

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Crim. No. 03-62-SLR
)
JOHN TIGGETT,)
)
 Defendant.)

MEMORANDUM ORDER

I. INTRODUCTION

After a two-day bench trial, defendant was convicted of conspiracy to import over 500 grams of cocaine, in violation of 21 U.S.C. §§ 952(a), 960(a)(1) and 960(b)(2)(B) and 21 U.S.C. § 963, and attempted possession of a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(B) and 21 U.S.C. § 846. (D.I. 31, 8) Defendant moves for a new trial pursuant to Fed. R. Crim. P. 33. (D.I. 42) Plaintiff has filed its opposition. (D.I. 43) The court has jurisdiction pursuant to 18 U.S.C. § 3231.

II. BACKGROUND

At the close of plaintiff's case, defendant moved for judgment of acquittal based on the assertion that plaintiff had failed to demonstrate that an overt act related to the charges

occurred in Delaware and, thereby, failed to establish that venue was proper in this district. (D.I. 36 at B-2) Consistent with the Third Circuit's decision in United States v. Perez, 280 F.3d 318 (3d Cir. 2002), the court used its discretion to allow the government to reopen its case to provide additional proof to cure an insufficient presentation on venue. (Id. at B-17) Agent McGetrick retook the stand and recounted defendant's statements about his participation in a drug conspiracy that operated in Delaware. (Id. at B-18 - B-31) Defendant objected on the grounds that this was new information that had not been provided to him during the discovery period. Based on defendant's own statements to the arresting officer that he intended to distribute the drugs in Delaware and that a co-conspirator was a Delaware resident, as well as considering the evidence of other conduct and drug distribution in Delaware, the court found by a preponderance of the evidence that venue had been appropriately established by plaintiff. (Id. at B-54) Consequently, defendant's motion for judgment of acquittal based on improper venue was denied.

III. ARGUMENT

Defendant asserts that, during the trial, he learned for the first time of evidence that had not been previously disclosed to him. Specifically, he contends the new evidence is: (1) the identity of the alleged unnamed co-conspirator, Dwayne Brown; (2)

information that Brown's connections to Delaware included his family living here and his being spotted in Delaware on two separate occasions in cars with Delaware tags; (3) that subpoenas had been issued to several New Castle County hotels seeking records to show Brown or the defendant rented rooms in Delaware; (4) information that Brown was involved in an identical conspiracy that has led to the arrest of seven couriers; and (5) testimony that this "other" Brown conspiracy was not connected to the defendant's alleged conspiracy. Defendant argues that this evidence is material to whether venue is proper in Delaware. In light of this evidence, defendant seeks: (1) to conduct additional examinations of the investigating officers; (2) requests any documented evidence concerning the Brown conspiracy; and (3) moves for an evidentiary hearing. United States v. Dansker, 565 F.2d 1262, 1262 (3d Cir. 1977).

Plaintiff argues that the motion for new trial is untimely because more than seven days passed between the verdict, April 22, 2004, and the date the motion was filed, June 10, 2004. Further, plaintiff asserts that defendant's motion fails to implicate the three year time limit allowed for new trial motions based on newly discovered evidence because the proposed information was known to defendant at the time of the trial. Under the Third Circuit's decision in United States v. Jasmin, 280 F.3d 355, 361 (3d Cir. 2002), plaintiff contends that the

evidence is only "newly available" and, therefore, cannot be the basis for a motion under Fed.R.Crim.P. 33(b)(1).

IV. STANDARD OF REVIEW

Under Rule 33 of the Federal Rules of Criminal Procedure, the court may grant a defendant's motion for new trial if mandated in the interests of justice.¹ Id. "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); Government of Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir. 1985). The defendant bears the burden of proving the necessity of a new trial. See United States v. Davis, 15 F.3d 526, 531 (6th Cir. 1994).

A motion for new trial based on newly discovered evidence must be filed within three years of the verdict. Fed.R.Crim.P. 33(b)(1) A defendant moving for a new trial on the basis of newly discovered evidence must satisfy a five-part test. United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976); accord United States v. DiSalvo, 34 F.3d 1204, 1215 (3d Cir. 1994). The factors are: (a) the evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant;

¹A motion for new trial must be filed within three years if based on newly discovered evidence or, if premised on any other reason, must be filed within seven days of the verdict, finding of guilt or within such time that the court sets during the seven-day period. Fed.R.Crim.P. 33(b)(2)

(c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

V. DISCUSSION

Because defendant filed his motion outside of the seven-day deadline required under Fed.R.Crim.P. 33(b)(2), the court is barred from reviewing his claims unless he demonstrates that the evidence is newly discovered under Iannelli and its progeny. Iannelli, 528 F.2d at 1292; see also Carlyle v. United States, 517 U.S. 416 (1996) (the seven-day time limit is jurisdictional).

Although plaintiff argues that the evidence is "newly available" as defined by the Third Circuit in United States v. Jasin, 280 F.3d at 362, the court finds the unique circumstances of the trial cause the evidence in issue to fall outside the parameters of that decision. Specifically in Jasin, the defendant knew of the evidence at the time of his trial, yet it was not available for his use until after the witness had been sentenced and no longer could, nor had reason to, assert his Fifth Amendment privilege against self-incrimination. Id. at 362. Conversely, defendant at bar was not provided with the evidence before trial and only learned of its existence during the trial when the court allowed the government to reopen its case to establish venue. This distinction is sufficient for the

court to find that the evidence in issue is newly discovered under the first prong of the Iannelli test.

Turning to the remaining factors, the court concludes that: (1) defendant has been diligent; (2) the evidence is not merely cumulative or impeaching; (3) the evidence is material to the issue of venue; and (4) the evidence is of such a nature that the evidence "would probably produce an acquittal." Iannelli, 582 F.2d at 1292. Accordingly, the interests of justice compel the court to grant defendant's motion for new trial.

V. CONCLUSION

For the reasons stated, at Wilmington this 27th day of July, 2004;

IT IS ORDERED that:

1. Defendant's motion for new trial is granted. (D.I. 42)
2. Plaintiff shall supply all discovery related to Dwayne Brown and the conspiracies on or before **August 16, 2004**.
3. A status teleconference is scheduled for **Thursday, August 26, 2004** at **4:30 p.m.**, with the court initiating said call.

Sue L. Robinson
United States District Judge