

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

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
	:	
v.	:	
	:	NO. 10-677-1
	:	
ADAM SCOTT	:	
	:	

MEMORANDUM

Tucker, J.

October _____, 2017

Presently before the Court is Defendant Adam Scott’s *Pro Se* Rule 33(b) Motion for New Trial (Doc. 197). Upon careful consideration of Defendant’s Motion, the Government’s Response in Opposition thereto (Doc. 201), and each Party’s argument presented during the January 26, 2016 evidentiary hearing, Defendant’s Motion is DENIED for the reasons set forth below.

I. FACTUAL AND PROCEDURAL BACKGROUND

During the course of an investigation, the Chester County District Attorney’s Office suspected Vincent Marchant and Adam Scott of trafficking drugs throughout the Commonwealth of Pennsylvania. The district attorney’s office sought authorization from the Honorable Paula Francisco Ott of the Superior Court of Pennsylvania to conduct wiretap surveillance on telephones utilized by Marchant and Scott.

A. The Marchant Wiretap

On April 26, 2010, Judge Ott issued an order authorizing the wiretap of Marchant’s cell phone for thirty (30) days. On May 26, 2010, Judge Ott’s order was extended for thirty (30) days, until June 25, 2010. The wiretap surveillance of Marchant’s phone ended on June 2, 2010, as a result of Marchant’s arrest.

Judge Ott informed the Assistant District Attorney (“ADA”) assigned to the case that her practice was to seal wiretap disks only if court security was present to take custody of the disks upon her sealing and to transport them immediately to the office of the Superior Court Prothonotary in Philadelphia. Judge Ott directed the ADA to report to her chambers for the sealing of the wiretaps on June 10, 2010. In accordance with Judge Ott’s practice, the disk for the Marchant Wiretap was sealed and transported to the office of the Superior Court Prothonotary on June 10, 2010, fifteen (15) days before the June 25, 2010, expiration date of the wiretap order.

B. The Scott Wiretaps

On May 18, 2010, Judge Ott authorized the wiretap of a cell phone used by Scott in the name of “Leonardo DiCaprio.” On May 19, 2010, Judge Ott authorized the wiretap of another cell phone used by Scott in the name of “Jason James.” Because Defendant Scott used the Leonardo DiCaprio line to communicate with Marchant, beginning on May 18, 2010, conversations between Scott and Marchant were recorded on both the Marchant Wiretap and the Scott Leonardo DiCaprio Wiretap. The order for the Leonardo DiCaprio line expired on Thursday, June 17, 2010, and the order for the Jason James line expired on Friday, June 18, 2010.

During the week of June 21, 2010, security was unavailable to assist Judge Ott in sealing the Scott wiretap. In addition, Judge Ott was not in chambers from June 28, 2010 to July 6, 2010. Given the security and storage concerns that the location of Judge Ott’s chambers presented, Judge Ott ordered that the wiretap disks be stored in the police department during the interim period. In accordance with Judge Ott’s direction, the Scott Wiretap disks were stored in a compartment of a safe in the police department. Upon her return to chambers on July 6, 2010,

Judge Ott directed the Scott Wiretaps to be sealed. The Scott Wiretaps were sealed eighteen and nineteen days, respectively, after the expiration of the wiretap orders.

On March 30, 2011, a federal grand jury returned a second superseding indictment charging Scott and co-Defendant Marchant with conspiracy to distribute five kilograms or more of cocaine and 280 grams or more of cocaine base (“crack”), in violation of 21 U.S.C. § 846. The indictment also charged Scott with one count of distribution of 28 grams or more of crack, in violation of 21 U.S.C. § 841(a)(1); one count of possession of crack with intent to distribute, in violation of 21 U.S.C. § 841(a)(1); one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1).¹

Scott proceeded to trial on July 9, 2012. Count 11, charging Scott with possession of a firearm by a convicted felon, was bifurcated from the other counts for trial. On July 16, 2012, the jury returned a verdict finding Scott guilty, having made specific findings that Scott conspired to distribute five kilograms or more of cocaine and conspired to distribute 280 grams or more of crack. Count 11, the felon in possession charge, was then submitted to the jury and Scott was found guilty.

Prior to his sentencing, Scott filed: (1) a request for an evidentiary hearing (Doc. 154), in which he asserted that the Government had not produced the sealing orders for the wiretaps; (2) a motion to compel discovery (Doc. 158); and (3) motions for new trial and judgment of acquittal (Docs. 161, 162), in which he alleged that the Government had committed discovery violations including failure to produce wiretap sealing orders.

¹ The indictment also charged Defendant Marchant with five counts of distribution of cocaine and one count of possession of cocaine and crack with intent to distribute, in violation of 21 U.S.C. §841(a)(1). Defendant Marchant pled guilty to all charges against him on April 12, 2011.

