MARCH 12, 2001

Presently before the court are the post-trial motions of defendants Otto Barbour, James Phillips, and Jeffrey Johnson, all of whom seek a judgment of acquittal or a new trial. For the reasons stated below, Barbour's motion for a judgment of acquittal on the charge of conspiracy to distribute cocaine is granted, and Phillips' and Johnson's motions for a judgment of acquittal or a new trial are denied.

I. BACKGROUND

The defendants were indicted on July 18, 2000 as part of a nine person indictment charging that defendants participated in a conspiracy to distribute cocaine base, commonly known as crack, in the Spring Garden Housing Project in the city of Philadelphia between March 11, 1999 and January 11, 2000. The indictment alleged that the leader of the conspiracy, Jeffrey

Hunt, packaged cocaine base for distribution in clear gelcaps labeled "357" and in clear vinyl tubing capped with wooden dowels. See Indictment at 2.

Barbour, Phillips, and Johnson were all charged with conspiracy to distribute over 50 grams of cocaine base, in violation of 21 U.S.C. § 846. Barbour and Phillips were also charged with distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(A), and distribution of cocaine base within a 1,000 feet of a public housing facility, in violation of 21 U.S.C. § 860. Following a trial, a jury found the defendants guilty on all counts.

At trial, the government presented the following evidence linking Barbour, Phillips, and Johnson to the conspiracy:

A. Otto Barbour

Police Officers Rodriguez and Cujdik testified that Barbour sold two vinyl tubes capped by wooden dowels that contained cocaine base to a confidential informant on December 2, 1999. See Trial Tr. Cujdik (12/13/00) at 19-20; Trial Tr. Rodriguez (12/14/00) at 9. In addition, Rashael Harris, a co-defendant who testified pursuant to a plea agreement with the government, testified on direct examination that she purchased

cocaine base packaged in "wooden vials"¹ from Barbour during the second half of 1999. See Trial Tr. Harris Direct (12/15/00) at 23. On cross-examination, however, Harris gave a more specific answer, stating that she bought cocaine base from Barbour between July 31 and September 25, 1999. See Trial Tr. Harris Cross (12/15/00) at 7. Following the close of the government's case, the government stipulated that Barbour was incarcerated between July 31 and September 25, 1999, therefore making it impossible for him to have sold cocaine base to Harris during that time period.

B. James Phillips

The government presented evidence at trial that Phillips sold a confidential informant four tubes of cocaine base capped with wooden dowels, and was arrested while holding five additional tubes in his mouth on December 14, 1999. See Trial Tr. Goodwin-Laws (12/13/00) at 24-26; Trial Tr. Rodriguez (12/14/00) at 12-13. Rashael Harris testified that she saw Phillips at 622 Franklin Place, one of the sites used by the conspiracy as a distribution point, "about three or four times out of the week." Trial Tr. Harris Direct (12/15/00) at 19. Harris also witnessed Phillips leaving 622 Franklin Place on one occasion with a pack of cocaine base. See id. Finally, Harris

¹Harris testified that when she referred to "wooden vials," she actually meant vials capped with wooden ends. See Trial Tr. Harris Direct (12/15/00) at 22.

stated that she bought cocaine base packaged in "wooden vials" from Phillips in the latter part of 1999. Id. at 22-23.

C. Jeffrey Johnson

Johnson was arrested three times during the time period charged in the indictment which the government claims links him to the conspiracy. On May 15, 1999, he sold two gel capsules labeled "357" ("357" gelcaps) and two clear gel capsules ("clear gelcaps"), all filled with cocaine base. See Trial Tr. Goodwin-Laws (12/13/00) at 15-16. Five additional "357" gelcaps were recovered around the area from which he fled after being confronted by police. See Trial Tr. Cujdik (12/13/00) at 7. On September 20, 1999, Johnson was arrested in possession of 20 clear gelcaps containing cocaine base. See Trial Tr. Poles (12/14/00) at 56-61. Finally, on November 6, 1999, Johnson was arrested while carrying 20 clear gelcaps and two tubes capped with wooden dowels containing cocaine base. See Trial Tr. Wenger (12/14/00) at 70. Rashael Harris testified that she saw Johnson at 622 Franklin Place "[a]bout three or four or five times a week." See Trial Tr. Harris Direct (12/15/00) at 17. In addition, Harris stated that she bought cocaine base packaged in "gel caps" from Johnson in July, 1999. See Trial Tr. Harris Direct (12/15/00) at 21-22.

