IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Crim. Act. No. 01-37-JJF
	:	
MICHAEL LACY,	:	
	:	
Defendant.	:	

Colm F. Connolly, Esquire, United States Attorney and Shannon Thee Hanson, Esquire, Assistant United States Attorney of the OFFICE OF THE UNITED STATES ATTORNEY, Wilmington, Delaware.
Attorney for Plaintiff.

Penny Marshall, Esquire and Jonathan B. Pignoli, Esquire (Research & Writing Specialist on the Brief) of the OFFICE OF THE PUBLIC DEFENDER, Wilmington, Delaware.
Attorney for Defendant.

MEMORANDUM OPINION

January 13, 2005

Wilmington, Delaware

Farnan, District Judge.

Pending before the Court is a Motion For Judgment Of Acquittal[1] (D.I. 114) filed by Defendant, Michael Lacy. For the reasons set forth below, the Court will deny Defendant's Motion.

BACKGROUND

I. Procedural Background

Defendant was arrested on June 19, 2001, and charged with possession with intent to distribute five or more grams of cocaine base in violation of 21 U.S.C. § 841(a)(1). Defendant was tried before a jury and acquitted of the charged crime, but convicted of two lesser included offenses which were submitted to the jury: (1) possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1), and (2) simple possession of more than five grams of cocaine base in violation of 21 U.S.C. § 844.

Following the jury's verdict, Defendant moved to extend the time to file a motion for judgment of acquittal. The Court granted Defendant's extension of time motion. Defendant thereafter filed the Motion For Judgment Of Acquittal with proposed findings of fact and conclusions of law. (D.I. 114). The Government filed a response to the Motion, and Defendant

[1] D.I. 114 is actually entitled Defendant's Proposed Findings Of Fact And Conclusions Of Law In Support Of His Motion For Judgment Of Acquittal. Defendant did not file a separate motion document, but moves for judgment of acquittal within the body of his Proposed Findings Of Fact And Conclusions Of Law.

filed a Reply Brief. Accordingly, Defendant's Motion is fully briefed and ripe for the Court's review.

II. Factual Background

A. Relevant Trial Testimony

Defendant's arrest precipitated from his encounter with members of an FBI Task Force working with the Wilmington Police Department on June 19, 2001. According to the testimony adduced at trial, officers of the task force entered an apartment building at 509 West Street in Wilmington, Delaware to search for Defendant. (Tr. 76). Upon entering the apartment where they believed Defendant entered, Officer Liam Sullivan observed Defendant going into the bathroom and making a throwing motion with his right hand as he moved out of sight. Officer Sullivan then saw money floating to the ground and ordered Defendant to come out with his hands up. (Tr. 77). Defendant complied and was placed under arrest. After Defendant was in custody, Officer Sullivan entered the bathroom and observed different items scattered throughout the bathroom, including a total of $713 located on the floor and in the bathtub, and two plastic lunch bags, one of which contained a white chunky substance and the other of which contained several smaller plastic wraps containing a white chunky substance within the wraps. (Tr. 78). Officer Sullivan showed the items to Defendant, and Defendant denied that he owned the bags. (Tr. 147).

Officer Sullivan then conducted a search of Defendant's person. Upon reaching into Defendant's right-hand pocket[2], Officer Sullivan found another plastic lunch baggie containing more individual plastic wraps with a chunky white substance inside. (Tr. 79-80). Defendant again denied owning the plastic baggie and insisted that the bag had been planted in his pocket. (Tr. 148). In addition to the plastic baggie, Officer Sullivan found Defendant's Delaware identification card. (Tr. 80).

Officer Sullivan retained possession of the evidence he found at the apartment. Officer Sullivan later opened the two bags that contained the smaller individual wraps and inventoried their contents. (Tr. 86-87). At trial, Officer Sullivan testified that it would have been a better practice to count the items with a superior or second officer present. (Tr. 158). Officer Sullivan also testified that he was unsure whether the Wilmington Police Department maintained a policy requiring supervision during the inventory of evidence. (Tr. 159). Other officers testified that there is a written procedure requiring a witness to be present during the counting of suspected drugs.

