

On July 30, 1998, at the conclusion of the Government's case, Polidoro moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. This Court denied that motion. On August 4, 1998, Defendant filed the instant motion renewing the Rule 29 motion and, in the alternative, requesting that this Court grant him a new trial. For the following reasons, Defendant's motion for a judgment of acquittal, or in the alternative for a new trial, is denied.

II. DISCUSSION

In the present motion, Defendant argues that he is entitled to either an acquittal or, in the alternative, a new trial on six grounds regarding errors made by this Court: (1) denying Defendant's motion to suppress the testimony of all Government witnesses who had been given, offered or promised anything of value in exchange for their testimony; (2) allowing Charles ("Chuck") McCaffery to testify regarding his prior drug dealings with Gaeten Polidoro and Brian Davis, which spanned a period of more than a decade prior to the two months designated by the indictment; (3) allowing Joseph Albanese to testify as to Defendant's prior arrangement with Louis Turra regarding the cooking of methamphetamine, particularly given the enhanced notoriety received by the Turra trial as a result of Tony Turra's murder; (4) allowing the admission of firearm evidence; (5) finding that the electronic recordings were voluntarily consented to by Alfred Baiocco; and (6)

allowing Jack Fasanello, Drug Enforcement Agency ("DEA") chemist and an expert witness, to render an opinion regarding the tape-recorded conversation from September 19, 1996. Defendant makes his Motion pursuant to Rule 29 of the Federal Rules of Criminal Procedure, which allows a defendant to move for a judgment of acquittal when the evidence is insufficient to sustain a conviction. Defendant also requests, in the alternative, that this Court grant him a new trial. Defendant does not state in his motion that this Court is permitted to grant a new trial if required in the interest of justice pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Nonetheless, this Court will examine Defendant's arguments under each Rule.

A. Defendant's Motion for Judgment of Acquittal

Defendant seeks a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c). When a trial court reviews a Rule 29 motion, the test is whether the evidence would warrant a jury finding the defendant guilty beyond a reasonable doubt. Burks v. United States, 437 U.S. 1, 16-17 (1978). When considering a motion for judgment of acquittal, this Court may not weigh the evidence or substitute its opinion for that of the jury. United States v. Casper, 956 F.2d 416, 421 (3d Cir. 1992); United States v. Giampa, 758 F.2d 928, 934-35 (3d Cir. 1985). Moreover, the Court may not assess the credibility of witnesses, for that is a jury function. Casper, 956 F.2d at 421; United States v.

Corcoran, Crim. No. 91-065, 1992 WL 398448, at *5 (M.D.Pa. Sept. 29, 1992), aff'd without op., 27 F.3d 559 (1994). In addition, the Court must view the evidence in the light most favorable to the Government and draw all reasonable inferences in the Government's favor. United States v. McNeill, 887 F.2d 448, 450 (3d Cir. 1989), cert. denied, 493 U.S. 1087 (1990). The Court may set aside the jury's verdict only where no rational jury could conclude beyond a reasonable doubt that the defendant committed the crimes charged. United States v. Ashfield, 735 F.2d 101, 106 (3d Cir.), cert. denied, 469 U.S. 858 (1984).

1. Conspiracy to manufacture Methamphetamine

In the instant case, the Government charged Defendant with violating 21 U.S.C. § 846, for conspiracy to manufacture Methamphetamine. "To obtain a conviction for conspiracy, the Government must first prove the existence of a conspiracy." United States v. Aichele, 941 F.2d 761, 763 (9th Cir. 1991), (quoting United States v. Baron, 860 F.2d 911, 919 (9th Cir. 1988), cert. denied, 490 U.S. 1040 (1989)). To prove a conspiracy existed, the Government must show that "there was an agreement between [the defendant and others] to commit a crime, namely" the manufacturing of methamphetamine. United States v. Rosalez-Cortez, 19 F.3d 1210, 1215 (7th Cir. 1994). "Once the existence of the conspiracy is shown . . . the Government need only prove a 'slight' connection between the defendant and the conspiracy.'" Aichele, 941 F.2d at