All three defendants contend that the evidence against them was insufficient to sustain the jury's verdict, and that

they are thus entitled to a judgment of acquittal under Fed. R. Crim. Pro. 29. More specifically, each relies on the proposition that a single sale of a controlled substance, without more, is insufficient to sustain a conviction for conspiracy to distribute the controlled substance. See United States v. Gibbs, 190 F.3d 188, 197 (3d Cir. 1999) ("It is well-settled that a simple buyer-seller relationship, without any prior or contemporaneous understanding beyond the sales agreement itself, is insufficient to establish that the buyer was a member of the seller's conspiracy."); United States v. Gore, 154 F.3d 34 (2d Cir. 1998).

Phillips and Johnson also contend that the court erred in: (1) denying defendants' request to suppress evidence; (2) denying defendants access to personnel files of the arresting officers or, in the alternative, holding an in camera review of the files to determine if there was any material discoverable under Brady v. Maryland; (3) failing to have the jury determine the reasonably foreseeable drug quantity attributable to each defendant individually; and (4) permitting the government to violate its discovery obligations under Brady v. Maryland when (a) the government failed to provide the defense with written copies of the confidential informant's agreement with the Philadelphia Police Department; and (b) failed to provide defense counsel with documents which would have identified the clothing worn by defendant Phillips on the night of his arrest on December

14, 1999. In addition, Phillips and Johnson contend that the government constructively amended the indictment or, in the alternative, there was a variance between the government's proof at trial and the charges set forth in the indictment that was material and prejudicial, because the government maintained at trial that cocaine base packaged in clear gelcaps constituted a mode of packaging unique to the charged conspiracy.²

II. DISCUSSION

The defendants are entitled to a judgment of acquittal if the evidence produced at trial is insufficient to sustain a conviction. See Fed. R. Crim. Pro. 29. In reviewing the evidence, the court must view the evidence in the light most favorable to the government. See United States v. Thomas, 114 F.3d 403, 405 (3d Cir. 1997). The verdict should be sustained if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). In addition, the court may grant a defendant a new trial under Rule 33 of the Federal Rules

²Phillips and Johnson joined in all of the post-trial motions filed by their co-defendants. Some of the grounds for acquittal and/or a new trial argued by one particular defendant have no application to the other two defendants. For example, although Phillips technically joined in Johnson's motion for a new trial based on the alleged constructive amendment or variance to the indictment because the government argued that Johnson's possession of clear gelcaps linked him to the conspiracy, the government did not present any evidence at trial linking Phillips to the distribution of clear gelcaps.

of Criminal Procedure "if the interests of justice so require."
Fed. R. Crim. Pro. 33.

A. Defendant Barbour Is Entitled to a Judgment of Acquittal.

Barbour argues that under United States v. Gore, 154 F.3d 34, 40 (2d Cir. 1998), there is insufficient evidence linking him to the charged conspiracy to sustain a conviction. In Gore, the evidence against the defendant consisted of a single sale of heroin with the brand name "Fuji Power" by the defendant to a confidential informant, and a taped conversation between the defendant and the informant. See id. at 39. In the conversation, the defendant made reference to another person. That reference, according to the Second Circuit, suggested that the defendant "has a buyer-seller relationship with another person who is a source for his drugs." Id. at 40.³ The government argued that this evidence linked the defendant to a conspiracy within the city of Albany to distribute heroin with the brand name "Fuji Power".

The Second Circuit held that this evidence was insufficient to sustain the jury's verdict that the defendant was a member of the charged conspiracy. After emphasizing that "[t]he essence of conspiracy is the agreement and not the

³The defendant stated that "I don't want to lose face with that dude man because he always has something decent and he always comes up right."

commission of the substantive offense," id. at 40, the court stated that the defendant's "vague statement made contemporaneously with a single heroin sale [in a packaging attributable to the conspiracy] . . . is too thin a reed to support the essential element of a conspiracy - the agreement." Id. at 41.

Likewise, the only evidence against Barbour other than the single sale on December 2, 1999 of cocaine base packaged in clear tubing with wooden dowels is Harris's contention that she bought cocaine base in tubing with wooden dowels from Barbour at a time when Barbour was incarcerated. Although the government attempts to salvage this evidence by pointing out that on direct examination Harris stated that she made the purchase from Barbour in the "second half of 1999," Harris flatly stated on cross-examination that she made the purchase between July 31 and September 25, 1999.