During Scott's sentencing proceeding on August 8, 2013, the Court heard argument on Scott's motions and denied Scott's motions for new trial and judgment of acquittal. The Court determined that the mere fact that Scott did not receive the sealing orders until after trial did not entitle him to relief.² Scott was required to show that he suffered prejudice from the delayed production, but he failed to meet that burden. The Court stated that Scott could file a motion to suppress, however he made no such motion.

The Court imposed a below-guideline range sentence of twenty (20) years imprisonment and a mandatory consecutive term of five (5) years imprisonment on the conviction for violating 18 U.S.C. § 924(c). The Court also imposed ten (10) years supervised release, a fine of \$1,000, and a \$500 special assessment. On appeal, the Third Circuit affirmed the judgment of the Court after finding that Scott's failure to move for suppression of the wiretaps after receiving the sealing orders constituted a waiver of the motion. *United States v. Adam Scott*, 607 F. App'x. 191, 200 (3d Cir. 2015) (not precedential).

On July 13, 2015, Scott filed the instant motion for new trial pursuant to Federal Rule of Criminal Procedure 33(b)(1) alleging that: (1) the sealing order, disclosed to Scott after trial, is newly discovered evidence justifying a new trial; and (2) the Government's failure to disclose the sealing orders for the Marchant and Scott Wiretap disks prior to trial constitutes a *Brady* violation.³

² Upon discovering that the disk sealing orders had not been provided to Scott before trial, the Government retrieved the disk sealing orders for each wiretap and provided them to Scott prior to his sentencing on August 8, 2013.

³ Scott also asserts that he was prejudiced by the Government's failure to produce the sealing order relating to the wiretap of a telephone used by Philip Dimatteo. However, Scott has not demonstrated that he was entitled to the Dimatteo sealing orders. The Government did not introduce any evidence relating to the wiretap of Dimatteo's telephone at trial, Dimatteo was neither a witness nor defendant in this case, and Scott has not alleged any basis for believing that the Dimatteo wiretap had any bearing on the case against him. Thus, Scott was not entitled to

II. STANDARD OF REVIEW

Federal Rule of Criminal Procedure 33 governs motions for a new trial. “Upon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33(a). A decision under Rule 33 is committed to the sound discretion of the district court. *United States v. Cimera*, 459 F.3d 452, 458 (3d Cir. 2006).

“Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 Motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government’s case.” *United States v. Silveus*, 542 F.3d 993, 1004 (3d Cir. 2008) (quoting *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002)). Even if the court believes the jury verdict is contrary to the weight of evidence, it cannot order a new trial unless it believes “that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted.” *Id.* at 1004–05 (quoting *Johnson*, 302 F.3d at 150)).

Five requirements must be satisfied before a court may grant a new trial on the basis of newly discovered evidence:

(a) the evidence must be in fact newly discovered, i.e. discovered since trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Quiles, 618 F.3d 383, 388–89 (3d Cir. 2010) (quoting *United States v. Saada*, 212 F.3d 210, 216 (3d Cir. 2000)). While the decision to grant or deny a motion for a new trial lies within the discretion of the district court, “the movant has a ‘heavy burden’ of proving each of these requirements.” *Cimera*, 459 F.3d at 458 (citing *Saada*, 212 F.3d at 216). Rule 33

receive the Dimatteo sealing orders.

Motions are disfavored and should be “granted sparingly and only in exceptional cases.” *Silveus*, 542 F. 3d at 1005 (quoting *Gov’t of V.I v. Derricks*, 810 F.2d 50, 55 (3d Cir. 1987)).

III. DISCUSSION

Scott’s Rule 33(b) Motion for New Trial is denied because: (1) the Government has offered a satisfactory explanation for any sealing delay that may have occurred; and (2) the newly discovered evidence would not likely result in an acquittal. To succeed on a motion for new trial based on newly discovered evidence, the movant has the heavy burden of establishing that: (a) the evidence is in fact newly discovered; (b) the movant was diligent; (c) the evidence relied on is not merely cumulative or impeaching; (d) the newly discovered evidence is material to the issues involved; and (e) it is probable that the newly discovered evidence would produce an acquittal. *Quiles*, 618 F.3d at 388.

The Government does not dispute that that the orders were not produced until after trial, that Scott was diligent in requesting the sealing orders, or that the orders are not cumulative or impeaching evidence. However, the Parties dispute whether the newly discovered evidence is material and whether the newly discovered evidence would probably produce an acquittal. The Government contends that the newly discovered evidence—the sealing orders—is not material because the sealing orders demonstrate that the recordings were timely sealed. Therefore, the recordings would not have been suppressed, even if the sealing orders were produced before trial. Further, the Government argues that, because the recordings were sealed in accordance with the law, and because the evidence of Scott’s guilt was overwhelming even without the recorded conversations, a new trial would not result in an acquittal.

