

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
: :
v. : :
: No. 05-216
JELANI LEE : :
and : :
TOMMY SPURILL : :
and : :
JAMES KOLLORE :

Stengel, J.

March 30, 2006

Memorandum and Order Regarding James Kollore's Pretrial Motions

In this drug trafficking case, James Kollore is charged with possession with intent to distribute more than 5 grams of crack cocaine and possession with intent to distribute more than 5 grams of crack cocaine in a school zone. He is charged along with Tommy Spurill and Jelani Lee.¹ The defendants were arrested by Lancaster City Police on January 7, 2005, after a traffic stop. An indictment was returned on April 14, 2005, a superseding indictment on August 4, 2005, and a second superseding indictment on September 29, 2005.

The defendants together filed twenty-three (23) pretrial motions and the government has filed its response to those motions. A hearing was held on January 12, 2006, on the motions to suppress certain physical evidence, identification evidence, and certain statements. The remainder of the motions are capable of resolution based upon

¹Defendant Jelani Lee is also charged with possession with intent to distribute more than 50 grams of crack cocaine.

the legal arguments raised in the memoranda filed by the parties. This memorandum addresses seven (7) of the motions filed by James Kollore.

I. Factual Background

On January 7, 2005, Officer Marguerita Wagner was interviewing a complainant on the first block of South Mary Street in the City of Lancaster at approximately 7:42 p.m. As she was discussing a parking issue with this complainant, Officer Wagner heard a vehicle come from Manor Street onto Mary Street and noticed that the vehicle was traveling at a high rate of speed for the neighborhood and the conditions, that is, approximately 40 to 45 miles per hour. She noted that the car came within three feet of her, that the driver side window started to go up as it passed her, and that the windows of the car were dark tinted. Officer Wagner described the car as a silver or gray Dodge Magnum; she could not see inside the car, nor could she get a registration from the vehicle. She recalls that the vehicle was very dirty, but that the back window was partially cleaned. Officer Wagner further saw the Dodge Magnum go north on South Mary Street and perform a “rolling stop” at the intersection of South Mary and West King Streets. Officer Wagner got in her patrol car and tried to catch up with the Dodge Magnum. She was unsuccessful with this. She then called Sgt. Gary McCrady, her patrol supervisor, and told him to watch for the Dodge Magnum which she described as “driving recklessly through the city.”

After receiving the initial call from Officer Wagner, Sgt. McCrady met briefly with Officer Wagner in the Water Street Rescue Mission parking lot near Prince and Conestoga Streets in Lancaster. She described the silver/gray Dodge Magnum going through the stop sign. Sgt. McCrady recalled an incident at the Manor Tavern, an establishment in the vicinity of South Mary and Manor Streets, involving a shooting and suspected drug dealers from New York. Officer McCrady recalled that there was a Dodge Magnum involved, and he recalled that the car was of a "lighter color." The Lancaster City Police produced a line-up memorandum regarding the car which had been provided to Sgt. McCrady and other officers at a roll call in October, 2004.

After meeting with Officer Wagner, Sgt. McCrady proceeded north on Queen Street and observed the Dodge Magnum. At that point, he pulled the car over on the 600 block of North Queen street. The vehicle had a New York registration plate. At the time Sgt. McCrady stopped the Dodge Magnum, he also recalled information about a Taquan Isaac, who had been arrested by Lancaster City Police and who had threatened the police. Isaac was known to Sgt. McCrady as a suspect in at least one shooting in New York City, and was suspected of involvement with drug dealing in Lancaster. Isaac had been using a like colored Dodge Magnum, and it was Isaac's Dodge Magnum that was described in the line-up memorandum. At the time of Isaac's arrest at the Manor Tavern, the Dodge Magnum went missing.

Sgt. McCrady testified that he spotted the Dodge Magnum approximately ten minutes after meeting with Officer Wagner, that it was proceeding north on Queen Street, and that it was going well over 35 miles per hour in an area with a posted speed limit of 25 miles per hour. He recalls the windows as being dark tinted and felt that this might be the car Officer Wagner saw on South Mary Street. Officer McCrady stopped the vehicle at approximately 7:57 p.m. He approached the vehicle from the passenger side and noted the vehicle was occupied by an African-American male driver, with an African-American male in the front passenger seat, an African-American male in the right rear passenger seat, and a white female in the left rear passenger seat. Sgt. McCrady noticed a lot of movement among the occupants of the vehicle while he was approaching. With knowledge of the contents of the "line-up memorandum" and upon viewing these movements in the vehicle, Sgt. McCrady radioed for back-up assistance from other officers. Sgt. McCrady then went to the passenger side of the car and spoke with the front passenger and the driver through the open passenger window. The driver provided him with a New York driver's license identifying him as Jelani Lee. Lee also produced a registration card showing that the vehicle was leased from Enterprise Rentals in New York. The front seat passenger identified himself as "John Terry" and Sgt. McCrady noted that the rental agreement was in John Terry's name and was dated November 26, 2004. McCrady further noted that the vehicle should have been returned to Enterprise