The court finds that Harris' testimony, like the tape recording offered in Gore, constitutes "too thin a reed" to support Barbour's conspiracy conviction. The Harris evidence, viewed in the light most favorable to the government, is no more probative of Barbour's participation in the conspiracy than the Gore defendant's reference to his supplier who "always comes up right," id. at 38, which certainly suggests defendant had multiple dealings with his supplier. The court, therefore,

concludes that a single sale of cocaine base in a package attributable to the conspiracy, even if combined with the Harris testimony, is insufficient to prove that Barbour was a member of the conspiracy.

The fact that the "Fuji Power" conspiracy in Gore reached throughout the city of Albany, whereas the government contended in this case that the packaging was unique to the Jeffrey Hunt conspiracy, does not bolster the government's argument because the government did not offer expert testimony that cocaine base could not be purchased in clear gelcaps or tubing with wooden dowels in the Philadelphia area other than in the Spring Garden Project. Accordingly, Barbour is entitled to a judgment of acquittal on the conspiracy charged in the indictment.⁴

B. Defendant Phillips Is Not Entitled to a New Trial.

⁴Although Phillips and Johnson nominally make the same argument under Gore, the evidence linking them to the charged conspiracy is much stronger than that against their co-defendant Barbour, or in the case of the defendant in Gore. In addition to his arrest for the sale of cocaine base in the tubing with the wooden dowels, Rashael Harris saw Phillips on numerous occasions at 622 Franklin Place, one of the conspiracy's distribution points, and once saw him leave with a pack of cocaine base. In addition, Harris purchased cocaine base in tubing with wooden dowels from Phillips. Johnson was arrested three times with cocaine base contained in the distinctive packaging, was seen by Harris at 622 Franklin Place on numerous occasions, and sold cocaine base in clear gelcaps to Harris. Therefore, viewed in the light most favorable to the government, the respective evidence linking Phillips and Johnson to the conspiracy is clearly sufficient to sustain a jury verdict under Gore.

In addition to his argument under Gore, see supra note 4, Phillips contends that he is entitled to a new trial because the court erred in: (1) denying defendants' request to suppress evidence; (2) denying defendants access to personnel files of the arresting officers or, in the alternative, holding an in camera review of the files to determine if there was any material discoverable under Brady v. Maryland; (3) failing to have the jury determine the reasonably foreseeable drug quantity attributable to each defendant individually; and (4) permitting the government to violate its discovery obligations under Brady v. Maryland when the government (a) failed to provide the defense with written copies of the confidential informant's agreement with the Philadelphia Police Department; and (b) failed to provide defense counsel with documents which would have identified the clothing worn by defendant Phillips on the night of his arrest on December 14, 1999. Phillips' counsel declined to make any arguments on these points in either the brief accompanying Phillips' motion or at the hearing on the post-trial motions. Accordingly, the court stands by its prior rulings.

C. Defendant Johnson Is Not Entitled to a New Trial.

Johnson contends that the government constructively amended the indictment or, in the alternative, he was prejudiced by a material variance between the charges contained in the indictment and the evidence produced by the government at trial.

More specifically, Johnson objects to the fact that the indictment listed two kinds of packaging unique to the charged conspiracy, "357" gelcaps and tubing capped with wooden dowels, but at trial the government contended that a third type of packaging, clear (and unlabeled) gelcaps, was also a signature packaging of the conspiracy.

An indictment is deemed to be amended "if the charging terms of the indictment are altered." United States v. Castro, 776 F.2d 1118, 1121 (3d Cir. 1985). Amendments to indictments are per se unconstitutional. See id. at 1121-22. In this case, the type of packaging used by the conspiracy was not an essential element of the offense. The government only needed to prove beyond a reasonable doubt that: (1) a conspiracy to distribute cocaine base existed; and (2) the defendant willfully joined the conspiracy. See 21 U.S.C. § 846. Therefore, the government's use of evidence of a type of packaging not listed in the indictment at trial did not constructively amend the indictment.

