

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

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL NO.</b>	<b>02-772-07</b>
	:		<b>02-772-09</b>
	:		<b>02-772-12</b>
	:		
<b>v.</b>	:		
	:		
<b>SCOTT GOSIZK</b>	:		
<b>HARVEY WAUGH</b>	:		
<b>CHARLES WHITFIELD</b>	:		

**MEMORANDUM OPINION**

**Savage, J.**

**November 1, 2005**

After an eight day trial, a jury found four of six defendants guilty of conspiracy to commit robbery and various different substantive charges.<sup>1</sup> Three of those defendants<sup>2</sup>, Scott Gosizk, Harvey Waugh and Charles Whitfield, have filed motions pursuant to FED. R. CRIM. P. 29 and 33, requesting judgment of acquittal, or in the alternative, a new trial. Waugh and Gosizk contend they are entitled to a judgment of acquittal because the evidence established multiple conspiracies rather than the single conspiracy alleged in the indictment. Whitfield and Gosizk allege a *Brady* violation because the government failed to disclose information that one of the government's cooperating witnesses who testified at trial had falsely accused a fellow inmate of supplying him drugs which were discovered while he was in prison.

Gosizk also argues that the evidence was insufficient to sustain his conviction

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<sup>1</sup> Gosizk and Waugh were each also found guilty of Hobbs Act robbery; and Whitfield, interstate transportation of stolen property. Fifteen defendants were charged in the indictment. One died and eight pleaded guilty prior to trial. The remaining two were acquitted at the trial.

<sup>2</sup> The fourth guilty defendant, Michael Sharpe, withdrew his post verdict motions, and has since pled guilty and has been sentenced.

because the evidence established as a matter of law that he had withdrawn from the conspiracy. Gosizk further contends that there was no physical evidence to corroborate the inconsistent testimony of two cooperating witnesses placing him at the scene of the attempted robbery of a gas station attendant.

I conclude that the evidence established a single conspiracy, the unintentionally omitted information from the prison authorities was cumulative impeachment evidence that would not have probably resulted in an acquittal, there was sufficient evidence of Gosizk's involvement in the attempted robbery to support the jury's verdict, and the jury's rejection of his withdrawal defense was within its province. Therefore, the motions will be denied.

### **Legal Standard**

Ruling on a motion for judgment of acquittal under Rule 29(c) requires the court to determine whether there was sufficient evidence to establish each element of the offense charged. Viewing the evidence and the reasonable inferences drawn from it in the light most favorable to the government, the court must determine whether any rational juror could accept the evidence as sufficient to support the conclusion that the defendant is guilty beyond a reasonable doubt. *U.S. v. Smith*, 294 F.3d 473, 476 (3d Cir. 2002). In considering a Rule 29(c) motion, the court cannot weigh the evidence nor assess the credibility of the witnesses, functions left solely for the jury.

A defendant may be granted a new trial "if the interest of justice so requires." FED. R. CRIM. P. 33(a). A new trial may be granted if the court finds that (1) there is a serious danger that a miscarriage of justice has occurred, resulting in the conviction of an innocent person, *U.S. v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002), or (2) where a trial error or a combination of errors substantially influenced the jury's decision. *U.S. v. Copple*, 24 F.3d

535, 547 n.17 (3d Cir. 1994).

### **The Conspiracy**

Viewed in the light most favorable to the government, the evidence demonstrated the existence of a long term, large scale burglary-robbery operation. In July 1999, Christopher Plytas and Mark Daniels formed a gang to commit burglaries and robberies. For the next two years, the confederacy committed numerous burglaries and armed robberies throughout eastern Pennsylvania and southern New Jersey, netting more than \$500,000 in cash and merchandise.

Central to the conspiracy were Plytas, Daniels and William Myrick, with Plytas at the head. During the course of the conspiracy, numerous other persons came and went, received various proceeds, and played various roles, ranging from lookout, planner, driver, robber and burglar. Success depended upon the coordination of the team members.

