

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 27, 2020

MEMORANDUM

Defendants are charged with conspiracy to distribute controlled substances and related drug charges. The Government moves to admit at trial audio and video recordings under Rules 104 and 901 of the Federal Rules of Evidence. (Gov't Mot. ECF No. 100.) The motion covers: (1) recordings from audio and video equipment hidden on cooperating informants who made controlled purchases of controlled substances; (2) recordings from video surveillance equipment; and (3) recordings from two telephone numbers with court-authorized wiretaps. Only Defendant Daniel Robinson opposes the motion. (ECF No. 182). The Court held an evidentiary hearing and oral argument on the motion on January 21, 2020 (ECF Nos. 256 and 257) and grants it for the following reasons.

I.

In *United States v. Starks*, the Third Circuit “recognized the risks inherent in the use of tape recordings, which are ‘peculiarly susceptible of alteration, tampering, and selective editing,’ and held therefore that the Government must ‘produce clear and convincing evidence of authenticity and accuracy as a foundation for the admission of such recordings.’” *United States v. Credico*, 718 F. App’x 116, 119 (3d Cir. 2017) (quoting *United States v. Starks*, 515 F.2d 112, 121 (3d Cir. 1975) (further citations

omitted)). Although “it is difficult to lay down a uniform standard equally applicable to all cases,” the Third Circuit held that it was appropriate to apply the following seven-part test to establish the admissibility of the tapes at issue in *Starks*:

[B]efore a sound recording is admitted into evidence, a foundation must be established by showing the following facts:

- (1) That the recording device was capable of taking the conversation now offered in evidence.
- (2) That the operator of the device was competent to operate the device.
- (3) That the recording is authentic and correct.
- (4) That changes, additions or deletions have not been made in the recording.
- (5) That the recording had been preserved in a manner that is shown to the court.
- (6) That the speakers are identified.
- (7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

515 F.2d at 121 n.11 (quoting *United States v. McKeever*, 169 F. Supp. 426, 430 (S.D.N.Y. 1958)). The Federal Rules of Evidence were adopted after *Starks* and include a less rigid authentication standard. Federal Rule of Evidence 901(a) provides that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Fed. R. Evid. 901(a). “It is unclear whether *Starks* remains relevant” *United States v. Tahn Le*, 542 F. App’x 108, 117 n.8 (3d Cir. 2013); see also *United States v. Savage*, No. 07-550-03, 2013 WL 420334, at *2 n.5 (E.D. Pa. Feb. 4, 2013) (“There has been uncertainty as to whether Congress’ adoption

of the Federal Rules of Evidence and, specifically Rule 901, abrogated *Starks*.”). The Third Circuit has not definitively answered the question of whether Rule 901 abrogated *Starks* and continues to reference the *Starks* factors when considering the admissibility of audio recordings. *See, e.g., Flood v. Schaefer*, 754 F. App’x 130, 133 (3d Cir. 2018). The Government urges that “to the extent *Starks* requires ‘clear and convincing evidence’ for the admission of audio tape recordings, it is no longer good law.” (Mem. in Support of Gov’t Mot., ECF No. 100 at 3.) Since Rule 901, courts within the Third Circuit “generally apply the *Starks* factors to determine the authenticity of a tape recording and use a preponderance of the evidence standard to identify a speaker on the recording.” *United States v. Davis*, No. 18-270, 2018 WL 6524240, at *8 (E.D. Pa. Dec. 12, 2018) (citations omitted).

II.

Robinson contends that the recordings the Government seeks to admit are inadmissible because it “cannot demonstrate that [he] is the voice on the intercepted calls.” (Robinson Opp’n, at 8.) No other Defendant objects to the admission of any recordings on this basis and no Defendant, including Robinson, challenges any other *Starks* factor. Robinson claims that “neither the confidential informants nor the law enforcement officers involved in the 14 transactions for which [he] stands accused[] had ever seen him or heard his voice prior to the making of the recordings.” (Robinson Opp’n, ECF No. 182 at p. 5, ¶ 17.) He also argues that he was not the registered subscriber of the telephone numbers that Government agents monitored and confidential informants called. (*Id.* at 8.)

However, as Robinson acknowledges, “voice identification on a recording may be established by circumstantial evidence surrounding the call.” (*Id.* at 8.) “[I]t is well settled that telephone calls may be authenticated by circumstantial evidence as well as by direct recognition of the person calling.” *United States v. Alper*, 449 F.2d 1223, 1229 (3d Cir. 1971). And, for recordings to be admitted, the Government is not required to show that an authenticating witness was familiar with a defendant’s voice *prior to* the recording which is the subject of the identification. Evidence satisfying the Rule 901 authentication requirement includes “[a]n opinion identifying a person’s voice – whether heard firsthand or through mechanical or electronic transmission or recording – based on hearing the voice *at any time* under circumstances that connect it with the alleged speaker.” Fed. R. Evid. 901(b)(5) (emphasis added); *see also* Fed. R. Evid. 901 Advisory Committee’s Notes, Example (5) (“the requisite familiarity may be acquired either before *or after* the particular speaking which is the subject of the identification”) (emphasis added); *United States v. Watson*, 594 F.2d 1330, 1335 (10th Cir. 1979) (holding that an agent was not prevented from authenticating the defendant’s voice on a tape introduced at trial where the agent “did not speak with [the defendant] until after the date of the telephone intercept”).

The Government adduced more than enough evidence, even under the clear and convincing standard, to permit admission of the audio and video recordings. FBI Agent Charles E. Simpson testified that in a video of a controlled drug buy conducted by a confidential informant on November 24, 2014, he was able to see Daniel Robinson and hear his voice at the same time. (*Starks* Hearing Tr. 38:24-40:16.) Agent Simpson also testified that he observed drugs being dealt out of a vehicle that was either registered

in Robinson's name and to his address or a vehicle that was not registered in his name but was registered to his address. (*Id.* at 54:12-16.) He testified that he spoke with Robinson at that address during the execution of a search warrant in June 2016. (*Id.* at 55:14-56:3.) When he spoke to Robinson that day, he "felt like [he] was talking to someone [he] had talked to for months" because Robinson's voice "in real time" was consistent with the voice he had previously identified as Robinson's. Agent Simpson testified that he listened to Robinson's voice on "more than one thousand" occasions, including on recordings of intercepted telephone calls and other controlled purchases. (*Id.* at 48:17-24; 51:22-23.)

The Government may introduce the requested audio and video recordings at trial. As the Government acknowledges, it will "have to separately meet its burden of establishing at trial that the speakers on these recordings are who the government alleges them to be." (Gov't Reply, ECF No. 224, at 2.)

An appropriate Order follows.

BY THE COURT:

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

**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

ORDER

AND NOW, this 27th day of January, 2020, upon consideration of the Government's Motion to Admit Audio and Video Recordings (ECF No. 100), Defendant Daniel Robinson's response thereto (ECF No. 182) and the Government's reply (ECF No. 224), following a hearing held on January 21, 2020 (ECF Nos. 256 and 257), and consistent with the accompanying memorandum of law, it is **ORDERED** that the Government's motion is **GRANTED**.

BY THE COURT:

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