

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

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 00-24-11,14,15
 :
 JOHN MILLER :
 PAMELA JOYCE :
 JOHN LATOURETTE :

MEMORANDUM AND ORDER

BUCKWALTER, J.

February 26, 2002

Defendants John Miller, Pamela Joyce and John Latourette have each filed a Motion for Judgment of Acquittal. In addition, John Miller has filed a Motion for a New Trial.

The standard for review applicable to a motion for judgment of acquittal was recently summarized in United States v. Hart, 273 F.3d 363, 371 (3d Cir. 2001). The court said:

Our review of the sufficiency of the evidence after a conviction is “highly deferential.” See United States v. Helbling, 209 F.3d 226, 238 (3d Cir. 2000), cert. denied, 531 U.S. 1100 (2001). We must determine whether the evidence submitted at trial, “when viewed in the light most favorable to the government, would allow a rational trier of fact to convict.” Id.; United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987) (holding that the court must determine “whether all the pieces of evidence against the defendant, taken together, make a strong enough case to let the jury find him guilty beyond a reasonable doubt.”).

The standard for review of a motion for a new trial is somewhat different. The court under Fed. R. Crim. P. 33, upon defendant’s motion, may grant a new trial if the interests

of justice so require. If the reason for a new trial is the allegation that the verdict is against the weight of the evidence, then there is authority which suggests that the trial court has the power to consider credibility of the witnesses. See United States v. Friedland, 660 F.2d 919, 931 (3d Cir. 1981). This power must be exercised with great care. Credibility is normally the sole prerogative of the jury.

In this particular case, there was no question of the witnesses competency to testify. To the extent that inconsistencies or out and out contradictions occurred during the course of their testimony, the jury was there to determine credibility. Thus, there is no basis for the court to interfere with the jury's decision under the rubric of "against the weight of the evidence."

As far as other alleged trial errors are concerned, the court will address them in turn when it discusses John Miller's post-trial motions.

The law of this circuit relative to conspiracy was recently stated this way:

To make out a conspiracy charge, the Government must show: (1) a unity of purpose between the alleged conspirators; (2) an intent to achieve a common goal; and (3) an agreement to work together toward that goal. The final factor – an agreement between the defendant and some other person – is the essence of the offense, and there is no lesser standard for proving an agreement in drug cases.

United States v. Pressler, 256 F.3d 144, 147 (3d Cir. 2001).

In the present case, the evidence with respect to all three defendants, when viewed in a light most favorable to the government, shows:

(1) A unity of purpose between the alleged conspirators; that is, to distribute and to possess with intent to distribute controlled substances; and

(2) An intent to achieve a common goal of possessing controlled substances, distributing them and/or possessing them with intent to distribute.

What is arguable and what the court will address as to each defendant is two-fold. First, was there an agreement to work together toward that goal; and second, if the evidence supports that agreement, does it support the jury's finding with respect to the scope of the conspiracy and the amount reasonable foreseeable to the particular defendant.

I. PAMELA JOYCE

The evidence that the government points to is:

(1) Three taped conversations between Joyce and Michael Ricks, one of the leaders of the conspiracy, where Joyce was seeking to trade marijuana for an unspecified controlled substance which the government's evidence tends to show was crack. These conversations were on October 19, 1999; October 22, 1999; and October 24, 1999.

(2) The testimony of a co-conspirator, Danny Hineine, who said he saw Michael Ricks cooking what he assumed was crack on one occasion at Joyce's home.

(3) That Hineine also heard Joyce saying something about marijuana to another co-conspirator, Angelo Carter, near Ricks' home on one occasion.

In determining whether the evidence is sufficient to show that there was an agreement between Joyce and some other person to work toward the goal of the conspiracy, United States v. Gibbs, 190 F.3d 188 (3d Cir. 1999), is particularly helpful. Clearly, the only involvement Joyce appears to have in this conspiracy is attempted purchases of drugs. She also

had a big party at which Danny Hine, one of the conspirators, testified that he thought Michael Ricks was cooking crack but did not actually see it. She also talked once to Angelo Carter, a convicted conspirator, about marijuana.