Scott contends that, had the sealing orders been produced prior to trial, he would have moved to suppress the recordings and all other evidence derived from the recordings pursuant to

18 U.S.C. § 2518(10)(a) because the sealing orders demonstrate that the wiretap recordings were not timely sealed. Scott argues that in the absence of this evidence, a new trial would produce an acquittal.

A. The Marchant Wiretap Disk was Properly Sealed.

The Court finds that the Marchant Wiretap was properly sealed.⁴ The Federal Wiretap Act (“Wiretap Act”), which governs wiretap sealing, provides that:

Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders.

18 U.S.C. § 2518(8)(a).⁵ The purpose of this sealing requirement “is to ensure the reliability and integrity of evidence obtained by means of electronic surveillance.” *United States v. Carson*, 969 F.2d 1480, 1487 (3d Cir. 1992).

In *United States v. Carson*, the Third Circuit Court of Appeals established that courts must consider two questions when determining whether wiretaps should be suppressed because of sealing delays. 969 F.2d at 1491 (citing *United States v. Vastola*, 915 F.2d 865, 875 (3d Cir. 1990)). First, the court must consider whether the wiretaps were sealed immediately. *Carson*, 969 F.2d at 1491. If the court finds that the wiretaps were sealed immediately, the court’s inquiry must end. *Id.* However, if the court finds that the wiretaps were not sealed immediately, the court

⁴ Although Scott also contends that the Scott wiretap was not timely sealed, the Court need not address the timeliness of the Scott wiretap sealing because beginning May 18, 2010, conversations between Scott and Marchant were recorded on both the Marchant wiretap and the Scott wiretap. Therefore, even if the Court suppressed the Scott wiretaps, the recorded conversations would still be available via the Marchant wiretap.

⁵ Pennsylvania’s Wiretap Act is modeled after the federal statute. In part, the Pennsylvania statute provides that “immediately upon the expiration of the order or extensions or renewals thereof, all monitor’s records, tapes and other recordings shall be transferred to the judge issuing the order and sealed under his direction. Custody of the tapes, or other recordings shall be maintained wherever the court directs.” 18 Pa.C.S.A. § 5714(b).

must determine whether the Government has offered a satisfactory explanation for the sealing delay that was objectively reasonable. *Id.*

Section 2518(8)(a) requires that wiretap recordings be sealed “immediately upon the expiration of the period of the order, or extension thereof” The Third Circuit has defined “immediately,” in the context of § 2518(8)(a), to mean “as soon as practical” *Id.* However, where surveillance ends prior to the expiration of the order authorizing the wiretap, our case law is silent as to which date—the date surveillance ends or the date the order expires—is controlling for purposes of determining whether there was a delay in sealing. Neither the United States Supreme Court nor the Third Circuit has resolved the issue of whether the Government must seal the tapes upon the termination of the surveillance or upon the expiration of the order authorizing the wiretap. *United States v. Mastonardo*, 987 F. Supp.2d 545, 558 n.8 (E.D. Pa 2013) (citing *Vastola*, 915 F.2d at 875 n.16).

Scott argues that the recordings should have been sealed immediately after surveillance ceased. Thus, according to Scott, the recordings should have been sealed on Wednesday, June 2, 2010, when surveillance ended as a result of Marchant’s arrest. There is a basis to support Scott’s contention that the wiretap should have been sealed as soon as practical after the surveillance ended. The Wiretap Act’s legislative history indicates that “the period of authorized interception is intended to begin when the interception—in fact—begins and terminates when the interception—in fact—terminates.” S. Rep. No. 90–1097, at 103 (1968). Considering this legislative history, Scott’s argument that the wiretap recordings should have been sealed after surveillance ended is plausible.

However, the Court need not resolve the issue because, even if the Court were to find that the Marchant Wiretap was not sealed immediately, the Court finds that the Government’s

reliance on the express provision of the Wiretap Act was reasonable, and therefore the delay, to the extent any occurred, was excusable. A literal reading of § 2518(8)(a) necessitates a finding that the Marchant wiretap was sealed “immediately” within the meaning of § 2518(8)(a). The statute states that the Government’s sealing obligation arises “immediately upon the expiration of the period of the order, or extensions thereof. . . .” 18 U.S.C. § 2518(8)(a). The recording period for the Marchant wiretap was set to expire on June 25, 2010. However, the Marchant wiretap was sealed 15 days **before** the expiration of the extension of Judge Ott’s order on June 10, 2010. Thus, if § 2518(8)(a) is read literally, there is no question that the wiretap was sealed immediately. *See United States v. Vastola*, 915 F.2d 865, 875 n.16 (3d Cir. 1990) (stating that the Supreme Court, in *United States v. Ojeda Rios*, 495 U.S. 257 (1990), read § 2518(8)(a) literally). Therefore, it was objectively reasonable for the Government to rely on the statute’s express provision for sealing after the order or extension expires. *See United States v. Ojeda Rios*, 495 U.S. 257, 266 (1990) (“In establishing a reasonable excuse for a sealing delay, the Government is not required to prove that a particular understanding of the law is correct, but rather only that its interpretation was objectively reasonable at the time.”).

