

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

**UNITED STATES OF AMERICA**

v.

**NAFIS MULLINS**

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**CRIMINAL ACTION  
No. 18-238**

**McHugh, J.**

**April 5, 2019**

**MEMORANDUM**

Defendant Nafis Mullins was charged with unlawful possession of a firearm, and with trial imminent, the Government moved for a pre-trial determination that his prior convictions be deemed admissible for impeachment purposes should he testify. Specifically, the Government sought to introduce evidence of a 2013 conviction for being a felon in possession of a firearm and three 2012 convictions for possession with intent to distribute convictions. This memorandum explains my reasons for denying the motion.

Federal Rule of Evidence 609(a)(1) sets forth the rules governing the admissibility of evidence of a prior felony conviction offered to impeach the credibility of a testifying witness. Under 609(a)(1)(B), when the testifying witness is the defendant in a criminal case, evidence of the prior conviction must be admitted only “if the probative value of the evidence outweighs its prejudicial effect to that defendant.” Fed. R. Evid. 609(a)(1)(B). The Third Circuit has held that “[t]his reflects a heightened balancing test and a reversal of the standard for admission under Rule 403,” creating “a predisposition toward exclusion.” *United States v. Caldwell*, 760 F.3d 267, 286 (3d Cir. 2014) (citation omitted).

When applying 609(a)(1)(B)'s "heightened test," the Third Circuit "has recognized four factors that should be considered when weighing the probative value against the prejudicial effect." *Caldwell*, 760 F.3d at 286. Those factors include "(1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the [defendant's] testimony to the case; [and] (4) the importance of the credibility of the defendant." *Id.* (alterations in original) (citation omitted). Upon consideration of these four factors, I find the probative value of the firearm and drug convictions insufficient to outweigh the risk of unfair prejudice to Mullins.

*A. Felon in Possession of a Firearm Conviction*

*Caldwell's* four-factor analysis certainly requires exclusion of the felon in possession of a firearm conviction. When evaluating the first factor, the kind of crime involved, "courts consider both the impeachment value of the prior conviction as well as its similarity to the charged crime." *Id.* The impeachment value refers to the degree to which a conviction is probative of the defendant's character for truthfulness. *Id.* The Third Circuit has expressly found that "unlawful firearms convictions do not, by their nature, imply a dishonest act," making their impeachment value low. *Id.* at 289.

"With respect to the similarity of the crime to the offense charged, the balance tilts further toward exclusion as the offered impeachment evidence becomes more similar to the crime for which the defendant is being tried." *Id.* at 286. As I have noted previously, "[p]rior convictions for similar crimes should be admitted 'sparingly if at all' because of the risk that the jury will draw an impermissible inference." *United States v. Church, et al.*, 2017 WL 2180284, at \*2 (E.D. Pa. May 18, 2017) (citing *Caldwell*, 760 F.3d at 286). Here, the prior conviction for felon in possession of a firearm involves exactly the same type of conduct underlying the present

case. In *Caldwell*, the Third Circuit excluded evidence of such a similar prior conviction, finding it “highly prejudicial.” *Caldwell*, 760 F.3d at 288-89. I reach the same conclusion here.

The remaining three factors do not demonstrate probative value sufficient to overcome the prejudicial effect of the evidence. Like in *Caldwell*, the passage of six years serves to diminish what probative value the conviction did offer. *See id.* at 289. As to the third and fourth factors, Mullins’s testimony and credibility are both of great significance. And, as discussed further below, the importance of Mullins’s being able to testify weighs in favor of exclusion while the significance of the credibility of his testimony generally weighs in favor of inclusion. But in assessing the overall probative value of the evidence, the weight of *Caldwell*’s fourth factor—significance of credibility—is necessarily impacted by its second factor—the impeachment value of the evidence—because evidence with low impeachment value is of lesser assistance in determining credibility. In short, given the low value of Mullins’ prior firearms conviction as an indication of his truthfulness, the importance of his ability to testify outweighs the Government’s interest in testing his credibility.

In summary, as to the firearms conviction, three of the four *Caldwell* factors favor exclusion, prohibiting its admission.

*B. Possession with Intent to Distribute Convictions*

With respect to the drug offenses, the answer is considerably less obvious, but I conclude that the *Caldwell* factors weigh in favor of exclusion. In considering the kind of crime involved, I again examine the prior convictions’ similarity to the charged crime and their impeachment value. *Id.* at 286. Here, although the prior convictions for possession with intent to distribute are not particularly similar to the charged offense, I find that they offer only limited impeachment value.

In assessing the impeachment value of drug convictions, many courts have concluded that such crimes are probative of a defendant's character for truthfulness. *See United States v. Whitfield*, 2013 WL 12212553, at \*2 n.1 (E.D. Pa. May 10, 2013); *United States v. Borrome*, 1997 WL 786436, at \*4 (E.D. Pa. Dec. 3, 1997), *aff'd*, 166 F.3d 1206 (3d Cir. 1998), *cert. denied*, 526 U.S. 1033 (1999); *United States v. Cordoba*, 104 F.3d 225, 229 (9th Cir. 1997); *United States v. Ortiz*, 553 F.2d 782, 784 (2d Cir. 1977). More broadly, the Third Circuit has recognized that Rule 609 is based on the premise that "one who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath." *Walden v. Ga.-Pac. Corp.*, 126 F.3d 506, 523 (3d Cir. 1997) (Becker, J.) (citation omitted). Nonetheless, in conducting the Rule 609(a) analysis, other courts in this Circuit have found the probative value of drug convictions minimal or insufficient to overcome a significant risk of prejudice to the defendant. *See United States v. Hart*, 1997 WL 634519, at \*2 (E.D. Pa., Oct. 15, 1997), *aff'd* 175 F.3d 1011 (3d Cir. 1999), *cert. denied*, 528 U.S. 945 (1999); *United States v. Womack*, 1998 WL 24355, at \*2, 4 (D. Del. Jan. 12, 1998), *aff'd* 172 F.3d 861 (3d Cir. 1998).