After counting the items he seized, Officer Sullivan listed the results of his inventory on the envelope in which he later stored the evidence. (Tr. 95). Officer Sullivan's notes on the

[2] At a motions hearing, Officer Sullivan testified that the bag was located in Defendant's left-hand pocket.

envelope indicated there were 37 plastic wraps within the two bags. At trial, Officer Sullivan testified that the correct number of wraps was 57 and that he intended to write this number on the bag but made a mistake. (Tr. 95). Officer Sullivan testified that he repeated that mistake when he dropped the evidence in the police drug locker, writing "37" when he meant to write "57."

Officer Sullivan requested the Medical Examiner's Office to conduct a qualitative and quantitative analysis of the substances seized as evidence. (Tr. 93). The evidence was received by the Medical Examiner's Office for analysis on June 25, 2001. Forensic chemist Kochu Madhavan performed the requested analysis. (B45, B48). Mr. Madhavan weighed the substances and performed chemical analysis to determine the nature of the substance within the three bags seized by Officer Sullivan. (B51). Among the tests performed, Mr. Madhavan conducted a preliminary color test, a mass selective detector test and a thin-layer chromatography test upon the substances found in each of the three bags. (B64-B67). Based on these tests, Mr. Madhavan concluded that each bag contained a mixture consisting of cocaine base or crack. (Tr. B54-B55).

With respect to the weighing of the substances within the bags, Mr. Madhavan found that the white chunky substance found in Government Exhibit 1 weighed 3.24 grams. (B53-55). Mr. Madhavan

reached this determination by weighing the substance alone. With respect to Government Exhibit 2, the baggie containing 35 individual plastic wraps of the chunky white substance, and Government Exhibit 3, the baggie containing 22 individual plastic wraps of the chunky white substance, Mr. Madhavan used a different weighing procedure because of the smaller packages within the larger bag. Rather than removing all of the wraps to weigh the substance alone, Mr. Madhavan weighed all of the plastic wraps together with the substances inside and then subtracted the average weight of each wrap according to the total number of wraps. (B73). The average weight of the plastic wrap was determined by weighing a small sample of five empty containers and then dividing the weight by five. (B73). Using this procedure, Mr. Madhavan determined the weight of the substance in Government Exhibit 2, containing 35 wraps, to be 1.66 grams, and the weight of the substance in Government Exhibit 3 containing 22 wraps to be 1.85 grams. (B56). Mr. Madhavan found the net weight of the substances contained in Government Exhibits 1, 2, and 3 to be 6.75 grams. (B57).

B. Jury Instructions and Verdict Form

Prior to the trial, the parties provided the Court with an agreed upon set of jury instructions and a verdict form. The Government requested that three lesser included offenses be included in the charge. In response, Defendant noted that the

instruction listing drug type and quantity did not cure the fact that drug type and quantity are listed as sentencing factors in 21 U.S.C. § 841. No further objections were raised to the instructions or verdict form.

After the Government presented its case-in-chief, Defendant made an oral motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a). Pursuant to Federal Rule of Criminal Procedure 29(b), the Court reserved its decision on the motion until after the jury returned its verdict.

Consistent with the jury instructions submitted by the parties, the Court instructed the jury as to the offense proscribed in 21 U.S.C. § 841(a)(1) and the lesser included offenses of (1) possession with intent to distribute cocaine base; (2) possession of more than five (5) grams of cocaine base; and (3) possession of cocaine base. The jury was also given a verdict form which allowed for the finding of guilty or not guilty on the indicted offense described in 21 U.S.C. § 841(a)(1) of possession with intent to distribute five grams or more of cocaine base. In the event that the jury unanimously found Defendant not guilty of the indicted offense, the jury verdict form then led the jury to consider two separate lesser included offenses: (1) possession with intent to distribute, and (2) possession of more than five (5) grams of cocaine base. If the jury found Defendant guilty of possession with intent to

distribute or possession of more than five (5) grams of cocaine base, the verdict form then provided that the jury should not consider the final lesser included offense of possession of cocaine base.