763. Moreover, in order to support a conviction for the crime of conspiracy to manufacture methamphetamine, under Section 846, the Government must produce sufficient evidence that the defendant, "had knowledge of and specifically intended to promote a manufacturing operation." United States v. Berkery, 919 F.2d 817, 820 (2d Cir. 1990). Accordingly, the Government must present sufficient evidence of two elements to meet the Rule 29 burden: (1) that two or more persons made an agreement to manufacture methamphetamine; and (2) that the defendant knew the unlawful purpose of the agreement and joined in it with the knowledge and specific intent to manufacture methamphetamine. Rosalez-Cortez, 19 F.3d at 1215-16; see United States v. Harris, 932 F.2d 1529, 1533-34 (5th Cir.) (discussing elements to a conspiracy prosecution under Section 846), cert. denied, 502 U.S. 897 (1991).

In his motion, Polidoro presents no arguments challenging the sufficiency of the evidence against him with respect to Count One. Viewed in the light most favorable to the Government, the evidence offered by the Government (including the testimony of Albert Baiocco, Joseph Albanese, Charles McCaffrey, and FBI Special Agent Luke Church, as well as the audiotapes of Defendant) clearly supports the jury's finding that Defendant made an agreement with others to manufacture methamphetamine, and knew the unlawful purpose of the agreement and joined in it with the knowledge and specific intent to manufacture methamphetamine in violation of

section 21 U.S.C. § 846. Thus, this Court finds ample evidence to support the jury's finding of guilt on Count One.

2. Attempt to Possess P2P With the Intent to Manufacture Methamphetamine

The charge of attempting to possess P2P with the intent to manufacture methamphetamine "requires proof that [the defendant] acted with specific intent to commit the underlying offense, and in addition took a substantial step towards its completion." United States v. Cea, 914 F.2d 881, 887 (7th Cir. 1990) (citing United States v. Rovetuso, 768 F.2d 809, 821 (7th Cir. 1985), cert. denied, 476 U.S. 1106 (1986)); United States v. Pennyman, 889 F.2d 104, 107 (6th Cir. 1989). "The [possession] of a noncontrolled substance believed to be a controlled substance," with the intent to manufacture a controlled substance, "constitutes an attempt to [possess a controlled substance with intent to manufacture] a controlled substance under section 846." United States v. Everett, 700 F.2d 900, 908 (3d Cir. 1983); see Pennyman, 889 F.2d at 106-07 (upholding attempt conviction for attempt to possess with intent to distribute where defendant purchased "sham drugs"). If the Government offers sufficient evidence that a defendant believed that he possessed P2P and intended to manufacture methamphetamine, the Government has shown that Defendant did so "knowingly and intentionally." Everett, 700 F.2d at 908. Finally, "when a defendant has been active in negotiating a drug transaction and has

actually taken physical steps to obtain possession of the drug, the [substantial step element of the] attempt offense is complete." Cea, 914 F.2d at 888 (citations omitted).

Accordingly, the Government must present sufficient evidence of two elements to meet the Rule 29 burden with respect to this Count. First, the Government must show that Defendant intended to possess P2P with the intent to manufacture methamphetamine. Second, the Government must demonstrate that Defendant willfully took a substantial step towards the commission of that crime. See Cea, 914 F.2d at 887; Pennyman, 889 F.2d at 106. The fact that Defendant may have received "sham" drugs is inconsequential. Pennyman, Id. at 106-07.

In his motion, Polidoro presents no arguments challenging the sufficiency of the evidence against him with respect to Count Two. Viewed in the light most favorable to the Government, the evidence offered by the Government (including the testimony of Albert Baiocco, Joseph Albanese, Charles McCaffrey, and FBI Special Agent Luke Church, as well as the audiotapes of Defendant) clearly supports the jury's finding that Defendant intended to possess P2P with the intent to manufacture methamphetamine, and willfully took a substantial step towards the commission of that crime in violation of 21 U.S.C. § 846. Thus, this Court finds ample evidence to support the jury's finding of guilt on Count Two.