The Gibbs case is instructive in this regard:

In cases where the defendant's only involvement in the conspiracy appears to be drug purchases, courts have looked to the surrounding circumstances to determine whether the defendant is a mere buyer who had such limited dealings with the conspiracy that he cannot be held to be a conspirator, or whether he has knowledge of the conspiracy to the extent that his drug purchases are circumstantial evidence of his intent to join that conspiracy.

Among the factors courts have considered in making that evaluation are: the length of affiliation between the defendant and the conspiracy; whether there is an established method of payment; the extent to which transactions are standardized; and whether there is a demonstrated level of mutual trust. See *United States v. Hach*, 162 F.3d 937, 943 (7th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 1586, 143 L.Ed.2d 680 (1999). While these factors are not necessarily dispositive of the issue, their presence suggests that a defendant has full knowledge of, if not a stake in, a conspiracy: when a defendant drug buyer has repeated, familiar dealings with members of a conspiracy, that buyer probably comprehends fully the nature of the group with whom he is dealing, is more likely to depend heavily on the conspiracy as the sole source of his drugs, and is more likely to perform drug-related acts for conspiracy members in an effort to maintain his connection to them.

Courts also have examined whether the buyer's transactions involved large amounts of drugs. See *United States v. Flores*, 149 F.3d 1272, 1277 (10th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 849, 142 L.Ed.2d 703 (1999); *Kozinski*, 16 F.3d at 808. A large transaction or an accumulation of deals suggests more trust, garnered over a period of time, as well as a greater likelihood that the parties have "put their heads together" to figure out planning, organization, and ways to conceal their activities. Whether the buyer purchased his drugs on credit may also be relevant. See *Price*, 13 F.3d at 728; *United States v. Dortch*, 5 F.3d 1056, 1065-66 (7th Cir. 1993); *United States v. Carbone*, 798 F.2d 21, 27 (1st Cir. 1986). A credit relationship may well reflect the kind of trust that is referenced *supra*, and often evidences the parties' mutual stake in each other's transactions. By extending credit to a buyer, the seller risks the possibility that the buyer will be unable to resell the drugs: even if the buyer does successfully resell the drugs, in this generally thinly capitalized "business," the seller will likely have to wait until the buyer collects the money from his resale before he can pay the seller back for the initial purchase. In addition, the buyer has a vested interest in the seller's ability to maintain a good working relationship with his supplier, since the buyer will not profit unless the drugs continue to flow from the seller's supplier to the seller.

Though no one of these factors alone will necessarily be sufficient – without more – to establish a mere buyer's agreement to join the conspiracy and his intent to achieve a common goal with that conspiracy, the presence of one or more of these factors furthers the inference that the buyer knew that he was part of a larger operation and hence can be held responsible as a co-conspirator.

Applying the Gibbs factors, the evidence presented with regard to Joyce does not show a lengthy relationship with Ricks; there was certainly no establishing method of payment; there were no “standard transactions”; and no demonstration of mutual trust. The amounts involved were very small.

Viewing the evidence in a light most favorable to the government does not support an inference that Joyce’s attempted drug purchases were circumstantial evidence of her intent to join the conspiracy. Moreover, there is no other evidence that supports such an intent. Joyce’s motion will be granted.

II. JOHN LATOURETTE

Latourette argues that the evidence is insufficient to:

- (1) Establish that he was in agreement with other members of the conspiracy to distribute drugs; and
- (2) Establish an amount greater than 50 grams of crack cocaine.

Between the period of time from October 24, 1999 to December 11, 1999, a period of about seven weeks, 22 taped calls between Latourette and Michael Ricks were played to the jury. The calls establish an ongoing relationship between Latourette and one of the leaders of the conspiracy.

