

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

UNITED STATES OF AMERICA

v.

ANTOINE CLARK, et al.

CRIMINAL ACTION  
NO. 19-15

**PAPPERT, J.**

**January 23, 2020**

**MEMORANDUM**

The defendants are charged in a superseding indictment with conspiracy to distribute controlled substances and related drug charges. The charges stem from a lengthy investigation by the FBI and the Philadelphia Police Department into alleged drug trafficking in South Philadelphia. Individually and collectively, the defendants have filed numerous pretrial motions, some of which the Court discusses below.

1. ECF Nos. 191 & 195

Defendants Daniel Robinson, Antoine Clark, Stefan Tucker and Gerald Spruell move to suppress evidence of wiretap communications on the grounds that the tapes were not sealed immediately and were allegedly altered. The Court denies the Motions.

18 U.S.C. § 2518(8)(a) requires that recordings of “[t]he contents of any wire, oral, or electronic communication” obtained pursuant to a search warrant be sealed “[i]mmediately upon the expiration of the period of the order.” Violation of the statute requires suppression if the sealing was not immediate and the government fails to provide a satisfactory explanation for the delay. *United States v. Bansal*, 663 F.3d 634, 651 (3d Cir. 2011). The term “immediately” means “as soon as practical” after the

surveillance ends or after the final extension order expires. *United States v. Williams*, 124 F.3d 411, 429 (3d Cir. 1997). In *United States v. Carson*, the Third Circuit held that sealing after a six-day delay, inclusive of an intervening weekend, is immediate within the meaning of § 2518(8)(a). 969 F.2d 1480, 1498 (3d Cir. 1992). If tapes are sealed immediately, the inquiry ends and the motion to suppress must be denied. *Id.* at 1491. If tapes are not sealed immediately, however, the court continues its inquiry to determine whether the government has provided a satisfactory explanation for “why the delay occurred [and] also why it is excusable.” *United States v. Ojeda Rios*, 495 U.S. 257, 265 (1990).

All the tapes at issue in this Motion were sealed immediately, as courts have defined that term. The first wiretap order authorized interception from April 15, 2016 to May 15, 2016. *See* (Order Authorizing Interception of Wire Communications 4, Ex. A, ECF No. 191-1). Surveillance ended on Friday, May 13 and sealing occurred four days later, inclusive of a weekend, on Tuesday, May 17. (Application to Seal Tape Recordings 10, Ex. A, ECF No. 220.)<sup>1</sup> The second wiretap order authorized interception from May 18, 2016 to June 17, 2016. *See* (Order Authorizing Interception of Wire Communications 4, Ex. C, ECF No. 191-1). The Government ceased surveillance on Thursday, June 9 and the tapes were sealed on Tuesday, June 14. (Application to Seal

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<sup>1</sup> It remains an open question in the Third Circuit whether the “immediately” inquiry runs from the date when surveillance terminates or from the date when the wiretap authorization order expires. *See United States v. Vastola*, 915 F.2d 865, 875 n.16 (3d Cir. 1990); *United States v. Mastronardo*, 987 F. Supp. 2d 545, 558 n.8 (E.D. Pa. 2013) (recognizing the open question remains twenty-three years post-*Vastola*). The Court need not decide this question because the sealing occurred immediately under either understanding of the rule.

Tape Recordings 10, Ex. B, ECF No. 220.) Only five days elapsed, including two weekend days, between the end of surveillance and the sealing of the tapes.<sup>2</sup>

## 2. ECF No. 197

Defendant Clark moves to strike overt acts one through nineteen in the superseding indictment. (ECF No. 197.) His motion is denied.