The jury returned a verdict of not guilty on the indicted charge of possession with intent to distribute five (5) grams or more of cocaine base in violation of 21 U.S.C. § 841(a)(1), and a verdict of guilty on each of the two lesser included offenses. Thus, Defendant was convicted of possession with intent to distribute cocaine base and possession of more than five (5) grams of cocaine base. Following the verdict counsel approached the bench in a side bar to query as to whether the verdict was proper. The Court directed the parties to raise the issue in post-trial applications.[3]

DISCUSSION

I. STANDARD OF REVIEW

The standard for granting a motion for judgment of acquittal based on insufficient evidence to sustain a conviction is quite stringent. United States v. Briscoe-Bey, 2004 WL 555405, *1 (D. Del. Mar. 19, 2004). The defendant bears a heavy burden of demonstrating that relief is appropriate, and the granting of relief under Rule 29 is "'confined to cases where the

[3] Before the jury returned from its deliberations, Defendant renewed his motion for judgment of acquittal again. The Court again reserved decision on the motion.

prosecution's failure is clear.'" Id. (quoting United States v. Leon, 739 F.2d 885, 891 (3d Cir. 1984)). The Court must view the evidence in the light most favorable to the Government and may not weigh the evidence or make credibility determinations. United States v. Giampa, 758 F.2d 928, 934-935 (3d Cir. 1985). Relief is only appropriate "if no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1986) (citing United States v. Castro, 776 F.2d 1118, 1125 (3d Cir. 1981)). Stated another way, the Court must determine whether "a reasonable jury believing the government's evidence could find beyond a reasonable doubt that the government proved all the elements of the offenses." United States v. Salmon, 944 F.2d 1106, 1113 (3d Cir. 1991); Coleman, 811 F.2d at 807.

II. Whether The Jury's Guilty Verdict On Possession Of More Than Five Grams Of Cocaine Base Should Be Set Aside

By his Motion, Defendant raises three arguments: (1) the jury's verdict violates double jeopardy principles, because Defendant cannot be convicted of possession with intent to distribute an unspecified amount of cocaine base and also convicted of possession of over five grams of cocaine base as lesser included offenses where the original charge was possession with intent to distribute five grams or more of cocaine base; (2) the evidence does not support the verdicts on both of the two

lesser included offenses provided to the jury; and (3) possession of cocaine base is not a lesser included offense of possession with intent to distribute a controlled substance. The Court will first consider Defendant's first and third arguments, and then turn to Defendant's argument concerning whether the evidence supports the jury's verdict.

A. Whether The Jury's Verdict Of Guilty On The Two Lesser Included Offenses Violates Double Jeopardy Or Is An Improper Application Of The Law Concerning Lesser Included Offenses

By his Motion, Defendant contends that the jury's verdict of guilty on both of the lesser included offenses is unlawful and violates double jeopardy. Specifically, Defendant contends that the jury's verdict essentially convicts him of the same charge on which he was acquitted, because it improperly divides up the original charge. Defendant contends that the jury verdict form was unclear to the jury and led the jury to consider the two lesser offenses together, when they should have been considered as alternatives to the principal offense and as alternatives to each other.

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life of limb. . . ." U.S. Const. amend. V. In advancing his Double Jeopardy claim, it appears to the Court that Defendant's argument is focused on his conviction for possession of more than five grams of cocaine base in violation of 21 U.S.C. § 844. Defendant

contends that it was inappropriate for the Court to instruct on this charge for two reasons (1) it created a new unit of prosecution that had not been indicted, and (2) it is not a lesser included offense of the originally indicted charge of possession with intent to distribute five or more grams of cocaine base in violation of 21 U.S.C. § 841(a)(1).

Defendant's first argument appears to be couched as an "allowable unit of prosecution" challenge. An allowable unit of prosecution challenge is a challenge to the number of counts the government can bring under a single statute. United States v. Johnson, 1995 WL 27153, *5 n.5 (E.D. Pa. Jan. 20, 1995). Here, the jury was instructed on simple possession under 21 U.S.C. § 844, an entirely different statute than that which was originally charged. As such, the Court is not persuaded that Defendant's claim should be considered in terms of the law regarding what is an allowable unit of prosecution.

