

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	NO. 99-781-2
	:	
MATTHEW ZIMMERMAN	:	

MEMORANDUM AND ORDER

YOHN, J. June , 2001

On May 30, 2000, the defendant, Matthew Zimmerman, was convicted by a jury of conspiring to distribute a kilogram of cocaine and related charges. The evidence consisted of, *inter alia*, the testimony of a cooperating witness, Roberto Sanchez, who participated with Zimmerman in the cocaine transaction; the testimony of a confidential source, Yancy Laureano, who, at Drug Enforcement Administration (“DEA”) agents’ instruction, posed as the buyer of a kilogram of cocaine to be obtained from defendant Hector Resto by Zimmerman; tape-recorded conversations in which Zimmerman agreed to sell a kilogram of cocaine the DEA confidential source; DEA surveillance that observed Zimmerman meet with the cocaine supplier, Resto, at Resto’s home and business; the fact that Zimmerman fled when confronted by DEA agents; and Zimmerman’s own trial testimony.

Currently before the court are two motions filed *pro se*.¹ In the first, defendant moves for

¹Citing *United States v. Hirschfeld*, 911 F. Supp. 200, 201 (E.D. Va. 1995), the government argues that because Zimmerman is represented by counsel, he is not permitted to file motions *pro se*. As such, the government contends that Zimmerman’s *pro se* motions may be

judgment of acquittal after guilty verdict, or, in the alternative, for a new trial (Doc. No. 96). In the second, defendant moves for a new trial (Doc. No. 143). Because these motions overlap significantly, I will consider them together. In these motions, defendant sets forth several arguments essentially stating that the verdict was contrary to the weight of the evidence and suggesting that the court committed numerous errors at trial, thereby necessitating a judgment of acquittal or a new trial. For the foregoing reasons, both of defendant's motions will be denied.

I. Background

The evidence at trial showed that, between approximately mid-November and November 21, 1999, Zimmerman and co-defendants Robert Sanchez, Hector Resto, and Luis Colon, conspired to distribute a kilogram of cocaine to Yancy Laureano, a confidential source working under the supervision of the DEA. (*See, e.g.*, 5/23/00 N.T. at 60-62; 5/24/00 N.T. at 102-03).²

On November 17, 1999, Laureano met Zimmerman, Sanchez, and Richard Knellinger

dismissed on this ground alone. In *Hirschfeld*, the district court noted that a number of courts have interpreted the language of 28 U.S.C. § 1654 which states that “[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel” to mean that a person can proceed *pro se* or represented by an attorney, but not by both methods. 911 F. Supp. at 201. The defendant in *Hirschfeld* had filed a number of *pro se* motions with the court, some of which were signed by an attorney as “of counsel.” Relying on the above interpretation, the court determined that because the defendant had filed previous motions *pro se* and because recent motions had been co-signed by an attorney, that the attorney became counsel of record for the defendant. *Id.* at 203. I, however, find this opinion distinguishable from the instant case. The *Hirschfeld* court merely used the proposition that a defendant either could represent himself or be represented by an attorney to determine the status of an attorney who signed a *pro se* motion as “of counsel”; it did not rely on the proposition to dismiss any *pro se* motions filed by a defendant already represented by an attorney. As such, I decline to dismiss Zimmerman's motion on this ground. *Cf. Non-Punitive Segregation Inmates of Holmesburg Prison v. Kelly*, 589 F. Supp. 1330, 1335 (E.D. Pa. 1984) (“Ordinarily, a court will not consider *pro se* submissions from a party represented by counsel.”).

