

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
vs.	:	
	:	
MIGUEL ORTIZ,	:	NO. 11-251-08
a/k/a "Miguelito,"	:	

DuBois, J.

January 7, 2013

MEMORANDUM

I. INTRODUCTION

Defendant is charged in the Third Superseding Indictment with: one count of conspiracy to distribute five kilograms or more of cocaine, twenty-eight grams or more of cocaine base ("crack"), and marijuana, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)-(C); two counts of distribution of, and aiding and abetting the distribution of, five kilograms or more of cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2; and one count of distribution of, and aiding and abetting the distribution of, five kilograms or more of cocaine within 1,000 feet of a school, in violation of 21 U.S.C. § 860(a) and 18 U.S.C. § 2.

Presently before the Court is defendant's Motion to Preclude Testimony, which the Court denies for the reasons set forth below.

II. BACKGROUND

On May 11, 2012, defendant filed a document entitled Omnibus Pre-Trial Motions, which contained ten separate motions, including the instant Motion to Preclude Testimony. The Motion to Preclude Testimony arises from the fact that certain video footage from cameras attached to utility poles ("pole cameras") by Drug Enforcement Agency ("DEA") to record activity around a warehouse, located at 3075 Jasper Street, Philadelphia, Pennsylvania, was

missing. (Resp. at 43.) The warehouse was allegedly used in connection with the drug conspiracy and other substantive crimes charged in the Third Superseding Indictment. (Third Superseding Indictment at 2, 12, 13.) The pole cameras were installed, respectively, at the intersection of Clearfield and Jasper Street, and at the intersection of Clearfield and Helen Street. (Resp. at 43.) The pole cameras digitally recorded footage 24-hours a day, beginning January 10, 2011, and the footage was transmitted to a DEA server, such that agents working on the case could review the recordings at any time. (Id.) The missing video footage covered the period from January 12, 2011, to February 26, 2011.

During a Motions Hearing on June 21, 2012, the Government presented testimony regarding how the video footage was viewed and subsequently handled. Specifically, in the course of the investigation, DEA Special Agents David Pedrini and Paul Gimbel viewed the video footage recorded by the two pole cameras. (Motions Hearing, June 21, 2012, at 72-74) (“H1.”) Following their viewings, Special Agents Gimbel and Pedrini each created investigative reports summarizing their observations, known as DEA-6 reports. (Id.) In their reports, based on pole-camera footage, Gimbel and Pedrini claim to have observed defendant at the Jasper Street warehouse on multiple occasions. (Motions Hearing, November 30, 2012, at 42, 75) (“H3.”)

The pole cameras were removed on April 11, 2011. (Resp. at 44; H3 at 12.) Then, on April 13, 2011, DEA personnel downloaded the pole-camera footage from the central server to external hard drives. (Resp. at 44; H1 at 168.) When the downloaded footage was reviewed that same day, DEA personnel discovered that the footage from the Helen Street pole camera, from January 12 to February 26, 2011, was missing. (Resp. at 44; H1 at 23.) DEA technical personnel, in concert with the FBI and private companies responsible for the hardware and

software used to play the footage, immediately attempted to recover the missing footage. (H1 at 172-76.) This initial effort was unsuccessful. (Id.)

Anticipating that the Government would seek to have Special Agents Gimbel and Pedrini testify as to their observations of the lost footage, defendant moved to preclude any such testimony. Addressing this issue at a Motions Hearing on June 21 and 22, 2012, the Government agreed to attempt further efforts to reconstruct the missing footage from the Helen Street pole camera. (Motions Hearing, June 22, 2012, at 80) (“H2.”)

Following several months of recovery efforts, the Government reported that it had been unable to extract any relevant footage or still pictures from the hard drives that contained the Helen Street pole camera footage. (Supp. Resp. at 1-5.) Defendant thereafter renewed his motion to preclude any testimony by law enforcement agents covering the missing video footage. (Reply at 3.)

The Court conducted a second Hearing on the Motion on November 30, 2012. At that Hearing, the Government stated its intent to have Special Agents Pedrini and Gimbel testify at trial as to the missing pole camera footage on the basis of their respective DEA-6 reports. (H3 at 12.) Specifically, the Government sought to have Special Agent Gimbel testify on the basis of certain portions of his report dated February 14, 2011, designated Government Exhibit 5. (Id. at 14-16.) The Government also sought to have Special Agent Pedrini testify on the basis of certain portions of his report dated February 10, 2011, designated Government Exhibit 6. (Id.) Accordingly, the Court heard testimony from both agents regarding their authorship of the respective reports, and the observations each allegedly made of the missing pole camera footage.