B. Defendant's Motion for New Trial

Alternatively, Defendant seeks a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Under Rule 33, the Court may grant a defendant's motion for a new trial "if required in the interest of justice." Fed. R. Crim. P. 33. Whether to grant a Rule 33 motion lies within the district court's sound discretion. United States v. Mastro, 570 F. Supp. 1388, 1390 (E.D. Pa. 1983). The motion can be granted on either of two grounds. "First, the Court may grant a new trial if, after weighing the evidence, it determines there has been a substantial miscarriage of justice." Government of V.I. v. Commissiong, 706 F. Supp. 1172, 1184 (D.V.I. 1989); see also United States v. Fleming, 818 F. Supp. 845, 846 (E.D. Pa.), aff'd, 9 F.3d 1542 (3d Cir. 1993), and cert. denied, 510 U.S. 1192 (1994). "Second, the Court must grant a new trial if trial error had a substantial impact on the verdict." Commissiong, 706 F.Supp. at 1184.

In contrast to a motion under Rule 29, a motion made pursuant to Rule 33 compels the Court to "weigh the evidence rather than examine its sufficiency." Id. (citation omitted). Further, whereas the Court may not assess credibility in evaluating a defendant's motion for judgment of acquittal, it may weigh the credibility of witnesses in evaluating a motion for new

trial. See id. However, the Court is not to act as a "thirteenth juror." Id. As the Court stated in Commissiong,

this Court does not believe that its discretion "extend[s]" to the grant of a motion if the evidence were to fail to convince us of guilt beyond a reasonable doubt--as it would if we were to sit as a juror. Rather, we are empowered to grant a new trial only if we are convinced that the evidence is such that the verdict was not "rational," or if the verdict is against the weight of the evidence.

Id. (citations omitted); see also Fleming, 818 F. Supp. at 846 (concluding that a court may grant a new trial only in exceptional circumstances involving a miscarriage of justice or where the evidence predominates heavily against the verdict).

In his motion, Defendant alleges six trial errors for which this Court should grant him a new trial. The Court will review each one in turn.

1. Defendants Motion to Suppress Under Singleton

Defendant alleges that this Court erred in denying his motion to suppress the testimony of all Government witnesses who received or were promised anything of value in exchange for their testimony. In this regard, Defendant relies solely on a recent three judge panel of the United States Court of Appeals for the Tenth Circuit in United States v. Singleton, No. 97-3178, 1998 WL 350507, at *1 (10th Cir. Jul. 1, 1998). The Tenth Circuit, however, vacated the Singleton opinion on July 10, 1998, and

ordered that the Singleton appeal be reheard by the court en banc during the week of November 16-20, 1998. See Order dated July 22, 1998, by Honorable Herbert J. Hutton, United States v. Gaeten Polidoro, Criminal No. 97-383-02. Defendant's motion therefore lacks any supporting legal authority. Accordingly, the Court must deny Defendant's motion with respect to Defendant's first ground for this Court granting him a new trial.

2. Testimony of Chuck McCaffery at Trial

Defendant alleges that this Court erred in allowing Chuck McCaffery to testify regarding his prior drug dealings with Defendant and Brian Davis. McCaffery testified as to the nature of his relationship with Polidoro and Brian Davis, a co-conspirator, and his involvement with the charged conspiracy. Specifically, McCaffrey testified that when he joined Davis' and Polidoro's methamphetamine conspiracy in early September of 1996, he had been a marijuana dealer for approximately a dozen years, and that Davis and Polidoro, who McCaffrey knew to be partners, had been his primary source for marijuana since the early 1990s. McCaffrey testified that he shared an apartment with Davis at 809 Cantrell Street in South Philadelphia, and that Davis and Polidoro frequently sold marijuana out of this location. By early September of 1996, McCaffrey had accumulated a marijuana debt of approximately \$15,000 to Davis and Polidoro. Davis offered to relieve McCaffrey of part of that debt if McCaffrey would assist

them in transporting and storing the methamphetamine chemicals involved in this case.