To measure the extent to which Mullins's drug convictions are probative of his character for truthfulness, I must initially examine the degree to which they involved dishonesty. The Third Circuit has emphasized that, in assessing the impeachment value of a prior offense, courts should consider whether the offense implies dishonesty by its nature, as in the case of theft.<sup>1</sup> *Caldwell*, 760 F. 3d at 286. The degree to which drug convictions imply dishonesty varies. *See Womack*, 1998 WL 24355, at \*2 (noting that "some drug offenses are generally more covert or deceptive" than others and referring to a "spectrum" of crimes with differing impeachment value); *United States v. Hayes*, 553 F.2d 824, 828 (2d Cir. 1977) (distinguishing between

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<sup>1</sup> Rule 609(a)(2) treats *crimen falsi* separately, but 609(a)(1) applies to numerous non-*crimen falsi* offenses that may by their nature inherently involve certain levels of dishonesty.

narcotics smuggling and possession because the former has more probative value as to credibility and veracity). Although courts in this Circuit have concluded that possession with intent to distribute “would appear to have slightly greater impeachment value than other crimes,” *Womack*, 1998 WL 24355, at \*2, they have also found that “possession of drugs with intent to deliver or manufacture, without more, is only minimally probative of truthfulness.” *Hart*, 1997 WL 634519, at \*2.

The weight to allocate to Mullins’s convictions for possession with intent to distribute, then, depends on the circumstances. Here, there are few details available about his prior convictions. All three resulted from arrests that occurred within a three-month period. That he was not detained for any extended period after the first two offenses seems to suggest a short pattern of street-level drug dealing. Absent more detail, I cannot conclude that the convictions involved the sort of large-scale drug conspiracy that would require significant deception. Although I agree that the convictions at issue have some impeachment value, the connection between possession with intent to distribute and a defendant’s likelihood of testifying truthfully is still rather attenuated, rendering the probative weight minimal.

The fact that Mullins stipulated to the existence of a prior conviction further diminishes the impeachment value of the drug convictions. The jury necessarily knows that Mullins “has transgressed society’s norms by committing a felony” and can assess whether that makes him “less likely than most to be deterred from lying under oath.” *Walden*, 126 F.3d at 523. Any additional impeachment value would have to come from the particular circumstances of the convictions, but for the reasons already discussed, I find the three 2012 convictions for possession with intent to distribute minimally probative to Mullins’s character for truthfulness. I

therefore find the impeachment value of this evidence quite limited, although the risk of prejudice remains significant.

The second factor, when the conviction occurred, does not add to the probative value of the convictions. Because the prior convictions are from within the past ten years, the Government is correct that the heightened standard in 609(b) does not apply. Nonetheless, “even where the conviction is not subject to the ten-year restriction, ‘the passage of a shorter period can still reduce [a prior conviction’s] probative value.’” *Caldwell*, 760 F.3d at 287 (alteration in original) (citation omitted). The convictions in question all occurred in 2012, almost seven years ago. This diminishes rather than enhances their probative value. The fact that they are clustered within a brief period of time further diminishes their value, as they do not reflect a sustained pattern of lawbreaking. Given the seven-year lapse and what appears to be the nature of the offenses, I do not find the probative value of the evidence sufficient to outweigh the significant risk of prejudice that accompanies admission of prior drug convictions.

The final two factors do not tilt the balance toward inclusion. It is self-evident that Mullins’s testimony is essential to his ability to rebut the officers’ account of what happened. *Caldwell*, 760 F.3d at 287-88. This weighs heavily in favor of exclusion. As to the fourth factor, “[w]hen the defendant’s credibility is a central issue, this weighs in favor of admitting a prior conviction.” *Id.* at 288. The Third Circuit has recognized a tension between these final two factors that has led some commentators to consider whether they cancel each other out. *Id.* at 288 n.15 (citing Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L.Rev. 289, 318 (2008); Roderick Surratt, *Prior–Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the ‘Balancing’ Provision of Rule 609(a)*, 31

Syracuse L.Rev. 907, 943 & 945 (1980)). But I am convinced that these factors do not stand in perfect counterbalance in every case. Necessarily, in a case like this, the defendant's credibility is important. But the weight to give that factor must be considered in light of the strength of the prior conviction as a means for testing credibility. As with the firearms offense, because of the relatively weak value of the prior drug convictions, Mullins's need to testify carries more weight here than the significance of his credibility.

As to the drug offenses, then, three of the four *Caldwell* factors favor exclusion.

In summary, aside from Mullins' stipulation of a prior felony, all specific evidence of Mullins' prior convictions was excluded because the Government could not show that the convictions' probative value as to his character for truthfulness outweighed that risk of prejudice under Rule 609(a)(1)(B).

          /s/ Gerald Austin McHugh  
United States District Judge