

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 : NO. 05-510
 v. :
 :
HASKELL PEAK :
 :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

April 18, 2006

Before the Court is the government's motion to admit tape recordings of certain conversations involving a confidential informant, an undercover police officer, the defendant, and other coconspirators.

Defendant argues that the conversations on these tape recordings should be excluded because they violate defendant's rights under the Confrontation Clause of the Sixth Amendment. Defendant points to Crawford v. Washington, a 2004 United States Supreme Court case in which the Court held that "testimonial" hearsay statements may only be introduced at trial if the declarant is unavailable at trial and the defendant has had a prior opportunity to cross-examine the witness. 541 U.S. 36 (2004).

Defendant contends that the statements of the confidential informant are testimonial, and should be excluded because the government has not asserted that the informant is unavailable.

The Third Circuit addressed a similar situation recently in United States v. Hendricks, 395 F.3d 173 (3d Cir. 2005). In Hendricks, the court addressed the meaning of "testimonial evidence" as used by the Supreme Court in Crawford.

In Crawford, the Court declined to define the term "testimonial statements," but did provide lower courts with several definition of the term, stating that "[t]hese formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction." One such definition is: "ex parte in-court testimony or its functional equivalent - that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonable expect to be used prosecutorially." Crawford, 541 U.S. at 51. Another is: "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 52.

The Hendricks court looked at the formulations provided by the Supreme Court and applied them to two situations: (1) to legally obtained wiretap evidence ("Title III evidence"); and (2) to evidence of conversations between some of the Defendants and a murdered confidential informant. 395 F.3d at 174.

The Hendricks court found that the Title III evidence

did not fall under the purview of Crawford, as the statements made were not "testimonial." Id. at 181. Even under the broadest of the definitions of "testimonial" set out by the Supreme Court, the court noted that the "speakers certainly did not make the statements thinking that they 'would be available for use at a later trial.'" Id. (quoting Crawford, 541 U.S. at 51.).

Similarly, in Hendricks, the statements made by the defendants and the co-conspirators in the non-Title III, confidential informant conversations, "are clearly nontestimonial statements and are thus not subject to the Crawford rule." Id. at 183 n.9. In other words, "the party admission and coconspirator portions of the disputed ... conversations are nontestimonial and thus, assuming compliance with the Federal Rules of Evidence, are admissible." Id. at 183-84; see also United States v. Hoffman, 2005 WL 762100, at *3 (E.D.Pa. 2005) (coconspirator statements may be admitted without the opportunity for cross examination).

Regarding the murdered, and thus unavailable, confidential informant, the Hendricks court noted that the informant could reasonably have expected his statements to be used prosecutorially, thus potentially placing his statements within the purview of Crawford. However, these statements were not introduced by the government for their truth. The Third

Circuit held that:

[I]f a Defendant or his or her coconspirator makes statements as part of a reciprocal and integrated conversation with a government informant who later becomes unavailable for trial, the Confrontation Clause does not bar the introduction of the informant's portions of the conversation as are reasonably required to place the defendant or coconspirator's nontestimonial statements into context.

Id. at 184; see also United States v. Johnson, 119 Fed. Appx. 415, 417-19 (3d Cir. 2005) (recordings of conversations of coconspirators and between confidential informant and defendant admissible because none of the statements were testimonial).

Here, defendant argues that the statements of the confidential informant should not be admitted by the Court because the government does not plan to call the informant at trial.¹ The government states that the statements of the informant will not be introduced for their truth. Instead, they will be offered to "put the statements of other parties to the conversations into perspective and make [the statements of other parties] intelligible to the jury and recognizable as admissions." Hendricks, 395 F.3d at 184.

Although the government has not stated that the confidential informant is "unavailable," as was the murdered informant in Hendricks, the logic of Hendricks applies here. The Hendricks court stated, "[a]s recognized by the Crawford Court,

¹ Defendant does not argue that the statements of the defendant or the coconspirators should not be admitted.

the Confrontation Clause ... 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" Hendricks, 395 F.3d at 183 (quoting Crawford, 541 U.S. at 59 n.9.). Following Hendricks, it is permissible to introduce the statements of the informant to "place the defendant or coconspirator's nontestimonial statements into context." Id. at 184.

The defendant attempts to distinguish the situation in Hendricks by stating that Hendricks only entailed a Title III wiretap. The defendant is wrong. Hendricks discussed the admissibility of a Title III wiretap in addition to recorded conversations of a confidential informant with coconspirators. In addition, defendant argues that it was not clear from the facts in Hendricks whether the confidential informant was aware he was being recorded. However, the court stated in Hendricks that "[i]t cannot be disputed that [the confidential informant] knew of the Government's surreptitious recording and documentation of these discussions." Hendricks, 395 F.3d at 182.

Pursuant to the Third Circuit's decision in Hendricks, all statements contained in the tape recordings offered by the government are admissible. The Confrontation Clause does not bar the nontestimonial statements of the defendant and coconspirators, and the statements of the confidential informant are admissible to place these statements into perspective.

The motion will be granted.

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O R D E R

AND NOW, this **18th** day of **April 2006**, upon consideration of the Government's Motion to Admit Tape Recordings (doc. no. 23) and the Defendant's Response (doc. no. 27), and after a hearing at which counsel for both parties participated, it is hereby **ORDERED** that the Government's Motion to Admit Tape Recordings (doc. no. 23) is **GRANTED**.

AND IT IS SO ORDERED.

S/Eduardo C. Robreno

EDUARDO C. ROBRENO, J.