

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

UNITED STATES	:	CRIMINAL ACTION
	:	
v.	:	
	:	
SAU HUNG YEUNG	:	
(a/k/a Fuk Chao Hung)	:	No. 98-28-1
	:	
O'Neill, J.	:	April , 1999

MEMORANDUM AND ORDER

Defendant Sau Hung Yeung was recently convicted by a jury of distributing and conspiring to distribute heroin. Defendant now moves for a judgement of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or, in the alternative, for a new trial pursuant to Rule 33. In his motion defendant contends that he is entitled to a judgment of acquittal or a new trial because the government did not disclose, as required under Rule 16, the fact that marijuana was found at defendant's home at the time of his arrest and that defendant had allegedly made a post-arrest statement concerning his use of marijuana. In addition, defendant argues that the court committed reversible error by precluding the defense from exploring certain alleged inconsistencies regarding payments by the FBI to the informant in this case and by allowing the government to introduce statements made by the absent co-defendant without first making a determination that the government had made a good faith effort to locate him. For the following reasons I will deny defendant's motion.

Prior to trial the government disclosed to defendant certain reports detailing the circumstances of defendant's arrest. These arrest reports, however, did not disclose the fact that the

arresting officers had found a small quantity of marijuana at defendant's home during his arrest. Due to miscommunication among the arresting officers, the marijuana was not seized and was in fact left at the residence. Defendant was never charged with any offense related to the marijuana discovered in his home.

The government did not elicit any reference to the marijuana in its presentation of the evidence. During the presentation of the defense, however, defense counsel asked defendant's wife whether the arresting officers had found any drugs during the search of the residence. The defendant's wife testified that no drugs were found and that none were present. The balance of her testimony contradicted the government's evidence that during the arrest defendant had admitted that he had been involved in a conspiracy to distribute heroin. On cross-examination, the government questioned her about the marijuana discovered during the arrest, and she again denied that the arresting officers had found any drugs. During the government's rebuttal, the case agent testified that a small amount of marijuana had been found during the arrest and that defendant had stated that the marijuana was for medicinal purposes. The agent also stated that he had told defendant that no charges would be brought concerning the marijuana. At the time of this testimony and in its charge, the Court instructed the jury that the testimony concerning the discovery of marijuana was to be considered only for the purpose of weighing the defense witness' credibility. The jury was further instructed that it could not consider this testimony in determining whether defendant was guilty of the offenses charged in the indictment.

Rule 16(a) of the Federal Rules of Criminal Procedure requires the government to disclose certain evidence and information upon request of a criminal defendant. More specifically, the government must permit a defendant "to inspect and copy or photograph books, papers, documents,

photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.” Fed. R. Crim. P. 16(a)(1)(C).

The materiality of withheld information must be assessed in light of the evidence as a whole. United States v. Stevens, 985 F.2d 1175, 1180 (2d Cir. 1993); United States v. Enigwe, 1993 WL 276966, \*8 (E.D. Pa. July 13, 1993). “Evidence which the government does not intend to use in its case in chief is material if it could be used to counter the government’s case or to bolster a defense; information not meeting either of those criteria is not to be deemed material within the meaning of the Rule merely because the government may be able to use it to rebut a defense position.” Stevens, 985 F.2d at 1180. Nor will such information be deemed material simply because it would have deterred the defendant from offering testimony which may be impeached easily. Id.

The Rule also gives a defendant a right to his own statements. In addition to written and recorded statements made by the defendant that are in the government’s possession, the government must also disclose “the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial.” Fed. R. Crim. P. 16(a)(1)(A). However, a statement which was offered only as impeachment evidence will not be deemed a “relevant statement” within the meaning of Rule 16(a). United States v. Gonzalez-Rincon, 36 F.3d 859, 865 (9th Cir. 1994). See also United States v. Ferrer-Cruz, 899 F.2d 135, 140 (1st Cir. 1990) (“Although [Rule 16(a)(1)(A)] should be interpreted to include statements that the government believes it will likely introduce in rebuttal as well as in its case-in-chief, . . . , we cannot read them

as including statements, located not on paper but only in the minds of arresting officers, that the government, at the outset, does not know about, has no particularly good reason to find out about (or take note of), and would be unlikely to introduce at trial.”) (internal citations omitted).

Here, the government did not violate its disclosure obligations under Rule 16(a). It is undisputed that the marijuana was not in the government’s possession or control and that the arrest reports, though devoid of any mention of the marijuana, were made available to defendant. Moreover, I find that any evidence or information concerning the discovery of marijuana was immaterial since it could not have been used to counter the government’s case or to bolster a defense. The fact that disclosure would likely have dissuaded defense counsel from eliciting easily impeached testimony does not alter that finding. As to defendant’s admission concerning his medicinal use of marijuana, such statements were offered only as impeachment evidence and thus did not constitute “relevant statements” requiring disclosure.

Even if the government’s failure to disclose the arresting officers’ discovery of marijuana were deemed a violation of Rule 16(a), that failure would not warrant a new trial. For the government’s withholding of evidence to warrant a new trial, defendant must show that the failure to disclose caused him substantial prejudice. Stevens, 985 F.2d at 1181; Enigwe, 1993 WL 276977 at \*8. In other words, “[t]here must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant to alter significantly the quantum of proof in his favor.” United States v. Maniktala, 934 F.2d 25, 28 (2d Cir. 1991), quoting United States v. Ross, 511 F.2d 757, 762-63 (5th Cir.), cert. denied, 423 U.S. 836 (1975). See also Stevens, 985 F.2d at 1180. Given the substantial evidence supporting the jury’s guilty verdict and the Court’s instructions to the jury regarding the disputed testimony, I find that there was no substantial prejudice to defendant and that

pretrial disclosure would not have significantly altered the quantum of proof.

Defendant next contends that the Court erroneously precluded the defense from exploring certain alleged inconsistencies between two letters from the FBI regarding payments to the informant in this case. This contention, however, incorrectly states the Court's ruling on this matter. Defendant was not precluded from pursuing any alleged inconsistencies but rather was precluded from continuing to question a witness concerning a letter of which, according to his testimony, he had no knowledge.

Finally, defendant argues that the Court erred in admitting statements made by the absent co-defendant without first making a determination that the government had made a good faith effort to locate him. Defendant apparently contends that the admission of this evidence violated his Sixth Amendment right to confront the witnesses against him. At no time during the trial, however, did defendant raise this particular objection. Defendant did object to this evidence as hearsay, but the Court overruled this objection finding that the government had established that a conspiracy existed between the declarant and the defendant as required for admission pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence. The Confrontation Clause of the Sixth Amendment is not violated when a court admits statements which properly fall within the "firmly rooted" co-conspirator exception to the hearsay rule. Bourjaily v. United States, 483 U.S. 171, 182-83 (1987); United States v. Arambula-Ruiz, 987 F.2d 599, 607 (9th Cir. 1993) (admission of co-conspirator statements in narcotics prosecution did not violate defendant's confrontation clause rights, where statements were properly admitted under Rule 801(d)(2)(E) of the Federal Rules of Evidence.)

Since I find no basis for to support either a judgment of acquittal or a new trial, I will deny defendant's motion.

AND NOW this     day of April, 1999, upon consideration of defendant's amended motion for judgment of acquittal or for a new trial and defendant's response thereto, it is hereby ORDERED that defendant's motion is DENIED.

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THOMAS N. O'NEILL, J.