The confederates, each performing different duties and often switching roles, used a similar method for committing the burglaries. Businesses which appeared easy prey were located and surveilled. Once the target was selected, the conspirators returned at night in dark clothing and masks. Using scanners, they knew where the local police were. They used two-way radios to communicate with each other and to avoid detection. One cut the alarm lines while others hid nearby to see if police responded. If the police responded, the defendants waited until they left and then penetrated the building.

In committing the robberies, the gang likewise targeted businesses. Acting on information about the establishment's banking routine provided by other confederates, the robbers waited outside the businesses for employees to leave with bank deposit bags. They then threatened the victims by brandishing guns. In the robberies as well as the

burglaries, the team used a driver to operate a getaway vehicle.

### **Single Versus Multiple Conspiracies**

Where the indictment charges a single conspiracy and the evidence demonstrates the existence of several separate conspiracies, there is an impermissible variance. “However, a finding of a master conspiracy with sub-schemes does not constitute a finding of multiple, unrelated conspiracies and, therefore, would not create an impermissible variance.” *U.S. v. Smith*, 789 F.2d 196, 200 (3d Cir. 1986).

In determining whether there was a single conspiracy or multiple conspiracies, we ask three questions. *U.S. v. Lee*, 359 F.3d 194, 207 (3d Cir. 2004). First, was there a common goal among the conspirators? *Id.* Second, did the agreement contemplate a continuous result that could not continue without the ongoing cooperation of the conspirators? *Id.* Third, to what extent did the participants overlap in the various dealings? *Id.*

In conducting the analysis, we must keep in mind that each defendant need not have known all of the details or all of the participants in order to find a single conspiracy. *Lee*, 359 F.3d at 208. Consequently, “a single conspiracy is not transformed into a series of unrelated, multiple conspiracies merely through a change in membership.” *U.S. v. Kelly*, 892 F.2d 255, 259 (3d Cir. 1989). Nevertheless, the government must show that a defendant claiming a variance knew that he was a part of a larger operation. *U.S. v. Quintero*, 38 F.3d 1317, 1337 (3d Cir. 1994).

Each one of these defendants knew that Plytas headed a burglary-robbery ring. Each wanted money and knew he could obtain it from participating in the conspiracy. Although they did not know the duration of the conspiracy nor all of the members of it, they

knew it existed for the purpose of obtaining money through burglaries and robberies. They willingly joined the gang. Although neither of these defendants participated in more than one burglary or robbery, each knew that the single event was only a part of the overall conspiracy in which others played overlapping roles.

Gosizk was attracted to the conspiracy while he was living in a motel without any money after having been released from prison. He sought employment with the conspiracy. His uncle, Plytas, agreed to let Gosizk participate in a robbery of a gas station in Princeton, New Jersey. On December 20, 2000, Gosizk, Plytas, Myrick and Gosizk's girlfriend drove to Princeton where they dropped the girlfriend off at a nearby Dunkin' Donuts. As Plytas and Gosizk approached the area of the gas station on foot, Gosizk walked away and did not take part in the actual robbery. He returned to the car where he waited while Myrick and Plytas attempted to rob the gas station attendant. Myrick and Plytas ran from the scene and jumped into the car which Gosizk drove from the area.

Whitfield was recruited by Myrick to join the conspiracy as a driver and lookout in the burglary of a beer distributorship in Glassboro, New Jersey, on March 19, 2001. Whitfield drove Plytas, Daniels and Myrick from Pennsylvania to the beverage store. He acted as a lookout and stayed in contact with his confederates by walkie-talkie. In fact, he alerted Myrick when the police responded to an alarm and advised him when the police had left. Plytas, Daniels and Myrick then proceeded to burglarize the store. They were driven from the store to Pennsylvania by Whitfield who was paid \$600.00 for his role.

Waugh, enamored with the gang's life style, sought membership in the conspiracy. With Plytas acting as the driver of the getaway car, Waugh and Daniels robbed the night manager of a grocery store in Edgewater, New Jersey. Wearing dark clothing and ski

masks, and armed with guns, Daniels and Waugh robbed the manager, who was walking from the store to her vehicle after closing the business. When Waugh and Daniels found that the woman did not have any money from the business, they demanded her handbag from which they took the keys to the store and \$15.00.