²Prior to trial Sanchez pleaded guilty to the indictment and agreed to cooperate with the government. *See* Gov. Ex. 15. Sanchez testified at trial. *See* 5/23/00 N.T. at 60-200.

inside a furniture store owned by Knellinger.³ Prior to the meeting, Zimmerman and Sanchez had discussed how Zimmerman could purchase cocaine from Resto. *See* 5/23 N.T. at 71-73, 155-56. During the meeting Sanchez, with the agreement of Zimmerman, offered to sell Laureano a kilogram of cocaine, showed her approximately three ounces of cocaine in a plastic bag, and gave her a cocaine sample. *See* Gov. Ex. 2A; 5/24/00 N.T. at 104-05; 5/25/00 N.T. at 138-40. Sanchez testified that Zimmerman supplied the three ounces of cocaine and that Zimmerman told Sanchez that he bought it from Resto. *See* 5/23/00 N.T. at 72-73, 159. Sanchez told Laureano that the price of the kilogram of cocaine would be \$31,000 and referred to the cocaine supplier as “Ace.” *See* Gov. Ex. 2A at 2; 5/24/00 N.T. at 105. Zimmerman and Sanchez both testified that they knew Resto as “Ace.” *See* 5/23/00 N.T. at 62, 83; 5/25/00 at 111. Sanchez and Zimmerman agreed to sell Laureano the kilogram of cocaine and page Laureano once they had obtained it from their supplier. *See* Gov. Ex. 2A at 5-6.

After Laureano left the furniture store, Zimmerman and Sanchez went to Resto’s business, CSC Electronics, where Zimmerman and Resto met. Sanchez was present during part of this meeting and testified that Zimmerman told him that Resto was on the telephone trying to obtain the kilogram of cocaine. *See* 5/23/00 N.T. at 78, 124. DEA Special Agent Merritt Gibson observed Zimmerman and Resto meet at CSC Electronics immediately after Zimmerman and Sanchez met with Laureano at the furniture store. *Id.* at 206-07. Zimmerman and Sanchez did not acquire the kilogram of cocaine from Resto at this time. *Id.* at 78.

Nevertheless, later that day, Sanchez paged Laureano. During Laureano’s return

³Knellinger worked as a confidential source for the DEA but did not testify at trial for either party.

telephone call, Sanchez told Laureano that he was “positive” he had the kilogram of cocaine. *See* Gov. Ex. 3B at 3; 5/23/00 N.T. at 79-80; 5/24/00 N.T. at 107. Sanchez testified that although he and Zimmerman had not obtained the cocaine, they wanted to make sure that they could “keep her interested” and complete the transaction the next day. *See* 5/23/00 N.T. at 79-80. Laureano agreed to meet Sanchez and Zimmerman at the furniture store when Sanchez later paged her. *See* Gov. Ex. 3B at 3-4. Sanchez did not page Laureano that day to pick up the kilogram of cocaine. *See* 5/24/00 N.T. at 109. They two, however, did speak that night in an unrecorded conversation wherein Sanchez assured Laureano that the cocaine transaction would occur the following day. *See id.*

On November 18, Laureano went to the furniture store to meet with Zimmerman and Sanchez about the kilogram of cocaine. *See* 5/23/00 N.T. at 85-86; 5/24/00 N.T. at 110-11. When Laureano arrived, Sanchez was inside the furniture store and Zimmerman was waiting outside in his cream colored Nissan Maxima. *See* 5/23/00 at 85, 101-02; 5/25/00 at 119, 141. Sanchez told Laureano that Resto was mad because the cocaine supplier had provided the cocaine the day before, but because they had failed to complete the transaction with Laureano, the cocaine had to be returned. *See* Gov. Ex. 5A at 2. Sanchez then stated that Resto would not give Zimmerman and him the cocaine until Resto first saw the purchase money. *See* Gov. Ex. 5A at 2-3; 5/23/00 N.T. at 102. Laureano insisted that she would not show Sanchez the money unless Sanchez showed Laureano the cocaine. *See* Gov. Ex. 5A at 3; 5/24/00 N.T. at 112-13. Laureano then went to Zimmerman’s car to speak with him. *See* 5/25/00 at 119, 141. Zimmerman confirmed to Laureano that his supplier would not give him the kilogram of cocaine without first seeing the purchase money. *See* Gov. Ex. 5A at 12-13; *see also id.* at 10-16.