Rentals before November 29, 2004. Officer McCrady ran Jelani Lee's driver's license and found that it was suspended in both Pennsylvania and New York.

Officer McCrady testified at the hearing he had some experience with rental vehicles with expired rental agreements. He testified that he had encountered a number of these expired rental agreements in the recent past. He recalled that the rental companies generally preferred the police contact them so that they could take custody of the vehicle.

After being radioed by Sgt. McCrady, Officer Wagner drove to the 600 block of North Queen Street in the City of Lancaster and identified the stopped vehicle as the same vehicle she had seen on South Mary Street. At the hearing she testified that she was "immediately sure it was the same car."

Sgt. McCrady decided to have the occupants step out of the Dodge Magnum. The police removed each occupant from the vehicle, one at a time, and performed a pat-down search on each of them. Officer Wagner conducted the pat-down of the female passenger, identified as Lindsay Boyer. During the pat-down, Officer Wagner felt hard objects, that she testified felt like rocks, inside both cups of Lindsay Boyer's bra, and asked her what they were. Boyer whispered to Officer Wagner "its crack, but it's not mine, and don't tell them I told you." Officer Wagner informed Boyer that she was under arrest. Boyer noted that the drugs were not her's and stated that she was not going to take the fall for something that wasn't her's. Boyer further told Officer Wagner that Jelani

Lee had given her the first bag, and that the rear passenger (James Kollore) had given her the smaller bag. Boyer told Officer Wagner that the men had picked her up earlier in the evening, and had told her to hide the drugs when Sgt. McCrady activated his lights and pulled the Dodge Magnum over on North Queen Street. A subsequent field test on the substance of each bag was performed for cocaine.

All four occupants of the car were placed under arrest. The police searched Jelani Lee and recovered \$977.00 in cash, as well as a motel room key. The police found \$562.00 on the person of James Kollore. This cash was wrapped in one hundred dollar increments. All four were then taken to the Lancaster City Police Department.

II. James Kollore's Motion to Preclude Introduction of Evidence of Prior Convictions Under Fed. R. Evid. 404(b)

James Kollore has four prior criminal convictions. On or about October 21, 1993, Kollore was convicted of criminal possession of a weapon-third degree, a class D felony, in the Court of Queens County, New York and was sentenced to serve two and a half to seven years imprisonment. On September 14, 1995, he was convicted of criminal possession of a weapon-third degree, a class D felony, in the Court of Suffolk County, New York, and was sentenced to one to three years imprisonment. On September 25, 1991, in the Court of Suffolk County, New York, Kollore was convicted of a felony drug offense involving the possession and delivering of marijuana, and was sentenced to five years probation. Further, on November 21, 1994, in the Circuit Court of Pittsylvania,

Virginia, Kollore was convicted of a felony grand larceny-auto offense, and it is unclear whether he was ever sentenced.

As a part of its case in chief, the government seeks to introduce evidence of Kollore's prior drug offense to refute any claims or other evidence that Kollore lacked the requisite knowledge or intent to distribute crack cocaine. The government does not seek to introduce evidence of Kollore's other three convictions during their case in chief. This issue is governed by Fed. Rule of Evidence 404(b) which states:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. . .