In addition, the ADA’s reliance on Judge Ott’s decision to wait until June 10, 2010, to seal the wiretap disk provides adequate justification for the delay. The ADA responsible for the wiretap contacted Judge Ott to arrange the sealing of the Marchant wiretap disk on Monday, June 7, 2010. Judge Ott informed the ADA that her practice was to seal the wiretap disk only if court security was available to take custody of the disk upon her sealing. In keeping with this practice, Judge Ott instructed the ADA to report to her chambers on June 10, 2010, in order to seal the disk. The disk was sealed in accordance with Judge Ott’s directions. *See* 18 U.S.C. § 2518(8)(a) (providing that the “recording shall be made available to the judge issuing such order and sealed

under his directions”). Therefore, the Court finds that the seven-day delay, which included an intervening weekend, constituted an excusable administrative delay. *See Carson*, 969 F.2d at 1488 (explaining that short delays necessitated by the process required to comply with the provisions of the Wiretap Act are justified).

Finally, Scott’s motion for new trial must be denied because, even if the wiretap recordings had been suppressed, a new trial would not result in an acquittal given the overwhelming evidence establishing Scott’s guilt. Scott’s co-defendant, Vincent Marchant, testified against Scott at length and described everything that was discussed in his telephone conversations with Scott. Thus, the substance of the wiretap disk was available through Marchant’s testimony. This testimony was corroborated by testimony provided by several of Scott’s co-conspirators. Physical evidence also corroborated the witnesses against Scott. Therefore, while the recordings were useful corroboration of the testimony presented at trial, their absence in a new trial would not likely result in an acquittal.

B. *Brady* Violation

Scott contends that the Government’s failure to produce the wiretap seal orders prior to trial constituted a *Brady* violation. *Brady v. Maryland* stands for the proposition that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *United States v. Reyerros*, 537 F.3d 270, 281 (3d Cir. 2008). “A *Brady* violation has three components: the evidence at issue must be favorable to the defendant; it must be material; and it must have been suppressed by the prosecution.” *Id.* According to Scott, the wiretap seal order was favorable to his defense because, had it been produced, Scott would have used the seal order to demonstrate that the wiretap was not timely

sealed. This would have resulted in the suppression of the wiretap recordings. Scott contends that the wiretaps are material because they were used as justification for search warrants that resulted in the seizure of evidence, and the wiretap recordings were played to the jury at trial. Finally, Scott alleges that the Government has clearly suppressed evidence because he did not receive the seal orders until after his trial.

Scott's motion for new trial based on a *Brady* violation is denied because the sealing order was not material. The failure to disclose *Brady* evidence only requires a new trial when "the evidence is material, meaning there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Hill*, 659 F. App'x 707, 711 (3d Cir. 2016) (internal quotations omitted), *cert. denied*, 137 S. Ct. 1109 (2017). Here, the sealing order was not material because it is not likely that the introduction of the sealing order would have changed the outcome of Scott's trial. While Scott argues that the production of the sealing order would have led to the suppression of the wiretap recordings, the Court disagrees. As discussed above, the wiretap recording would have been admitted into evidence because any delay in sealing the wiretap was excusable in light of the Government's objectively reasonable reliance on the express language of the Wiretap Act and the Government's reliance on Judge Ott's directives for sealing wiretaps. Because the sealing orders were not material, there was no *Brady* violation.

IV. CONCLUSION

For the reasons stated above, Scott's *Pro Se* Rule 33(b) Motion for New Trial is DENIED. An appropriate order follows.

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

UNITED STATES OF AMERICA

v.

ADAM SCOTT

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:
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CRIMINAL ACTION

NO. 10-677

ORDER

AND NOW, this ____ day of October, 2017, upon consideration of Defendant Adam Scott's *Pro Se* Rule 33(b) Motion for New Trial (Doc. 197), **IT IS HEREBY ORDERED AND DECREED** that the Motion is **DENIED**.⁶

BY THE COURT:

Hon. Petrese B. Tucker, U.S.D.J.

⁶ This Order accompanies the Court's Memorandum dated October ____, 2017.