Special Agent Gimbel testified that, upon viewing the footage, he typed his observations into his computer and then “cut and paste[d]” those notes directly into his formal report. (Id. at

40.) Special Agent Gimbel also testified that in writing his investigative report, Government Exhibit 5, in addition to relating his observations of the pole camera footage, he sometimes incorporated information conveyed to him by other law enforcement agents. (Id. at 52.) As a result, for certain portions of his report, Special Agent Gimbel stated that he could not be certain whether the observations described were based solely upon his own viewing of the now-missing pole camera footage, or upon information from other agents. (Id. at 51, 56.) Finally, Special Agent Gimbel stated that other portions of the report were, in fact, based entirely on his personal observations of the video footage. (Id. at 45-46, 57-58.)

For his part, Special Agent Pedrini testified that while watching the pole camera recordings, he took rough notes which he later transferred into his investigative reports. (Id. at 74.) He further stated that for the observations noted in his report at issue in this case, Government Exhibit 6, each was based solely on his own observations of the camera footage. (Id. at 74-75.)

Defendant makes several arguments in support of his motion to preclude the agents' testimony. They are addressed in turn.

III. DISCUSSION

A. Best Evidence Rule

Defendant first argues that the agents' testimony should be barred under the Best Evidence Rule, Fed. R. Evid. 1002. That rule states that the original writing, recording or photograph in question must be produced in evidence. However, Fed. R. Evid. 1004 eliminates this requirement where "all the originals are lost or destroyed, and not by the proponent acting in bad faith." The Advisory Committee notes to Fed. R. Evid. 1004 state that "if failure to produce the original is satisfactorily explained, secondary evidence is admissible. . . . The rule recognizes

no ‘degrees’ of secondary evidence.” As such, if the Court finds that the Helen Street pole-camera footage was lost, and not by the bad faith of the Government, testimony regarding the footage is not barred by the Best Evidence Rule.

“It is the burden of the proponent of the evidence to prove that the originals were not lost or destroyed in bad faith.” Stocchi v. Kmart Corp., No. 96-cv-4884, 1997 WL 611619, at *1 (E.D. Pa. Sept. 24, 1997). The proponent’s burden may be satisfied by “circumstantial evidence such as evidence of a diligent but unsuccessful search for the document.” Id. (quoting Remington Arms v. Liberty Mut. Ins., 810 F. Supp. 1420, 1426 (D.Del. 1992)).

In Stocchi v. Kmart Corp., the Court found no bad faith where defendant Kmart offered testimony as to the chain of custody of a lost videotape and evidence of a diligent search for the tape. Id. The case most on point, United States v. Brown, concerned a videotape that had been erased while in possession of the DEA. Cr. No. 08-0098, 2009 WL 2338112, at *1 (W.D. Pa. July 29, 2009). The Government in that case sought to offer the testimony of DEA agents who had previously viewed the tape. Id. The court held, “While we are troubled by the Government’s failure to take any steps to determine forensically how the video tape was destroyed, we find that there is no evidence that the Government destroyed the tape in bad faith. Accordingly, we hold that the Government met its burden under Rule 1004(1).” Id.

At the June 21 and June 22, 2012 Hearings, the Government presented evidence as to how the Helen Street video footage was handled, and subsequently lost, when it was downloaded from the DEA server to external hard drives. (Resp. at 44; H1 at 168-69.) The testimony supports the Government’s contention that the footage was not lost as the result of any bad faith, but rather was the result of some still-unexplained computer malfunction. Further, in their Supplemental Response, the Government detailed their additional, unsuccessful effort lasting

several months, to recover any relevant footage or still frames from the dates in question. (Supp. Resp. 1-4.)

At the November 29 Hearing, defendant argued that the Government was negligent, and thus acted in bad faith, by failing to adequately back up the Helen Street pole camera footage. (H3 at 20, 22-23.) Defendant's argument is both factually and legally incorrect.

First, the Government presented testimony from DEA technical personnel at the June 21, 2012 Hearing, establishing that the server where the footage was stored had multiple backup hard drives, "[s]o that, if one fails, the backups can rebuild those portions of data that is lost." (H1 at 166.) There was no contrary evidence. Thus, defendant's argument based on the alleged failure to adequately backup the Helen Street pole camera footage is refuted by the evidence.

Second, assuming *arguendo* that the Government was negligent in failing to back up the footage of the Helen Street pole camera, such negligence is insufficient to establish bad faith. See Stocchi, 2009 WL 2338112, at *1 ("The fact that agents of [defendant] might have been negligent in losing an important piece of evidence neither establishes a 'bad faith' destruction according to Fed. R. Evid. 1004, nor detracts from the reasonableness of [defendant's] subsequent search.")