While many involved small amounts indicating personal use only, at least two showed that Latourette intended to distribute drugs to a third party. Other calls referring to cooking are clearly references to crack rather than powder cocaine. Indeed, Latourette’s wife understood that a 5-0 is a reference to a \$50 piece of rock cocaine (N.T. 2/12/01 at 17). In addition, there is a showing of trust between Ricks and Latourette.

On December 10, 1999, Latourette loaned his van to Ricks for a trip to New York where Ricks got his drugs. Latourette actually drove the van and was accompanied by Ricks and April Halladay, both of whom have plead guilty to the conspiracy alleged in the indictment. April Halladay had marijuana and 5.3 grams of crack cocaine on her person. (*See* N.T. 2/7/01 at 198-199). Latourette had frequent contact with one of the conspiracy leaders. It is fair to infer a level of mutual trust and also to infer that Latourette was more than just a drug purchaser.

The verdict of the jury as to guilt is clearly supported by the evidence. His motion will be denied in that regard. As to drug amounts attributable to Latourette, the court will discuss its analysis of this issue in conjunction with the analysis of John Miller's argument.

III. JOHN MILLER

Defense counsel candidly states in his brief that the jury was within its rights to interpret the telephone call evidence to believe and decide that Miller was involved in a conspiracy to distribute small amounts of marijuana and small amounts of crack. However, he strenuously argues that the jury was "not within its rights to interpret the telephone call evidence to believe that John Miller was involved in a conspiracy to distribute 50 grams or more of crack." The court agrees. There is no doubt that the jury was correct in finding him to be a member of the conspiracy under Count One.

The evidence regarding the amount of crack cocaine involved overall in the conspiracy charged in the indictment showed that it was in excess of 50 grams. The evidence with regard to Miller and Latourette shows that they were always involved in very small amounts (usually 1/4 of a gram for personal use). The record does not support a finding that their own personal involvement was 50 grams or more. Nevertheless, the question is: was the amount of

crack cocaine involved in this conspiracy (more than 50 grams) reasonably foreseeable to them?

My conclusion is that the record in this case does not support a finding that the scope of this conspiracy, which was more than 50 grams of crack cocaine, was reasonably foreseeable to either Latourette or Miller. At least five grams was, however.

As previously stated, Latourette and Miller's involvement was primarily in the obtaining of small amounts for their own personal use. There were limited occasions where they may have gotten small amounts for others. But there simply is no evidence that the many sales that Michael Ricks and others were responsible for were in furtherance of Latourette's jointly undertaken criminal activity with Ricks or Miller's jointly undertaken activity with Ricks. In addition, there is no evidence of any kind of pooling of resources by either Latourette or Miller with other small or large scale drug dealers in the conspiracy.

Miller has raised issues which he feels entitle him to a new trial. The verdict of guilty was clearly not against the weight of the evidence, as previously stated. The other allegations of error involve an alleged inflammatory remark by the Assistant United States Attorney during his closing. This matter was correctly cured by a cautionary instruction, assuming it was improper in the first instance. Secondly, the transcripts of the tapes were given to the jury after appropriate instructions by the court. This motion will not be granted.

Based upon the foregoing, the following Order is entered:

AND NOW, this 26th day of February, 2002 it is hereby **ORDERED** that:

(1) The Motion for Judgment of Acquittal of Defendant Pamela Joyce (Docket No. 283) is **GRANTED**, and judgment of acquittal is hereby entered.

(2) The Motion for Judgment of Acquittal of Defendant John Latourette (Docket No. 282) is **DENIED**.

(3) The Motion for Judgment of Acquittal or for a New Trial of John Miller (Docket No. 281) is **DENIED**.

With regard to defendants John Latourette and John Miller, the court finds that the record supports a finding that the scope of the conspiracy was 50 grams of crack cocaine or more, but that the amount reasonably foreseeable to John Latourette and John Miller was 5 grams of crack cocaine or more, but less than 50 grams.

BY THE COURT:

RONALD L. BUCKWALTER, J.