The admission of 404(b) evidence is within the District Court's discretion limited only in circumstances which are clearly contrary to reason and not justified by the evidence. U.S. v. Murray, 103 F.3d 310 (3d Cir. 1997). See also Becker v. ARCO Chemical Company, 207 F.3d 176 (3d Cir. 2000). In the Third Circuit, the court is required to place on the record a clear explanation of the basis for the admission of Rule 404(b) evidence. Murray, supra. The United States Supreme Court provides guidance for evaluating and admitting 404(b) evidence: the evidence should be admitted (1) if it is offered for a proper purpose, (2) if it is relevant, (3) if the evidence's probative value is not substantially outweighed by its unfair prejudice, and (4) if the court properly instructs the jury that it should consider the evidence only for the proper purpose for which it was

admitted. See Huddleston v. United States, 485 U.S. 681, 691-92 (1988). So long as the District Court explains its reasons, relevant evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. See United States v. Sampson, 980 F.2d 883, 889 (3d Cir. 1992). Unfair prejudice suggests a decision on an improper basis.²

Given the facts in this case, it is reasonable to assume the defendant will argue that the drugs found on Ms. Boyer are not his, and that he lacked the requisite intent and/or knowledge to distribute the crack cocaine. To rebut this lack of intent or knowledge, the government would like to present evidence that the defendant has been involved in drug trafficking prior to the incident currently charged. Furthermore, the government would like to use the conviction to show that the defendant “had access to drugs” and that “he was willing and hoping to engage” in large scale “drug transactions.” United States v. Zolicoffer, 869 F.2d 771, 773 (3d Cir. 1989).³

In this case, the prior drug conviction is offered for a proper purpose: as evidence of state of mind and to rebut the defendant’s expected defense of lack of knowledge or intent to possess and distribute the crack cocaine. United States v. Givan, 320 F.3d 452, 461 (3d Cir. 2003). Furthermore, the conviction is highly relevant because having a prior

²“The term “unfair prejudice,” as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” Old Chief v. United States, 519 U.S. 172, 180 (1997).

³Unlike Zolicoffer, however, in which the prior bad act was a recent offer by the defendant to supply specific amounts of drugs, Kollore’s prior drug offense occurred over ten years ago.

drug conviction makes it more probable than not that the drugs involved in the indictment were possessed knowingly and with the requisite intent. Id. The probative value of introducing the prior drug conviction outweighs its prejudicial effect.

I will deny the defendant's motion to preclude evidence of his prior drug conviction without prejudice as to his right to raise the issue again at trial when the court can more fully consider the context in which the evidence is offered. At this point in the proceeding, the government has shown that the prior conviction is offered for a proper purpose, is relevant, and is not unfairly prejudicial. Once admitted, an appropriate limiting instruction will be given to the jury.

III. Motion to Require Notice if Planning on Introducing 404(b) Evidence

In this case, the government seeks to introduce 404(b) evidence at trial to refute any claim that Kollore lacked the requisite intent and/or knowledge to possess the crack cocaine. This memorandum has more fully addressed the admissibility issue of Kollore's prior convictions under sub-section II. In terms of notice to the defendant that the government intends to introduce the 404(b) evidence, the government should make its intentions clear. To the extent that the government intends to use 404(b) evidence of prior bad acts by Kollore that are not covered in this memorandum, the government shall provide notice to Kollore one (1) week before the beginning of trial.

IV. Motion to Preclude Using Prior Weapons Offenses for Impeachment

The defendant James Kollore has filed a motion to preclude the government from introducing his prior possession-of-weapons convictions for impeachment purposes in the event the defendant chooses to testify at trial. The admissibility of impeachment evidence is governed by Fed. R. Evid. 609. Fed. R. Evid. 609(a)(1) provides that “evidence that an accused has been convicted shall be admitted if the probative value outweighs its prejudicial effect.” Fed. R. Evid. 609(a)(1). Additionally, those convictions for which a witness was released from custody more than ten years before trial are admissible only if the court finds that “the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” Fed. R. Evid. 609(b). The trial court can reserve making its final ruling on this issue until after the defendant testifies. See Ohler v. United States, 529 U.S. 753, 758 n.3 (2000).

The Third Circuit has set forth four basic factors to be considered in balancing the probative value and prejudicial effect when applying Rule 609(a)(1): “(1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the witness’ testimony to the case; [and] (4) the importance of the credibility of the defendant.” Government of the Virgin Islands v. Bedford, 671 F.2d 758, 761 n.4 (3d Cir. 1982). Accordingly, evidence that may have been inadmissible under Rule 404(b) is nevertheless admissible under Rule 609 because a testifying defendant’s credibility is the central issue. See United States v. Haslie, 160 F.3d 649 (10th Cir. 1998).