The Government provided evidence both as to the loss of the footage, and the subsequent recovery effort. The Court finds that, based on this evidence, the Government has met its burden of establishing the absence of bad faith in the loss of the Helen Street pole camera footage. Thus, testimony regarding the missing footage, as secondary evidence, is not barred by the Best Evidence Rule, and defendant's motion on this ground is denied.

B. Hearsay

Although the Best Evidence Rule does not bar the agents' testimony, the Court finds that certain portions of the testimony are hearsay, and do not fall into any exception to the Hearsay Rule, Fed. R. Evid. 802. Those portions of the testimony containing such hearsay are thus precluded.

Under Fed. R. Evid. 801, hearsay is an out of court statement which is offered in evidence to prove the truth of the matter asserted in the statement. At the November 30 Hearing, the Government stated its intention to have Special Agents Gimbel and Pedrini testify as to their observations of the now-missing pole camera footage, based on certain sections of their respective investigation reports. (H3 at 12.) Special Agent Gimbel testified that in writing investigative reports, he would sometimes incorporate information from other law enforcement agents, and he did so in this case. (Id. at 52.) Specifically, he stated that for several parts of his report, Government Exhibit 5, he did not know whether what was written was based solely on his own observations of the video footage, or on information conveyed to him by other agents. (Id. at 51, 56.) The Court concludes that testimony from Government Exhibit 5, based in whole or in part on information provided by other agents is hearsay. The Government has not identified, and the Court has not found, any applicable exception to the Hearsay Rule regarding such testimony. It is therefore excluded.

The Court concludes that Special Agent Gimbel and Special Agent Pedrini may testify regarding their observation of the missing pole camera footage but only as to what each personally observed. That is, neither agent may offer any testimony about the missing video which is based on any source other than their own observation of the now-missing camera footage.

C. Undue Prejudice

Defendant additionally argues that the agents' testimony regarding the missing footage is unduly prejudicial and should be precluded, pursuant to Fed. R. Evid. 403. That rule provides that: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. The Government contends that the evidence is probative and that it is of only minimal prejudice to defendant.

In making his argument, defendant relies on Brown, noted above. In Brown, the court precluded testimony of DEA agents regarding missing video on Fed. R. Evid. 403 grounds because: (1) cross-examination of the testifying agents would be virtually impossible in that "[n]one of the agents took contemporaneous notes that could qualify as present sense impressions of the video tape . . . Instead, they intend[ed] to testify . . . regarding what they remember seeing on the recording when they watched it once, three years ago;" (2) the jury could be misled into believing that the agents were eyewitnesses to the crime; and (3) the testimony was cumulative, given the other evidence of the crime available. Brown, 2009 WL 2338112, at *2.

This case is materially distinguishable from Brown. First, cross-examination of Agents Pedrini and Gimbel may be effectively conducted on the basis of the agents' contemporaneous notes and/or reports of the observations made on the footage. The Court heard testimony that Special Agent Pedrini took rough notes as he watched the video, and that he later transferred those notes into his DEA-6 reports. (H3 at 74.) Both Special Agent Pedrini's notes and reports have been made available to defense counsel in discovery. (Id. at 17; Resp. at 46.) Further,

while Special Agent Gimbel did not take rough notes during his observation of the video footage, he in fact typed contemporaneous notes into his computer and then “cut and paste[d]” those notes directly into the DEA-6 reports. (H3 at 40.) Defense counsel has also been provided with Special Agent Gimbel’s DEA-6 reports. (Resp. at 46.) Thus, defense counsel has been given contemporaneous notes or reports for both agents, enabling effective cross-examination as to what the agents observed on the video.

Second, given the use of the reports and notes, the Court finds that there is minimal risk that the jury will be misled into believing that the testifying agents were eyewitnesses to the event in question. The Court also notes that a limiting instruction further addressing this issue may be requested by either party during trial.

Finally, in Brown the Government had “an audio tape of the telephone conversation between the confidential informant and defendant arranging the purchase purportedly depicted on the corrupted video tape[and] an audio recording of the alleged illegal transaction.” Brown, 2009 WL 2338112, at *2. Accordingly, the Brown court ruled that the agents’ testimony regarding the video of the alleged drug purchase was cumulative evidence. Id. In this case, apart from the missing video, there exists no similar recording of the defendant’s alleged actions at or near the Jasper Street warehouse during the dates in question.