Johnson argues in the alternative that there was an impermissible variance between the indictment and the evidence at trial. A variance results when the evidence produced at trial proves facts other than those in the indictment. See United States v. Palma-Rudas, 121 F.3d 841, 854 (3d Cir. 1997). A variance is fatal when it "affects 'the substantial rights of the accused either (1) by insufficiently informing him such that he

is taken by surprise and prevented from presenting a proper defense, or (2) by affording him insufficient protection against reprosecution for the same offense.'" United States v. Lewis, 113 F.3d 487, 492 (3d Cir. 1997) (quoting United States v. Pierce, 893 F.2d 669, 676 (5th Cir. 1990)).⁵

Johnson claims he was prejudiced by the variance because he was surprised by the government's argument at trial that his possession and sale of the cocaine base packaged in clear gelcaps linked him to the charged conspiracy. Johnson notes that he had planned on using his arrest on September 20, 1999 for possession of 20 clear gelcaps containing cocaine base to bolster his argument that he was merely an independent drug dealer, rather than a member of the charged conspiracy. Johnson further argues that had he known of the government's theory concerning the clear gelcaps, he would have either pled guilty or sought an expert who would have testified that cocaine base packaged in clear gelcaps is available in other areas of Philadelphia and thus is not unique to the charged conspiracy.

The government contends that it gave ample notice of its position concerning the clear gelcaps to Johnson. Two months before trial, it provided Johnson's counsel with a Philadelphia police report that summarized the investigation upon which the

⁵Johnson does not contend that because of the alleged variance he is insufficiently protected from reprosecution for the same offense.

indictment was based. The report referred to several instances where the police recovered cocaine base in clear, unlabeled gelcaps. See Def. Johnson's Mot. for New Trial Ex. B at 2, ¶ 3 & 4, at 4 ¶ 1. In addition, the government provided documents pertaining to Johnson's September 20, 1999 arrest for possession of cocaine base packaged in clear gelcaps approximately two weeks prior to trial.

The court finds that, to the extent a variance did exist between the indictment and the evidence offered, Johnson was not unfairly surprised by the variance. The government supplied the documents pertaining to the clear gelcaps evidence in a timely manner. These documents put defendant on notice of at least the possibility that the government would contend at trial that a clear gelcap was another signature packaging of the charged conspiracy.

In addition, Johnson's counsel's failure to object to the government's use of the gelcap evidence at any point during the trial and to seek the court's permission to find an expert to testify regarding the prevalence of cocaine base packaged in clear gelcaps in the Philadelphia area strongly suggest that Johnson was not in fact surprised by the government's position during the trial. Johnson's counsel conducted an extremely active defense on Johnson's behalf, as evidenced by the fact that defense counsel filed no less than six different motions during

the course of the trial. See doc. nos. 163-64, 167-69, 180. Although defense counsel is somewhat unclear about when he actually became aware of the government's view of the clear gelcaps evidence, he stated that "I believed I was aware of it after Officer Simmons testified." Hr'g Tr. (3/5/01) at 46. Officer Simmons testified on December 13, 2000, see Trial Tr. Simmons (12/13/00) at 89-162, two days before the government completed its case in chief. Defense counsel therefore had ample time to submit a motion to the court for leave to hire an expert who could testify concerning the prevalence of clear gelcaps in the Philadelphia area.⁶

Finally, Johnson's argument, if accepted, would discourage the government from continuing its practice of specifying in the indictment certain details of the charged conduct that are not essential to sustain the sufficiency of the

⁶It should also be noted that the government made its position on the clear gelcaps evidence extremely clear in its opening statement, which was also given on December 13, 2000. The government's counsel said that: "

Now what you'll see through the evidence is that from at least March of 1999 until about the fall, the defendants were selling the crack cocaine package [sic] in little clear gel caps, gel capsules, sort of like what you see in a Contac pill and the crack would be inside there. And that would be the unique packaging that this group would use to sell the crack cocaine. And oftentimes [sic] those gel capsules were labeled with 356. which meant three rocks for \$5 on 7th Street
. . . .

Trial Tr. Government's Opening Statement (12/13/00) at 3.

indictment. This practice has been endorsed by the Third Circuit in United States v. Lewis, 113 F.3d 487, 493 (3d Cir. 1997) (noting that even though the allegation in the indictment concerning the particular type of controlled substance was not needed, the government should not change its practice of including such information in the indictment). In this case, the indictment specified two different types of packaging that the government contended were unique to the charged conspiracy. The addition of a third type of packaging was permissible in light of the government's production of documents suggesting that other alleged members of the conspiracy were packaging cocaine base in clear gelcaps.

Accordingly, Johnson's motion for a new trial is denied.

III. CONCLUSION

For the reasons stated above, defendant Otto Barbour's motion for a judgment of acquittal is granted, and defendants James Phillips' and Jeffrey Johnson's motions for a judgment of acquittal or a new trial are denied.

An appropriate order follows.