In this case, the crack cocaine was originally found on the person of Ms. Boyer. By pleading not guilty, Kollore denies that he possessed the crack cocaine. Ms. Boyer can be expected to testify at trial that the crack cocaine found on her person belongs to others, including Mr. Kollore. If Kollore testifies, his credibility will be at issue. As the Third Circuit has stated, “evidence of a felony conviction is probative of credibility.” United States v. Johnson, 302 F.3d 139, 152 (3d Cir. 2002). Furthermore, other courts have admitted similar types of evidence to impeach a criminal defendant. See United States v. Castor, 937 F.2d 293, 298-99 (7th Cir. 1991) (admitted evidence of defendant’s prior weapons offenses for purposes of impeachment based upon “centrality of the credibility issue”); United States v. Johnson, 720 F. 2d 519, 522 (8th Cir. 1983) (after counsel for the defendant elicited testimony on direct regarding the defendant’s prior weapons offense, Eighth Circuit found the district court did not abuse its discretion in its pretrial ruling that admitted the prior weapons offense for impeachment); and United States v. Butch, 48 F. Supp. 2d 453, 466 (D.N.J. 1999) (admitted prior state court conviction of “aggravated assault, driving under the influence and failing to comply with his duty to . . . render assistance in connection with an accident involving death or injury” to impeach the defendant).

In this case, although Kollore’s prior weapons convictions are non-crimen falsi felonies, it is entirely possible the probative value of introducing these convictions outweighs their prejudicial effect. The age of the conviction is an issue. At this point,

this court has certain information about parole violations and subsequent sentences served by the defendant on these charges. (See Section V. below.) It will be necessary to confirm all information about all sentences served before these convictions can be used at trial. With the availability of this information at trial, the court will be in a better position to rule on the use of these convictions for impeachment.

I will deny Kollore's motion to preclude the government's use of Kollore's prior weapons offenses for purposes of impeachment without prejudice as to Kollore's ability to raise the issue again at trial. An appropriate limiting instruction shall be given to the jury if the convictions are introduced for impeachment.

V. Motion to Preclude Testimony of Parole Status

At the time of his arrest, Kollore was on parole in the State of New York as a result of his October 21, 1993, conviction for criminal possession of a weapon, and the imposition of a new sentence of 44 months to 11 years imprisonment on February 3, 2004, following his violation of parole. The government argues that in addition to the reasons for admission of Kollore's prior convictions, the fact that any conviction in this matter may constitute a violation of his parole and result in the imposition of "back time," may give him an even greater motive to testify falsely. The government then argues that the parole status should be admissible impeachment evidence as it speaks to Kollore's possible bias. Because I accept the government's argument that Kollore's parole status

does speak to his possible motive to testify falsely, I will deny Kollore's motion to preclude questions to him about his parole status or other evidence as to his parole status.

VI. Motion to Preclude Introduction of Hearsay Testimony Regarding Investigation of NY Drugdealers using a Similar Car

The government, through its response to the defendant's motions, has agreed to instruct its witnesses at trial to not mention the investigation of a prior shooting and a New York drug dealer with a similar car. In order to avoid viewing the car stop in a vacuum, however, the government has requested, through a separate motion in limine, to have Sgt. McCrady testify at trial that the Dodge Magnum stopped in this case was consistent with a description of a vehicle that had been seen in the same vicinity and was related to a previous crime, without making a specific reference to the type of crime. The testimony proposed by the government is not hearsay as it is not being offered to prove the truth of the matter asserted. Rather, Sgt. McCrady's expected testimony will speak to his state of mind prior to and during the traffic stop. I will deny the defendant's motion to preclude introduction of the testimony and will grant the government's motion in limine based upon the limited scope of its proposed inquiry.

VII. Motion to Sever Trials of the Three Defendants

James Kollore has been charged along with Tommy Spurill and Jelani Lee with drug trafficking offenses. The United States has indicated its intention to try all three defendants together. James Kollore has filed a motion to sever his trial. Fed. R. Crim. P. 14 permits severance of an otherwise properly joined defendant "if it appears that the

defendant. . . is prejudiced by a joinder of offenses or of defendants.” The law favors joint trials of defendants indicted together. Zafiro v. United States, 506 U.S. 534 (1993). Zafiro instructs that in certain circumstances defenses which are mutually antagonistic or irreconcilable may be so prejudicial that severance is mandated. The Supreme Court has recognized that Rule 14 does not require severance when the defendants present mutually antagonistic defenses. The Supreme Court has ruled that even if a defendant shows prejudice as a result of mutually antagonistic defenses, severance is not required and “the tailoring of the relief to be granted, if any, is left to the district court’s sound discretion.” Zafiro at 539. A district court should grant a severance motion under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence. Zafiro; United States v. Palma-Ruedas, 121 F.3d 841 (3d Cir. 1997); United States v. Balter, 91 F.3d 427 (3d Cir. 1996).