In his motion, Defendant relies on three circuit court opinions: United States v. Philibert, 947 F.2d 1467 (11th Cir. 1991); United States v. Sullivan, 919 F.2d 1403 (10th Cir. 1990); and United States v. Harvey, 845 F.2d 760 (8th Cir. 1988). Defendant fails to cite any case that has binding authority on this Court. Furthermore, aside from citing the aforementioned cases, Defendant does not state any reason why the admission of such evidence was wrong or why it constitutes reversible error. As the Government states, "the Third Circuit has consistently approved the admission of background testimony of this type, even when it was considerably less intertwined with the charged offenses." See Gov't's Mot. for J. of Acquittal; Ex. C at 7. In United States v. Simmons, 679 F.2d 1042, 1050 (3d Cir. 1982), cert. denied, 462 U.S. 1134 (1983), the court upheld the trial court's decision to permit testimony of prior criminal acts on the grounds that such testimony by a co-conspirator and key prosecution witness was relevant "to provide necessary background information, to show an ongoing relationship between [the witness and the defendants], and help the jury understand [the witness'] role in the scheme." Id.; see also United States v. O'Leary, 739 F.2d 135, 136 (3d Cir. 1984) (upholding the trial court's decision to admit evidence of prior cocaine transactions in a trial for conspiracy to distribute

cocaine on the grounds that such evidence was needed to show the parties' familiarity with one another and their concert of action), cert. denied, 469 U.S. 1107 (1985); United States v. DiPisquale, 561 F.Supp. 1338, 1352 (E.D.Pa. 1983) (finding that testimony of two victims' drug-selling relationships with one defendant was properly admitted).

In the instant case, McCaffrey's testimony about his pre-existing drug relationship with Davis and Polidoro and the drug debt that he aimed to pay off by his participation in the charged conspiracy, is essential to understanding his role in the conspiracy, his motive for participating, and the trust which his co-conspirators placed in him. Further, any concerns about possible prejudice were allayed by the Court's limiting instruction, directing the jury to "consider only the evidence as it concerns the Defendant and whether it proves the Defendant guilty or fails to prove him guilty" of the crimes charged. See Jury Charge dated July 22, 1998, by Honorable Herbert J. Hutton, United States v. Gaeten Polidoro, Criminal No. 97-383-02, at 16. Thus, the Court denies Defendant's motion to grant him a new trial with respect to the second ground.

3. Testimony of Joseph Albanese

Defendant alleges that this Court erred in allowing Joseph Albanese to testify regarding Polidoro's prior arrangement with Louis Turra regarding the cooking of methamphetamine.

Specifically, Albanese testified that Polidoro approached him in the Summer of 1996 and told him about an agreement that Polidoro and Davis had struck with Turra. According to Albanese, Turra had promised Davis and Polidoro that he would teach them how to make methamphetamine and give them access to methamphetamine supplies if they provided assistance to his drug organization. (This assistance, in fact, consisted of helping Turra carry out a plot to kill Philadelphia organized crime under-boss Joseph Merlino.¹ Albanese did not specifically mention the murder plot.)

In his motion, Defendant relies on two circuit court opinions: United States v. Blackstone, 56 F.3d 1143 (9th Cir. 1995) and United States v. Ridlehuber, 11 F.3d 516 (5th Cir. 1993). Again, Defendant ignores the law from this circuit and fails to provide the Court with any reason for finding that the admission of such evidence constitutes reversible error. As stated above, the Third Circuit has consistently approved the admission of background testimony of this type. See Simmons, 679 F.2d at 1050; O'Leary, 739 F.2d at 136; see also DiPisquale, 561 F.Supp. at 1352.

In this case, Albanese's testimony about Polidoro's deal with Turra provides the context in which Albanese's role in the charged conspiracy makes sense, and explains how Polidoro obtained

¹ Both Davis and Polidoro were convicted in United States v. Louis Turra et al., Crim. No. 97-359, of various offenses involving Turra's drug enterprise, including racketeering, drug conspiracy (Polidoro only), and conspiring with Turra to murder Merlino.

the opportunity to manufacture methamphetamine as charged in Count One. Further, in contrast to the substantial probative value of the evidence, any prejudice to Polidoro is slight, given that Albanese did not mention Polidoro's participation in the Merlino murder plot, but rather described the arrangement in more general terms. Finally, any concerns about possible prejudice were allayed by the Court's limiting instruction. See Jury Charge dated July 22, 1998, by Honorable Herbert J. Hutton, United States v. Gaeten Polidoro, Criminal No. 97-383-02, at 16. The Court therefore denies Defendant's motion to grant him a new trial with respect to the third ground.