The Government refers to Defendant's argument as a multiplicity challenge, and it appears to the Court that this is the more appropriate approach to the issue raised by Defendant. Multiplicity challenges are also referred to as separate offense challenges. A separate offense challenge considers whether the counts in an indictment charge separate offenses under two or more statutes, or as applicable to this case, whether the defendant was convicted of the same offense as a result of his

conviction for both possession with intent to distribute an unspecified quantity of cocaine base under 21 U.S.C. § 841 and possession and of more than five grams of cocaine base under 21 U.S.C. § 844. The test for determining whether the two distinct statutory provisions constitute the same offense is whether each provision requires proof of a fact which the other does not. Blockburger v. United States, 284 U.S. 299, 304 (1932).

In this case, Defendant was convicted of possession with intent to distribute an unspecified quantity of cocaine base in violation of 21 U.S.C. § 841(a). The elements of this offense are that the defendant: (1) possessed a controlled substance, namely cocaine base (2) knew that he possessed a controlled substance, and (3) intended to distribute the controlled substance. United States v. Kim, 27 F.3d 947, 959 (3d Cir. 1994). By contrast the elements of the possession charge under Section 844 for which defendant was convicted are that the defendant: (1) knowingly possessed a controlled substance, (2) that substance is in fact, cocaine base, and (3) the quantity of the cocaine base was in excess of five grams. See e.g. United States v. Quarles, 30 Fed. Appx. 404, 408, 2002 WL 228144, *2 (6th Cir. Feb. 14, 2002); United States v. Stone, 139 F.3d 822, 836 (11th Cir. 1998). Because the Section 844 possession charge requires an element which was not contained in the charge for which Defendant was convicted, namely a specified quantity of

drugs, the Court concludes that Defendant was not convicted of the same offense twice.

Defendant also contends that it was inappropriate for the jury to be instructed on the Section 844 possession charge, because the Section 844 offense for which Defendant was convicted is not a lesser included offense of the crime originally charged. "A lesser included offense is one that does not require proof of any additional element beyond those required by the greater offense." Government of Virgin Islands v. Joseph, 765 F.2d 394, 396 (3d Cir. 1985). Prior to Apprendi, several courts held that Section 844(a) sets forth two crimes, one involving simple possession of a controlled substance and the other involving simple possession of more than five grams of cocaine base. See e.g. United States v. Deisch, 20 F.3d 139, 152 (5th Cir. 1994); United States v. Michael, 10 F.3d 838, 839 (D.C. Cir. 1993). These courts held that the misdemeanor crime of simple possession, with no gram weight or substance identified, was a lesser included offense of Section 841(a)(1); however the crime of simple possession which included more than five grams of cocaine base was not a lesser included offense of Section 841(a)(1), because specific quantity and drug type were essential elements of the Section 844 offense which were not part of a Section 841(a)(1) offense. See Stone, 139 F.3d at 826-839; United States v. Deisch, 20 F.3d 139, 152 (5th Cir. 1994); United

States v. Michael, 10 F.3d 838, 839 (D.C. Cir. 1993). Since Apprendi, however, the Third Circuit has recognized that drug type and quantity can be considered elements of a Section 841(a)(1) offense. See United States v. Barbosa, 271 F.3d 438, 457 (3d Cir. 2001); United States v. Vazquez, 271 F.3d 93, 98 (3d Cir. 2001). Consistent with this post-Apprendi approach, to find Defendant guilty of the Section 841(a)(1) charge for which he was indicted, the Government had to prove that he (1) possessed a controlled substance, namely cocaine base in the quantity of 5 or more grams, (2) knew that he possessed a controlled substance, and (3) intended to distribute the controlled substance. See Tr. B-132. Under this formulation of the offense charged, drug quantity and type are essential elements of the offense, just as they are essential elements of the Section 844 offense, which requires the Government to establish that the defendant (1) knowingly possessed a controlled substance, (2) that substance was in fact, cocaine base, and (3) the quantity of the cocaine base was in excess of five grams.[4] Because these elements are a