This is not a complex case where the defendants have “markedly different degrees of culpability.” See Zafiro, 506 U.S. at 539. Nor have the defendants established that there is a “Bruton problem”⁴; i.e., where the admission of a statement against one defendant necessarily inculpatates another. As to levels of culpability, the indictment contains more charges against Jelani Lee because he was charged exclusively with possession with intent to distribute crack cocaine from the motel room. All three

⁴Bruton v. United States, 391 U.S. 123 (1968).

defendants are charged with possession with the crack cocaine in the car. This crack cocaine, which was recovered by the police from the person of Lindsey Boyer, exposes each of the three defendants equally to culpability. From the arguments of counsel and from the evidence presented at the suppression hearing, it appears that the majority of the evidence in this case will be admitted against all three defendants. The questions for the jury will be who possessed the crack cocaine, and who had the intent to distribute the crack cocaine. The jury will be capable of making separate decisions on these issues as to each of the three defendants. The motion to sever will, for this reason then, be denied.

VIII. Motion to Preclude Evidence of Other Crimes and Bad Acts Revealed in Police Interviews

Kollore seeks to preclude testimony from police officers that Kollore allegedly told them that he could quickly and effectively obtain specific amounts of drugs. This evidence is considered bad act evidence and is governed by Fed. R. Evid. 404(b). Similar to Zolicoffer, Kollore stated that he could facilitate the sale and purchase of specific amounts of crack cocaine. This testimony may be used by the government to show Mr. Kollore's state of mind or to refute any claim that the defendant lacked either the knowledge or intent to distribute crack cocaine. I find that the evidence of Kollore's discussions with police investigators regarding specific amounts of drugs he could obtain is admissible as to his state of mind. The evidence is highly probative, not unfairly prejudicial, and is offered for a legitimate purpose: to prove an element of one of the

crimes charged. I will give an appropriate limiting instruction to the jury regarding the specific purpose for which this evidence will be admitted.

An appropriate Order follows.

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ORDER

AND NOW, this 30th day of March, 2006, upon consideration of the defendant James Kollore's pretrial motions, the government's response thereto, and oral arguments held on January 13, 2006, it is hereby **ORDERED**:

1) Defendant's Motion to Preclude the Introduction into Evidence of Kollore's Prior Convictions during the Government's Case in Chief pursuant to Fed. R. Evid. 404(b) (Docket # 57) is **DENIED**. The Government's cross-motion to admit said evidence (Docket # 84) is **GRANTED**.

2) Defendant's Motion to Preclude the use of Kollore's prior weapons offenses for purposes of impeachment in the event Kollore chooses to testify at trial pursuant to Fed. R. Evid. 609 (Docket # 57) is **DENIED**. The Government's cross-motion to admit said evidence (Docket # 87) is **GRANTED**.

3) Defendant's Motion to Require that the Government give notice to the defendant in the event the Government plans on introducing evidence pursuant to Fed. R.

Evid. 404(b) (Docket # 57) is **GRANTED**. The Government shall notify Kollore at least one (1) week prior to trial if it intends to utilize Fed. R. Evid. 404(b) evidence.

4) Defendant's Motion to Preclude Testimony of Kollore's Parole Status (Docket # 57) is **DENIED** to the extent that the Government may introduce evidence of Kollore's parole status for purposes of impeachment, should Kollore choose to testify, pursuant to Fed. R. Evid. 609.

5) Defendant's Motion to Preclude the Introduction of Evidence regarding an ongoing investigation of New York drug-dealers driving a similar car as the defendants (Docket # 57) is **DENIED**. The Government's Motion regarding said evidence (Docket # 85) is **GRANTED** to extent as stipulated in the Government's response to the Defendant's Motion to Preclude.

6) Defendant's Motion to Sever Trials of the Three Defendants (Docket # 66) is **DENIED**.

7) Defendant's Motion to Preclude Introduction of Evidence of Other Bad Acts Revealed during Kollore's interviews with the investigating officers pursuant to Fed. R. Evid. 404(b) (Docket # 78) is **DENIED**. The Government's cross-motion to admit said evidence (Docket # 84) is **GRANTED**.

BY THE COURT:

s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.