

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA :  
 :  
 Plaintiff, :  
 :  
 v. : Criminal Action No. 04-57 JJF  
 :  
 JECONA JOHNSON, :  
 :  
 Defendant. :

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Colm F. Connolly, Esquire, United States Attorney, and April M. Byrd, Esquire, Assistant United States Attorney, UNITED STATES ATTORNEY'S OFFICE, DISTRICT OF DELAWARE, Wilmington, Delaware. Attorneys for Plaintiff.

Christopher Furlong, Esquire, LAW OFFICES CHRISTOPHER G. FURLONG, Media, Pennsylvania. Attorney for Defendant.

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**MEMORANDUM OPINION**

March 2, 2005  
Wilmington, Delaware

  
Farnan, District Judge.

Pending before the Court is Defendant's Motion To Determine Admissibility Of Audio Tapes (D.I. 29). For the reasons discussed, Defendant's motion will be denied.

**I. Background**

On December 17, 2004, Defendant filed a Motion To Determine Admissibility Of Audio Tapes (D.I. 29). On January 24, 2005, the Court held a Starks Hearing on the motion. Testifying on behalf of the Government were DEA Special Agents Eric Miller and David Hughes, as well as DEA Task Force Officer Lawrence Collins. Defendant called no witnesses. At the conclusion of the hearing, the Court ordered that the parties submit post-hearing papers upon receipt of the hearing transcript.

Before accessing the transcript, Defendant submitted a letter memorandum dated February 1, 2005 (D.I. 33). Defendant advised that, "based on the content of Defendant's presentation here," Defendant did not believe a transcript was necessary (D.I. 33 at 1). Defendant, however, requested that, once he received the transcript, he have the opportunity to present further argument on any additional facts that Defendant may have overlooked in his letter memorandum (D.I. 33 at 3). The Court understands that the parties have received the transcript and, since Defendant has not supplemented his papers, the Court will decide the motion on the record before it.

The Government filed its Response Memorandum on February 15,

2005 (D.I. 46) after receipt of the transcript, and therefore, its response includes citations to the Starks hearing's testimony.

## **II. Legal Standard**

Under United States v. Starks, before a sound recording is admitted into evidence, the party offering the evidence must establish a foundation by showing the following facts:

- (1) That the recording device was capable of taking the conversation now offered in evidence.
- (2) That the operator of the device was competent to operate the device.
- (3) That the recording is authentic and correct.
- (4) That changes, additions or deletions have not been made in the recording.
- (5) That the recording had been preserved in a manner that is shown to the court.
- (6) That the speakers are identified.
- (7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

515 F.2d 112, 121 n.11. When the Government attempts to admit a sound recording into evidence, "the burden is on the government 'to produce clear and convincing evidence of authenticity and accuracy as a foundation for the admission of such recordings ..." Id. at 121 (quoting United States v. Knohl, 379 F.2d 427, 440 (2d Cir. 1967)).

## **III. Discussion**

The Government's witnesses testified that the recording devices they were in proper working order at the time of their use and capable of recording the conversations in question. (D.I. 32

at 4-9, 36-39, 60-61, 64-65, 105, 108-110). Further, the witnesses testified that no substantive changes had been made to the recordings and that they had been maintained in an evidence envelope. (D.I. 32 at 11-20, 60-67.) Agent Hughes testified that he or another DEA in his presence made identical copies of the recordings, comparing each to the original to ensure accuracy. (D.I. 32 at 68-74.)

Defendant does not challenge the first five factors of the Starks standard, but contends that the Government fails to satisfy Starks' sixth and seventh requirements. Specifically, Defendant contends that the Government has not met its burden of producing clear and convincing evidence that the speaker in the tape was Defendant and that the conversation recorded was made voluntarily. Defendant's contentions are grounded in the lack of testimony from the confidential information at the Starks Hearing. Defendant contends that the testimony of Agent Hughes, the Case Agent, was insufficient because he neither participated in the recorded conversations nor personally recruited the informant. Further, Defendant contends that the Government has not met its burden because the Government failed to produce the alleged document that evinces the agreement between the Government and the informant.

In response, the Government contends that the Starks standard does not require the Government to call the informant as

a witness to authenticate the recordings. Further, the Government contends that the testimony of Special Agent Eric Miller, Special Agent David Hughes, and Task Force Officer Lawrence Collins are sufficient to establish by clear and convincing evidence all seven factors of the Starks standard.

The Court concludes that the testimony of Agent Hughes establishes by clear and convincing evidence the identity of the Defendant as one of the speakers in the recording. The Court finds that Agent Hughes became sufficiently familiar with Defendant's voice both through the course of the investigation and after spending several hours interviewing him after the arrest (D.I. 32 at 75-77).

Further, the Court concludes that the recorded conversations were made voluntarily and in good faith, without any kind of inducement. Agent Hughes testified that the informant voluntarily signed a written cooperation agreement and then knowingly and voluntarily participated in each of the recordings, absent any improper inducements from the DEA. (D.I. 32 at 48-49, 53-59, 82-83.) As Case Agent, Agent Hughes was well-situated to be informed about the issues surrounding the investigation. He was in communication with the other agents, including the agent that originally recruited the informant, and also personally participated in some of the recorded conversations. Thus, the Court finds that Agent Hughes would have been aware if the

Government had improperly induced the informant.

Defendant contends that authentication of the tapes requires the testimony of the confidential informant. The Court, however, finds no authority to support such a requirement. While the Third Circuit has not directly addressed the issue, several other circuits have admitted recordings absent the testimony of a participant in the recorded conversation. (See, e.g., U.S. v. Barone, 913 F.2d 46, 49 (2d Cir. 1990)). For these reasons, the Court concludes that the audio recordings are admissible.

An appropriate Order will be entered.

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**ORDER**

At Wilmington, this 2 day of March 2005, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED THAT Defendant's Motion To Determine Admissibility Of Audio Tapes (D.I. 29) will be **DENIED**.

March 2, 2005  
DATE

  
UNITED STATES DISTRICT JUDGE