Ultimately, Laureano did not give Sanchez and Zimmerman any purchase money at this time. Instead, Laureano agreed with Sanchez and Zimmerman that they would page her when they had the cocaine. *Id.* at 17.

Immediately after this meeting, Zimmerman and Sanchez drove to Resto's residence to get the kilogram of cocaine. *See* 5/23/00 N.T. at 103, 209; 5/25/00 N.T. at 121, 145-46; *see also* 5/25/00 N.T. at 122 (Zimmerman stating that he went to Resto's house to attempt to introduce Laureano to Resto so that she and Resto could conduct a cocaine transaction or to see if Resto "could help him [Sanchez]" obtain a kilogram of cocaine). Zimmerman then went inside to meet with Resto and returned to Sanchez's car with a kilogram of cocaine, obtained from Resto, that Zimmerman showed to Sanchez. *See* 5/23/00 N.T. at 104; 5/24/00 N.T. at 3.

Zimmerman and Sanchez proceeded to the furniture store to complete the cocaine transaction. *See* 5/23/00 N.T. at 209-10; 5/25/00 N.T. at 122, 150. The transaction, however, was not completed because Laureano was not there and Zimmerman and Sanchez could not find Laureano's telephone number to contact her. *See* 5/23/00 N.T. at 107. Zimmerman and Sanchez waited approximately fifteen minutes at the furniture store and then left to return the cocaine to Resto. *See* 5/23/00 N.T. at 108. While in route, Zimmerman and Sanchez were encountered by DEA Task Force Officer Scott Nowetner. *See* 5/23/00 N.T. at 108-09; 5/24/00 N.T. at 24-29. Zimmerman drove directly at the standing officer, struck him, and fled. *See* 5/24/00 N.T. at 29-31. Zimmerman then led the police on a high-speed chase, *see* 5/23/00 N.T. at 112; 5/24/00 N.T. at 65-67, ultimately eluding officers until the next day. During the chase, Zimmerman took the kilogram of cocaine which was in his waistband, threw it to Sanchez in the passenger seat, and told Sanchez to get rid of it. *See* 5/23/00 N.T. at 111.

At trial, Zimmerman stipulated that the places where the drug transactions were alleged to have occurred were within 1,000 feet of a school. The jury found Zimmerman guilty of conspiring to distribute a kilogram of cocaine, possession of a kilogram of cocaine with intent to distribute, and possession of a kilogram of cocaine with intent to distribute within 1,000 of a school. The jury acquitted Zimmerman of attempting to murder a federal officer and could not reach a decision on the charge of assaulting a federal officer.

II. Standard of Review

Federal Rule of Criminal Procedure 29(c) provides that a defendant may, within seven days after the verdict, or such longer time as the court may prescribe, file a motion for judgment of acquittal. *See* Fed. R. Crim. P. 29(c). The purpose of Rule 29 is to question the sufficiency of the evidence to support a conviction. *See generally United States v. Pungitore*, 910 F.2d 1084, 1129 (3d Cir. 1990) (discussing the standard of review for a motion for judgment of acquittal), *cert. denied sub nom, Virgilio v. United States*, 500 U.S. 915 (1991). "A defendant challenging the sufficiency of the evidence bears a heavy burden." *United States v. Casper*, 956 F.2d 416, 421 (3d Cir. 1992).