Defendant also argues that the proposed testimony of the agents is cumulative because the Government has stated it will offer additional evidence against defendant such as testimony of witnesses and phone records. The Court rejects this argument because the missing pole camera footage would corroborate such other evidence, it would not be cumulative.

Based on the foregoing, the Court concludes that the probative value of the agents' testimony is not substantially outweighed by the danger of unfair prejudice or confusion, and that the evidence is not cumulative. Thus, defendant's motion based on Fed. R. Evid. 403, is denied.

D. Spoliation

Defendant asserts that because the Government lost the video, the Court should preclude testimony regarding its contents as a sanction pursuant to the spoliation doctrine. Under this concept, where a court finds that evidence was destroyed or lost, precluding its use by another party in litigation, the court may impose a variety of sanctions on the party at fault. See, e.g., United States v. Bunty, 617 F. Supp. 2d 359, 370 (E.D. Pa. 2008). Generally, such sanctions involve an adverse inference against the party responsible for the loss, but the court may also impose fines, preclude other evidence, or assign responsibility for certain costs. Id.; see also Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 334 (3d Cir. 1995).

The Third Circuit has stated that, "No unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for." Brewer, 72 F.3d at 334. As noted above, the Government has met its burden to show an absence of bad faith in the loss of the pole camera footage. Accordingly, the doctrine of spoliation does not apply in this case, as the evidence at issue was "lost or accidentally destroyed." Id. The defendant's motion on this ground is denied.

E. Due Process

Defendant next argues that testimony regarding the missing footage would amount to a Constitutional Due Process violation. Specifically defendant argues that allowing the agents' testimony would be akin to giving the jury "a fact to find." (Mot. at 9.) However, the Court

agrees with the Government that this claim is essentially a Fed. R. Evid. 701 argument. That is, the defendant appears to argue that the agents' testimony would not be "rationally based on the perception of the witness, [and] helpful to a clear . . . determination of a fact in issue." Fed. R. Evid. 701.

The Court rejects defendant's Due Process argument. To ensure that the agents' testimony at trial is rationally based upon their own perception, and to preclude any hearsay evidence, the Court will permit Special Agent Gimbel and Special Agent Pedrini to testify as to the descriptions of the pole camera footage based solely on those sections of their respective reports which were based on their individual observations.¹

V. CONCLUSION

For the reasons set forth above, defendant's Motion to Preclude Testimony is denied. An appropriate order follows.

¹ Defendant also cites a Ninth Circuit decision, Loud Hawk, in support of his motion to preclude the agents' testimony. In that case, then-judge Kennedy discussed how a court should address the loss or destruction of criminal evidence. United States v. Loud Hawk, 628 F.2d 1139, 1151 (9th Cir. 1979). This analysis is not binding in the Third Circuit and this Court declines to follow it.

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
vs.	:	
	:	
MIGUEL ORTIZ,	:	NO. 11-251-08
a/k/a “Miguelito,”	:	

ORDER

AND NOW, this 7th day of January, 2013, upon consideration of the Defendant’s Motion to Preclude Testimony (Document No. 266, filed May 11, 2012) and related filings of the parties,² following Hearings on June 21, June 22, and November 30, 2012, with the defendant, Miguel Ortiz, and all counsel present, for the reasons set forth in the Memorandum dated January 7, 2013, **IT IS ORDERED** that Defendant’s Motion to Preclude Testimony is **DENIED**. Special Agent Paul Gimbel and Special Agent David Pedrini may testify at trial regarding the now-missing video obtained from the Helen Street pole camera for the period from January 12, 2011, to February 26, 2011, subject to the proviso that their testimony shall be limited to those sections of their respective reports which were derived entirely from their personal observation of the now-missing pole camera footage.³ Neither agent may testify regarding any part of his report which was based, in whole or in part, on any source other than his personal observation of the now-missing camera footage.

BY THE COURT:

/s/ Hon. Jan E. Dubois

² The related filings of the parties considered by the Court are: Government’s Response to Motion to Preclude Video (Document No. 277, filed June 1, 2012); Government’s Supplemental Response in Opposition to Defendant Miguel Ortiz’s Motion to Preclude Testimony (Document No. 339, filed October 5, 2012); Miguel Ortiz’s Reply to the Government’s Supplemental Response in Opposition to his Motion to Preclude Testimony (Document No. 340, filed October 22, 2012).

³ Special Agent Gimbel authored the report designated Government Exhibit 5, and Special Agent Pedrini authored the report designated Government Exhibit 6, at the November 30, 2012 hearing.

JAN E. DUBOIS, J.