Clark argues that he should not be charged with overt acts one through nineteen because he “was in Philadelphia County and Pennsylvania State custody at all times” between August 22, 2012 and May 28, 2014, had no contact with his co-defendants and did not take part in any alleged conspiracy during that time. (Def.’s Mot., ECF No. 197, at 2.) He does not contend that the overt acts constitute a conspiracy separate from a conspiracy supported by other overt acts alleged in the superseding indictment.<sup>3</sup>

“A single conspiracy is not transformed into a series of unrelated, multiple conspiracies merely through a change in its membership.” *United States v. Kelly*, 892 F.2d 255, 259 (3d Cir. 1989). Conspirators who “come on later and co-operate in the common effort to obtain the unlawful results become parties thereto and assume responsibility for all done before.” *United States v. Lester*, 282 F.2d 750, 753 (3d Cir.

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<sup>2</sup> To the extent Defendants allege that the Government tampered with the tapes, the Court’s inquiry ends after concluding that the tapes were sealed immediately. *Carson*, 969 F.2d at 1491. Nonetheless, the Government represents that it has produced through discovery all the intercepted recordings between the confidential human sources and Defendants that are contested in the briefing. (Gov’t Resp. 11–16, ECF No. 220.)

<sup>3</sup> To determine whether there is a single conspiracy, the Court considers whether alleged conspirators had “a common goal” with an agreement that “contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators,” and examines any overlap between the participants. *United States v. Kelly*, 892 F.2d 255, 259 (3d Cir. 1989).

1960) (quoting *Lefco v. United States*, 74 F.2d 66, 68 (3d Cir. 1934)). The Government may prove Clark's guilt "through the acts of another committed within the scope of and in furtherance of a conspiracy of which the defendant was a member, provided the acts are reasonably foreseeable as a necessary or natural consequence of the conspiracy." *United States v. Lopez*, 271 F.3d 472, 480 (3d Cir. 2001) (citing *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946)). Even if Clark was in custody during the time of overt acts one through nineteen, there are enough facts alleged in the superseding indictment to tie him to this case's purported single conspiracy.

3. ECF No. 198

Clark moves, pursuant to Federal Rule of Evidence 404(b), to exclude evidence of an attempted firearm purchase on May 3, 2016. (Def.'s Mot. 5–13, ECF No. 198.) The Court denies the Motion.

A

Prior bad acts may be admitted as intrinsic or extrinsic evidence. *United States v. Green*, 617 F.3d 233, 245 (3d Cir. 2010). In the Third Circuit, evidence of prior bad acts is considered intrinsic to the charged offense if such acts "directly prove" the charged offense or are "performed contemporaneously with the charged crime" and "facilitate the commission of the charged crime." *Id.* at 248–49. Intrinsic evidence is not subject to a Rule 404(b) analysis, but the court must still determine whether the evidence is admissible under Rule 403. *United States v. Ligambi*, 890 F. Supp. 2d 564, 578 (E.D. Pa. 2012). Under Rule 403, "[t]he court may exclude 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 Court “must assess the genuine need for the challenged evidence and balance that necessity against the risk that the information will influence the jury to convict on improper grounds.”

*United States v. Sriyuth*, 98 F.3d 739, 747–48 (3d Cir. 1996) (citation omitted).

Evidence of prior bad acts that are not intrinsic are extrinsic and are analyzed under Rule 404(b), which prohibits evidence of a crime, wrong, or other act that is used to show a person’s character in order to show that on a particular occasion, the person acted in accordance with that character. Fed. R. Evid. 404(b)(1). Evidence of a crime, wrong, or other act may be admissible however, if it serves another purpose such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Fed. R. Evid. 404(b)(2). The Third Circuit also acknowledges that “supplying helpful background information to the finder of fact” is a permissible purpose under Rule 404(b). *Green*, 617 F.3d at 250. Courts apply a four-factor test to determine if a prior act is admissible under Rule 404(b). The evidence must be:

- (1) offered for a proper non-propensity purpose that is at issue in the case;
- (2) relevant to that identified purpose;
- (3) sufficiently probative under Rule 403 such that its probative value is not outweighed by any inherent danger of unfair prejudice; and
- (4) accompanied by a limiting instruction, if requested.