In reviewing the record to determine whether there was sufficient evidence to support a conviction, "the court must view the evidence and the inferences logically deducible therefrom in the light most favorable to the government, to determine if there is sufficient evidence to support the factfinder's verdict." *United States v. McNeill*, 887 F.2d 448, 450 (3d Cir. 1989), *cert. denied*, 493 U.S. 1087 (1990). "The evidence need not unequivocally point to the defendant's guilt as long as it permits the jury to find the defendant guilty beyond a reasonable doubt." *Pungitore*, 910 F.2d at 1129 "A verdict will be overruled only if no reasonable juror could

accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987) (citations omitted); *see also United States v. Salmon*, 944 F.2d 1106, 1113 (3d Cir. 1991) (finding that in evaluating the sufficiency of the evidence to support a conviction, the court "must determine whether a reasonable jury believing the government's evidence could find beyond a reasonable doubt that the government proved all of the elements of the offenses"), *cert. denied sub nom, Washington v. United States*, 502 U.S. 1110 (1992).

In the alternative to a judgment of acquittal, the defendant requests that the court grant a new trial, presumably under Federal Rule of Criminal Procedure 33. Pursuant to Rule 33, "[o]n a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require." *See Fed. R. Crim. P. 33*; *see also United States v. Bevans*, 728 F. Supp. 340, 343 (E.D. Pa.) ("[The court] may set aside the verdict and order a new trial if it is ascertained that the verdict constitutes a miscarriage of justice ."), *aff'd*, 914 F.2d 244 (3d Cir. 1990). "The decision whether to grant a motion for a new trial under Rule 33 is committed to the sound discretion of the trial court, which may set aside the verdict and order a new trial if it ascertains that the verdict constitutes a miscarriage of justice." *United States v. Daniels*, No. 95-CR-369, 1996 WL 311444, at *4 (E.D. Pa. June 6, 1996) (citing *United States v. Martorano*, 596 F. Supp. 621, 624 (E.D. Pa. 1984), *aff'd*, 767 F.2d 63 (3d Cir.), *cert. denied*, 474 U.S. 949 (1985)). One reason a new trial may be granted is if the conviction is against the weight of the evidence. *See United States v. Clemons*, 658 F. Supp. 1116, 1119 (W.D. Pa. 1987) (citing *Tibbs v. Florida*, 457 U.S. 31, 37-39 n.11-12 (1981)), *aff'd*, 843 F.2d 741 (3d Cir. 1988).

III. Discussion

Zimmerman's motions set forth the following grounds for a judgment of acquittal or a new trial: (1) the verdict is contrary to the weight of evidence and not supported by substantial evidence; (2) the court erred in denying a motion to dismiss all counts of the indictment; (3) the court erred in denying defendant's motion to sever his case from those of the other defendants; (4) the court committed plain error when it denied a motion to dismiss the entire jury panel because many panel members were closely related to law enforcement officers and government agents or agencies; (5) the court committed plain error in failing to instruct the jury that the government must prove the charges against Zimmerman with two witnesses, or one witness with corroboration; (6) the court erred in refusing to instruct the jury that before co-conspirator statements could be attributed to the defendant, it must find that a conspiracy existed and that Zimmerman participated in it; (7) the court erred in admitting, over defense objections, co-conspirator hearsay pursuant to Federal Rule of Evidence 801(d)(2)(E) before a conspiracy was shown; (8) the court erred in denying a defense motion for a mistrial after the testimony of DEA Agent Brown because he testified that Knellinger cooperated with the government and was not involved in any drug activity; (9) the court erred in admitting unintelligible tape recordings; (10) the court erred in instructing the jury regarding co-conspirator vicarious liability where, as the defendant contends, there is not evidence that he remained in a conspiracy after November 17, 1999, if any conspiracy existed at all; (11) the court erred in permitting, over defense objection, the jury to take transcripts and secondary evidence into the jury room; and (12) the cumulative effect of all of these errors denied Zimmerman due process. I conclude that Zimmerman's motions will be denied for three reasons: waiver; untimeliness and because the record demonstrates that there was ample evidence to support the jury's verdict of guilty.