Whether a single conspiracy or multiple conspiracies existed is a question for the jury. *U.S. v. Perez*, 280 F.3d 318, 345 (3d Cir. 2002). Here, the jury was specifically instructed that it could not find the defendants guilty on the conspiracy count if it found there were multiple conspiracies rather than the single conspiracy charged in the indictment. The jury found a single conspiracy. Therefore, because there was sufficient evidence from which the jury could have concluded that there was a single conspiracy as opposed to a series of unrelated smaller agreements between the participants, the conspiracy verdict will not be disturbed.

### **Undisclosed Impeachment Evidence**

Whitfield and Gosizk complain that although they were provided information about Plytas' having been caught with heroin in the Federal Detention Center while awaiting trial, they were not apprised that he had accused a fellow inmate of supplying him the drug instead of his father, who had actually provided it to him on a visit. They contend that the missing information was valuable impeachment evidence that could have affected the outcome of the trial.

Although the defendants do not contend that the prosecutors intentionally withheld the information, they still characterize it as a *Brady* violation. There has been no showing of when the prosecution learned that Plytas had falsely accused his fellow inmate. In any event, the defendants were not prejudiced by the non-disclosure.

Newly discovered evidence will justify granting a new trial only if the defendant shows that (1) the evidence was discovered after trial; (2) the defendant moved diligently to discover it; (3) the evidence is not merely cumulative or impeaching; (4) it is material; and (5) it would probably produce an acquittal. *U.S. v. Adams*, 759 F.2d 1099, 1108 (3d Cir. 1985). Assuming that the defendants satisfy the first two requirements, I shall address the remaining three. Before doing so, I note that Plytas was not the only witness who implicated the defendants. His testimony was bolstered by that of the two other leaders of the gang, Myrick and Daniels. Thus, Plytas was not, as the defendants characterize him, the government's "star witness."

The false accusation of another inmate was cumulative impeachment evidence. It was just one more lie in a string of prevarications. The government had provided the defense voluminous information regarding Plytas' extensive criminal activities, his use of various aliases when confronted by police, his making false police reports, his committing crimes while on bail and his lengthy prior criminal history. It was just one more instance, among many, of his propensity for fabrication and lawlessness.

As to materiality, the newly discovered evidence went only to impeachment. It did not implicate Plytas' testimony regarding the nature of the conspiracy and the various roles played by the participants, particularly these defendants.

Given that defense counsel had abundant impeachment evidence which they thoroughly and expertly exhausted on cross examination, and the government presented testimony implicating each of these defendants from two other cooperating witnesses, the defendants cannot demonstrate that the cumulative impeachment evidence which had not been provided prior to trial would have probably resulted in an acquittal. In short, the

impeaching evidence would not have significantly impaired the believability of Plytas' testimony.

### **Withdrawal Defense**

Goszick also complains that there was no physical evidence to corroborate the accomplice testimony of Plytas and Myrick implicating him. He argues that the evidence is actually inconsistent with his having been at the scene of the robbery. He points to the evidence that there were only two sets of footprints found near the scene which confirms his claim that he had withdrawn from the conspiracy.

“[U]ncorroborated accomplice testimony may constitutionally provide the exclusive basis for a criminal conviction,” especially where the defense had ample opportunity to cross examine the witnesses and the jury was specifically instructed as to its role in weighing the witnesses' testimony and credibility. *Perez*, 280 F.3d at 344.

The evidence was sufficient for the jury to find that Goszick was a part of the conspiracy and the robbery. The government's evidence showed that Goszick had joined Plytas and Myrick willingly with the intent to participate in the robbery of the gas station because he needed money. Although he did not actually approach the gas station attendant, he traveled with his accomplices to New Jersey to commit the robbery and he drove the getaway vehicle. Therefore, the testimony of Myrick and Plytas was enough to support the jury's finding that Goszick participated in the robbery, if not as the actual robber, certainly as the getaway driver.

Goszick did not testify. He developed his withdrawal defense through cross examination of the government's witnesses and a police detective's finding only two sets of footprints, pointing to Myrick and Plytas as the sole perpetrators of the robbery. Both

