

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Criminal Action No. 01-79-SLR
)
KEVIN COKER,)
)
 Defendant.)

MEMORANDUM ORDER

I. INTRODUCTION

After a three day trial, a jury convicted defendant Kevin Coker of Counts I and II of an Indictment charging conspiracy to knowingly distribute and possess with the intent to distribute marijuana, and with conspiracy to travel in interstate commerce with the intent to carry on and facilitate the carrying on of a business enterprise involving marijuana distribution. (D.I. 31) Defendant moves for a new trial pursuant to Fed. R. Crim. P. 33. (D.I. 35) The government has filed its opposition. (D.I. 37) For the reasons that follow, the motion for a new trial is granted.

II. BACKGROUND

The sole issue for review is whether the remarks made by the prosecutor during his closing statement constitute a violation of

defendant's Sixth Amendment rights and are so prejudicial as to warrant a new trial. The record reflects the following closing statements by the prosecutor:

And I'm going to do this quickly. It's not necessary to beat this to death because it has been a relatively short trial. But this ticket that the defendant has, all of the tickets the defendant has, they're drug trafficking tickets. These are plane tickets that only a drug trafficker would have. They're purchased a day before and the reason they do that is because when people are in Arizona and they have pounds - -

Defense counsel:

Your Honor, I object to argument that's not in evidence about what drug traffickers do supposedly. I don't think I've heard any evidence to that effect. It should not be offered by argument.

Court:

Mr. Falgowski?

Government:

Your Honor, I'm just arguing inferences from the evidence.

Defense counsel:

I think it was what drug traffickers do was - -

Court:

Perhaps - -

Defense Counsel:

Testimony practically, not from an expert witness on the stand.

Court:

All right. Perhaps you can change the wording of that argument.

Government:

Common sense would dictate that if a person has got pounds of marijuana they want to move and they're in Arizona with it, they don't want to hold it forever.

When you've got contraband, [sic] want to move it. You don't want to hold it because the longer you hold it, the greater the chances you're going to get caught, common sense.

And people out in Arizona that have this marijuana want somebody to get out there. That's why they've got to buy these tickets quickly. That's why they have to go in the day before, buy the tickets, get on the flight or that very day and leave.

(D.I. 32, 79-80)

III. DISCUSSION

Fed. R. Crim. P. 33 provides, in pertinent part, that "on a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require." A new trial should be granted sparingly and only to remedy a miscarriage of justice. United States v. Copple, 24 F.3d 535, 547 n.17 (3d Cir. 1994). The standard for assessing prosecutorial comments is a narrow one in which the "relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986); United States v. Scarfo, 685 F.2d 842, 849 (3d Cir. 1982). "Prosecutorial misconduct does

not always warrant the granting of a mistrial.” United States v. Zehrbach, 47 F.3d 1252, 1265 (3d Cir. 1995).

Although defendant’s original objection was that the prosecutor’s statements exceeded the actual evidence in the case, he now adds that the comments constitute impermissible “vouching.”¹ (D.I. 35) The Third Circuit Court of Appeals has adopted a two part test for determining vouching: “1) the prosecutor must assure the jury that testimony of a government witness is credible; and 2) this assurance must be based on either the prosecutor’s personal knowledge or other information not contained in the record.” United States v. Saada, 212 F.3d 210, 225 (3d Cir. 2000); United States v. Molina-Guevara, 96 F.3d 698, 704-705 (3rd Cir. 1996). Because the court agrees with the government that the statements do not satisfy the first element of vouching, the question becomes whether the prosecutor’s comments were appropriate in light of the evidence presented.

The government asserts that the statements were based on common sense and supported by the totality of the evidence presented. Specifically, the government argues that the statements were based on uncontested evidence of defendant’s

¹Defendant also contends that the government erred when the prosecutor directed the jury to use its “common sense” regarding drug trafficking when there was not expert testimony concerning that activity and the court specifically voir dired the panel to identify anyone who had ever witnessed such crimes. Defendant submits that the government’s failure to offer this evidence through an expert deprived him of a fair trial.

trips to Arizona, the travel records of his alleged co-conspirators and the testimony of two co-conspirators which arguably established that defendant knew of the drug trafficking. (D.I. 37) Moreover, the government asserts that since an objection was made before the prosecutor finished his last sentence any argument it was intended to convey was vitiated.

The court is troubled by the prosecutor's statements in light of the evidence presented at trial. As the first witness, the government called DEA Special Agent Moranelli. Although a DEA agent for 13 years, the prosecutor did not question him regarding the travel habits of drug traffickers. The closest the prosecutor came to broaching this subject was:

Government:

And in your experience and training as a DEA officer, including your work in Tucson, in speaking to people that are arrested, have you come to any conclusions about the drugs that are taken to the Tucson Airport by individuals as opposed to Phoenix?

Moranelli:

Yes. Based on my experience and training and also dealing with defendants that have been arrested and doing undercover work, it seems to be the pattern that a lot of the traffickers like to go through the Phoenix Airport because it's a much larger airport. It's a lot easier to blend in up there and the police presence is large, but it's - - it's not as large as in Tucson.

(Tr. 5-6) Likewise, alleged co-conspirators Taylor and Fountain

did not impart information substantiating the prosecutor's statements regarding the travel habits of drug traffickers. The other law enforcement witness, Detective Marvin Mailey, testified about events related to defendant's arrest in Delaware on the charges herein. The four remaining witnesses² worked in travel agencies where the airline tickets were purchased by various members of the drug enterprise and testified to the records and purchases related thereto. Using these various pieces of a puzzle, the government sought to demonstrate that defendant was a member of the drug conspiracy and his travel was consistent with drug trafficking.

In the court's view, the question presented by this motion is whether a prosecutor can rely solely on inferences he suggests to the jury in his closing remarks to supply the necessary "evidence" that ties the government's circumstantial case together. It is clear that the government can establish the elements of a criminal offense entirely through circumstantial evidence. See e.g. United States v. Kapp, 781 F.2d 1008, 1010 (3d Cir. 1986). It is equally clear, however, that "the operations of narcotics dealers have repeatedly been found to be a suitable topic for expert testimony because they are not within the common knowledge of the average juror." United States v.

²Jane Short, Lois Huffman, Shelley Brocklehurst and Patricia Welch.

Watson, 260 F.3d 301, 307 (3d Cir. 2001). The court concludes that the prosecutor in this case was not simply drawing inferences from the evidence, but was instead presenting evidence not of record for the jury's consideration.³ Under these circumstances, the court finds the statements in issue to be sufficiently prejudicial to warrant a new trial.

IV. CONCLUSION

For the reasons stated, at Wilmington this 13th day of December, 2002;

IT IS ORDERED that:

1. Defendant's motion for a new trial is granted. (D.I. 35)
2. A telephonic scheduling conference will be conducted on **Wednesday, December 18, 2002 at 9:00 a.m.** to be initiated by the court.

Sue L. Robinson
United States District Judge

³The government had the opportunity to present the testimony of a qualified law enforcement agent regarding the typical travel patterns of drug dealers.