

the car, whereupon they intended to seize the vehicle and impound it. As the two agents were conducting this surveillance, they observed a red Taurus vehicle arrive and park a couple of car lengths behind the vehicle in which the agents were seated. One of the occupants of the red vehicle got out of the car and crossed the street toward the house which was believed to be Mr. Ramos's residence. The agents recognized him as Mr. Chaleco, who had been with Ramos earlier in the day. They observed Mr. Chaleco enter the residence and, shortly thereafter, emerge from the house, carrying a black plastic bag. Agent Crowley immediately got out of his car, and, in English, called out to Mr. Chaleco with a view toward interviewing him and ascertaining the contents of the bag. Mr. Chaleco ignored Agent Crowley, and re-entered the red Taurus vehicle. Agent Crowley reached into the open window of the vehicle and attempted to prevent Mr. Chaleco from leaving. He grabbed the package in his left hand, and attempted to remove it and/or Chaleco from the red vehicle. At about the same time, Mr. Chaleco said something in Spanish to the driver of the vehicle, whereupon the vehicle proceeded to leave the scene. Agent Crowley's left forearm was injured when the departing vehicle scraped against him.

In the meantime, Agent Tanzola had approached the front of the Taurus vehicle, on the driver's side. Both he and Agent Crowley called out "Police! Step out of the car, please." At

some point during the confrontation, both agents drew their weapons and pointed them at the vehicle.

When the red Taurus started speeding away, Agent Tanzola was standing about 10 or 12 feet away from the front driver's side of the vehicle. If he had not moved out of the way, he would have been struck by the car. Instead, he leaped sideways, and landed in a prone position on the nearby sidewalk. He did not suffer any physical injury.

At trial, the jury was confronted with two issues: (1) Was the defendant Ayala-Mendez the driver of the Ford Taurus? and (2) Did the driver of the Ford Taurus commit an assault on either or both of the two agents? By its verdict, the jury convicted the defendant of assaulting Agent Tanzola, but acquitted him of assaulting Agent Crowley. At the close of the evidence, the defendant made a motion for judgment of acquittal, which the Court took under advisement.

When the case was originally scheduled for a sentencing hearing, I had not yet ruled on the pending motion for judgment of acquittal. In discussing with counsel the advisability of deferring sentencing until the motion had been ruled upon, the Court was advised that counsel had agreed that sentencing should be deferred until the motion was decided, and that defense counsel was granted an extension of time in which to file a

motion for judgment of acquittal, and the government would be entitled to file a further response.

The case is now before the Court for disposition of the pending motion for judgment of acquittal. The government's further response, however, does not address the merits of the motion, but seeks a ruling that the Court now lacks jurisdiction to grant a judgment of acquittal, because the defendant's post-trial written motion was filed too late, under the time restrictions set forth in Fed. R. Crim. P. 29(c)(1). If that were the applicable rule, I would agree with the government's position. But, in this case, the motion for judgment of acquittal was made before the case was submitted to the jury, and the Court reserved decision on the motion. Under the plain meaning of Rule 29(a) and (b), the Court may "decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict." There is thus no merit to the government's jurisdictional argument.

The issue, then, is whether the evidence sufficed to permit a reasonable jury to conclude, beyond a reasonable doubt, that the defendant was driving the car in question, and that he committed an intentional assault upon Special Agent Tanzola.

I. Identification of the Driver

Both of the agents testified at trial that, in their opinion, the defendant was the driver of the red Taurus. The process by which they arrived at that conclusion raises serious questions as to the accuracy of the identification. It is clear that the agents had very limited opportunity to see the driver of the red Taurus at the time of the incident. They were, however, able to ascertain that both the driver and his companion were "Hispanic males," and that the driver was wearing a brightly-colored baseball cap.

The incident occurred on September 6, 2006. Some weeks later, on September 26, 2006, Agent Tanzola attended the preliminary hearing for Mr. Chaleco, in this Courthouse, and observed the defendant in the audience. He thereupon, surreptitiously, took a photograph of the defendant on his telephone-camera, so that he could learn whether Agent Crowley could verify that the defendant was the driver of the Taurus. Allegedly, the photograph was of poor quality. At any rate, neither of the agents could reach a definite conclusion at that point. About a month later, on October 31, 2006, the agents learned, from information provided by an unidentified informant, that it was probable that the driver of the red Taurus had been a person who used the nickname "Indio"; that the defendant Ayala-Mendez was known by that nickname; and that "Indio" was then

present in the neighborhood. The agents went to the area where the defendant was reported to be, and engaged him in conversation. The defendant ultimately agreed that he had been present at the hearing on September 26 (in the presence of Chaleco's girlfriend), and that he was a friend of Chaleco's. The defendant stated that his name was Angel Rodriguez but that he had no identification papers on his person at that time. Asked about the September 6 incident, the defendant denied being involved in any way, stating that he did not have a Pennsylvania driver's licence and did not drive automobiles in Pennsylvania. At the agents' request, the defendant agreed to take them to his grandmother's house (where he was residing), so that she could verify his identity.

The defendant accompanied the officers to his grandmother's house. A total of approximately seven agents and/or police officers were present. The grandmother consented to a search of the residence. Four of the officers conducted the search. In a back bedroom, they found defendant's identification papers, verifying that his correct name is Ayala-Mendez. In a front bedroom, the officers found a brightly-colored baseball cap similar to the one which had been worn by the driver of the red Taurus. The defendant stated that his bedroom was in the rear, and that the cap belonged to his brother. The agents directed the defendant to don the baseball cap, and, when he did so,

reached a firm conclusion that the defendant was, indeed, the driver of the red Taurus on September 6.

At a pretrial suppression hearing, defendant's counsel sought to preclude the agents from testifying, on the ground that their eyewitness identification was improperly tainted by the use of the baseball cap. Given the fact that the agents insisted they had concluded that the defendant was the driver, even before seeing him in the baseball cap, I denied the motion to suppress. Defense counsel did not, as I understood his argument, raise any issue about the hearsay nature of the information relied upon by the agent. It can be argued, for example, that the agents' trial testimony on the subject of the driver's identification is, in essence, merely to the effect that an unidentified informant told them that the defendant was the driver.

In short, there were many aspects of the evidence which might well have given rise to a reasonable doubt as to whether the evidence established that defendant was the driver of the car. But the issues were fully presented to the jury, and the jury has spoken. I am not authorized to set aside a verdict merely because, had I been the fact-finder, I might have reached a different conclusion.

II. Proof of Intentional Assault

The evidence was to the effect that the defendant does not speak English. The officers were in plain clothes. The

officers pointed weapons at the vehicle in which the defendant was located. It seems entirely possible that, in driving away from the scene, the defendant was merely attempting to extricate himself from an unpleasant situation, and had no intention of assaulting Agent Tanzola. But these questions, too, were fairly presented to the jury, and the jury has spoken. I am not prepared to hold that no rational jury could have failed to entertain a reasonable doubt in this case. The motion for judgment of acquittal will be denied.

An Order follows.