*United States v. Caldwell*, 760 F.3d 267, 277–78 (3d Cir. 2014) (citing *United States v. Huddleston*, 485 U.S. 681, 691–92 (1988)). Any evidence admissible under Rule 404(b) must fit “into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged,” *United States v.*

*Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994), and it must materially advance the prosecution's case. *United States v. Brown*, 765 F.3d 278, 291 (3d Cir. 2014).

## B

Clark's attempted firearm purchase is intrinsic evidence because it directly proves the conspiracy charge. The Grand Jury alleged that members of the conspiracy, including Clark, "carried and used loaded firearms or had [them] available in hidden locations" to further their drug trafficking activities. (Second Superseding Indictment, Count I, Manner and Means ¶ 17, at 6, ECF No. 143.) Clark's attempted purchase of the firearm is explicitly alleged as an overt act to the drug trafficking conspiracy.<sup>4</sup> (*Id.*, Overt Act ¶ 78, at 18.) Because the Grand Jury alleged Clark's attempted purchase as an overt act of the conspiracy, evidence of that purchase goes to directly prove the charged conspiracy. *See, e.g., United States v. York*, 165 F. Supp. 3d 267, 270 (E.D. Pa. 2015) (finding possession of firearm to be intrinsic evidence of a drug trafficking conspiracy where possession was alleged as an overt act).

Clark argues that the attempted firearm purchase should nonetheless be excluded under Rule 403's balancing test because the purchase carries little probative value and its admission into evidence runs the risk of jurors "simply infer[ring] that Mr. Clark was part of a dangerous, drug-toting criminal enterprise." (Def.'s Mot. 9–11, ECF No. 198.) The attempted firearm purchase—which was initiated through a phone call on Target Telephone #1 during the dates of the alleged conspiracy and in South Philadelphia where the conspiracy allegedly operated—is highly probative of the

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<sup>4</sup> Overt Acts 47 and 48 also relate to firearms and Clark's "stashing" of them. *See* (Second Superseding Indictment, Over Acts ¶¶ 47 & 48, at 14, ECF No. 14).

Government's allegation that Clark engaged in the overt act in furtherance of the conspiracy. Although prejudicial to Clark, the risk of unfair prejudice is not so great as to require suppression.<sup>5</sup>

BY THE COURT:

/s/ Gerald J. Pappert  
GERALD J. PAPPERT, J.

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<sup>5</sup> Even if evidence of the attempted firearm purchase is not intrinsic evidence, it would nonetheless be admissible extrinsic evidence under Rule 404(b) and the four-part *Caldwell* test. The evidence goes to the non-propensity purpose of demonstrating the means by which the conspiracy operated. It also provides helpful background information for why the Philadelphia Police Department attempted to stop Clark's car, which in turn led to the recovery of Target Telephones #1 and #2 and Clark purchasing a new cell phone. *See* (Gov't Resp. 16–17, ECF No. 216.) Evidence of the attempted purchase is also relevant to the conspiracy charge because “guns are tools of the drug trade.” *See United States v. Russell*, 134 F.3d 171, 183 (3d Cir. 1998); *United States v. Adams*, 759 F.2d 1099, 1109 (3d Cir. 1985) (explaining that weapons have probative value regarding the “scale of the conspiracy and the type of protection the conspirators felt they needed”). And for the reasons discussed above, the probative value of the firearm purchase sufficiently outweighs its prejudicial effect under Rule 403.

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**ORDER**

**AND NOW**, this 23rd day of January 2020, upon consideration of Defendants D. Robinson, Clark, S. Tucker, and Spruell's Motion to Suppress (ECF Nos. 191 & 195) and the Government's Response (ECF No. 220), Defendant Clark's Motion to Strike (ECF No. 197) and the Government's Response (ECF No. 217), and Defendant Clark's Motion in Limine (ECF No. 198) and the Government's Response (ECF No. 216), it is hereby **ORDERED** that the Motions are **DENIED**.

BY THE COURT:

**/s/ Gerald J. Pappert**  
GERALD J. PAPPERT, J.