4. Firearm Evidence

Defendant alleges that this Court erred in allowing the admission of firearm evidence. The Government introduced evidence that Davis and Polidoro used and maintained firearms in connection with their drug trafficking. Specifically, the Government offered into evidence two bags of firearms and ammunition, and testimony by McCaffery of Polidoro's use of firearms to carry out his drug business.

In his motion, Defendant relies on two circuit court opinions: United States v. Jobson, 102 F.3d 214 (6th Cir. 1996) and United States v. Hill, 953 F.2d 452 (9th Cir. 1991). Aside from citing these two cases, Defendant does not state any reason why the admission of such evidence was wrong or why it constitutes

reversible error. As the Government states, the Third Circuit has consistently held that "firearms are 'tools of the trade' in the drug business, and evidence of their ownership or use is admissible as proof of drug trafficking." See Gov't's Mot. for J. of Acquittal; Ex. C at 11; see also United States v. Adams, 759 F.2d 1099, 1108-09 (3d Cir. 1985) (upholding trial court's admission into evidence a number of weapons seized from member of a large-scale narcotics distribution conspiracy).

In this case, the firearms evidence makes clear the violent nature of Polidoro's drug conspiracy. It also tends to show that Polidoro knew that he was engaging in illegal activity rather than using chemicals for some legitimate purpose. Further, it is probative of Polidoro's intent to engage in illegal drug trafficking. Finally, any concerns about possible prejudice were allayed by the Court's limiting instruction, directing the jury to "consider only the evidence as it concerns the Defendant and whether it proves the Defendant guilty or fails to prove him guilty" of the crimes charged. See Jury Charge dated July 22, 1998, by Honorable Herbert J. Hutton, United States v. Gaeten Polidoro, Criminal No. 97-383-02, at 16. Thus, the Court denies Defendant's motion to grant him a new trial with respect to Defendant's fourth ground.

5. Electronic Recordings

Defendant alleges that this Court erred in finding that

the electronic recordings were voluntarily consented to by Alfred Baiocco. During trial, the Government presented audiotapes and transcripts of recorded conversations of Davis, Polidoro and Albert Baiocco, an undercover cooperating witness of the FBI. On July 22, 1998, this Court issued an order that audio recordings by cooperating witness Baiocco were made voluntarily and not as a result of government coercion. See Order dated July 22, 1998, by Honorable Herbert J. Hutton, United States v. Gaeten Polidoro, Criminal No. 97-383-02, at 16. The Court's conclusion followed a full evidentiary hearing in which Baiocco and FBI Special Agent Luke Church both testified, without contradiction, that Baiocco's decision to make recordings was voluntary and not the result of coercion by the Government. The Court's decision was based on uncontradicted testimony. As such, the Court denies Defendant's motion to grant him a new trial with respect to Defendant's fifth ground.

6. Opinion Regarding Tape-Recorded Conversation

Defendant alleges that this Court erred in allowing DEA forensic chemist Jack Fasanello to render an opinion regarding the tape-recorded conversation from September 19, 1996. On the tape, Polidoro described in detail his attempt to manufacture a sample batch of methamphetamine. Fasanello was limited to testifying about his understanding of the chemicals, ratios and other technical processes described on the transcript.

As such, the Court denies Defendant's motion to grant him a new trial with respect to Defendant's sixth and final ground.

III. CONCLUSION

For the foregoing reasons, the evidence was sufficient to support the jury's verdict under both the Rule 29 standard and the Rule 33 standard, and Defendant's assignments of error are without merit. As such, this Court denies Defendant's motion for acquittal, and in the alternative for a new trial.

An appropriate Order follows.

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
v. :
 :
GAETEN POLIDORO : NO. 97-383-02

O R D E R

AND NOW, this 14th day of September, 1998, upon consideration of Defendant's Post-Trial Motion for Acquittal (Docket No. 111), and the Government's response thereto (Docket No. 114), IT IS HEREBY ORDERED that Defendant's Motion is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.