First, because Zimmerman failed to raise at trial the objections contained in grounds 2, 3, 4, and 5, *supra*, he has waived those claims. Moreover, because the defendant has not demonstrated any legitimate reason why such grounds were not raised at trial, that waiver is not here excused.⁴ *See* Fed. R. Crim. P. 12(b)(1) (motions based upon defects in the indictment or information must be made prior to trial); Fed. R. Crim. P. 12(f) (absent cause shown, such claims are deemed waived if defendant fails to raise them prior to trial).

Second, because the objections contained in grounds 6 through 12, *supra*, were untimely made, those objections must now be denied.⁵ Motions for a new trial must be made within seven days after the guilty verdict or within such further time established by the court during this period. *See* Fed. R. Crim. P. 33; *see also* Fed. R. Crim. P. 29 (establishing same time period for motions for judgment of acquittal made after guilty verdict); *United States v. Gaydos*, 108 F.3d 505, 511 (3d Cir. 1997). In the instant case, the verdict was returned on May 30, 2000. The court extended the time in which to file post-trial motions to July 8, 2000. Defendant's motion containing these grounds (Doc. No. 143) was not filed until October 5, 2000, nearly three months after the deadline. Therefore, the motion will be denied.

Finally, it is clear that Zimmerman's guilty verdict is supported by sufficient evidence and not contrary to the weight of the evidence. Sanchez, Zimmerman's accomplice, testified that he, along with Zimmerman, Resto, and Colon engaged in a conspiracy to distribute a kilogram of cocaine to Laureano. Sanchez testified Zimmerman told him that he could obtain the cocaine

⁴In any event, the court has reviewed the claims presented in grounds 2 through 5 and has determined them to be without merit.

⁵ In any event, the court has reviewed the claims presented in grounds 6 through 12 and has determined them to be without merit.

from Resto and that Zimmerman brought a sample, consisting of three ounces of cocaine supplied by Resto, to the November 17 meeting with Laureano. Sanchez further testified that he and Zimmerman went to Resto's business and home on consecutive days for the purpose of obtaining a kilogram of cocaine to deliver to Laureano. Sanchez also testified that Zimmerman did obtain the kilogram of cocaine from Resto on November 18, 1999 and that Zimmerman showed this cocaine to Sanchez shortly after obtaining it.

The testimony of Sanchez alone is sufficient to support Zimmerman's conviction. *See Jacobs v. Redman*, 616 F.2d 1251, 1255 (3d Cir. 1980) (citations omitted). Nevertheless, Sanchez's testimony was corroborated by other sources. First, the evidence contained several tape recorded conversations wherein the cocaine transaction is discussed (and Zimmerman was present) and wherein Zimmerman is heard negotiating with Laureano regarding when and how payment for the kilogram of cocaine would be made and how the cocaine Zimmerman was about to obtain from Resto would be delivered to Laureano. Second, DEA agents provided testimony regarding their surveillance which observed, *inter alia*, Zimmerman and Sanchez traveling to Resto's business and home. Finally, the DEA confidential source, Laureano, testified as to Zimmerman and Sanchez's agreement to sell her a kilogram of cocaine for \$31,000. Thus, it is clear that there was ample evidence to support Zimmerman's conviction and therefore, Zimmerman's motions will be denied.

In summary, because there is sufficient evidence in the record to support Zimmerman's guilty verdict, and because Zimmerman has either waived or untimely brought the other claims supporting his motions for acquittal and for a new trial, defendant's motions will be denied.

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	NO. 99-781-2
	:	
MATTHEW ZIMMERMAN	:	

ORDER

YOHN, J. June , 2001

 AND NOW, this day of June, 2001, upon consideration of defendant's motion for judgment of acquittal, or, in the alternative, for a new trial (Doc. No. 96) and of defendant's motion for a new trial (Doc. No. 143), and the government's responses thereto (Doc. Nos. 126 and 180), IT IS HEREBY ORDERED that the motions are DENIED.

William H. Yohn, Jr., Judge