[4] Defendant contends that the fact that the Court included in its instruction a requirement that the Government prove that Defendant did not have a valid prescription or order from a practitioner to obtain cocaine base precludes this offense from being considered a subset of the offense charged, regardless of drug quantity or identity. The Court is not persuaded by Defendant's argument. Courts considering simple possession, without identifying gram weight, have concluded that it is a lesser included offense of Section 841(a), despite the statute's reference to a valid prescription or order. Indeed, some courts have treated the statute's reference to a valid prescription as

subset of the elements required to prove that Defendant committed the Section 841(a)(1) offense for which he was indicted as that offense is now interpreted in light of Apprendi, the Court concludes that the jury was properly instructed on the Section 844 offense of simple possession of more than five grams of cocaine base as a lesser included offense of the Section 841(a)(1) offense for which Defendant was indicted. Fed. R. Crim. P. 31(c) (providing that a defendant "may be found guilty of an offense necessarily included in the offense charged").

In reaching this conclusion, the Court is aware that since Apprendi, at least one Court of Appeals, has concluded that the Section 844 offense of possession of more than five grams of cocaine base is not a lesser included offense of possession with intent to distribute a controlled substance. See United States v. Steward, 252 F.3d 908, 909 (7th Cir. 2001). However, the Steward court did not have the opportunity to consider this issue in light of Apprendi, because the parties waived any claim

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an affirmative defense, which the Government is not required to prove. See e.g. United States v. Forbes, 515 F.2d 676, 680 (D.C. Cir. 1975) (holding that "unless" clause establishes a defense in prosecution for simple drug possession under 18 U.S.C. § 844(a)). By placing this burden on the Government, the Court actually provided Defendant with more of an advantage than other courts have in their formulations of Section 844. Accordingly, the Court cannot conclude that its inclusion of this element takes the Section 844 offense for which Defendant was convicted out of the purview of being a lesser included offense of the post-Apprendi interpretation of the Section 841(a)(1) offense for which Defendant was indicted.

regarding the effect of Apprendi. Therefore, the Court recognizes that a different conclusion is certainly reasonable and available, but concludes that Steward adopts too narrow an approach.

In sum, the Court concludes that the jury was properly instructed as to simple possession of more than five grams of cocaine base in violation of Section 844 as a lesser included offense of the indicted crime under Section 841(a)(1), and therefore, the Court will deny Defendant's Motion to the extent that it raises a double jeopardy challenge and a challenge based on the law of lesser included offenses.

B. Whether The Jury's Verdict Is Supported By The Evidence

Defendant contends that no rational jury could have found that the evidence adduced at trial supported convictions of both charges offered as lesser included offenses. Specifically, Defendant contends that the two guilty verdicts returned by the jury improperly use the same evidence to support both.

Reviewing the evidence in the light most favorable to the Government, the Court concludes that the evidence adduced at trial supports the jury's verdict. At trial, the Government established that 6.75 grams of cocaine base contained in three separate baggies were found on or near Defendant. None of the individual baggies contained over 5 grams of cocaine base, but two of the three baggies contained the cocaine wrapped in several

smaller plastic wraps. Evidence was also presented that the cocaine contained in the smaller plastic wraps weighed 3.51 grams total. Based on this evidence, the Court concludes that the jury could reasonably have found that while Defendant possessed all 6.75 grams of cocaine base, he did not intend to distribute five or more grams of it as required by the charge in the indictment. Rather, the fact that 3.51 grams of cocaine base were contained in individual packets, could have led the jury to conclude that Defendant intended to distribute only this amount. Accordingly, the Court concludes that the jury's verdict is rationally supported by the evidence, and therefore, the Court will deny Defendant's Motion for judgment of acquittal.

CONCLUSION

For the reasons discussed, the Court will deny Defendant's Motion For Judgment Of Acquittal.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Crim. Act. No. 01-37-JJF
	:	
MICHAEL LACY,	:	
	:	
Defendant.	:	

O R D E R

At Wilmington, this 13th day of January 2005, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Defendant's Motion For Judgement Of Acquittal (D.I. 114) is DENIED.

2. Sentencing for Defendant shall be set for **Wednesday, March 9, 2005 at 2:00 p.m.**, in Courtroom No. 4B on the 4th Floor, Boggs Federal Building, Wilmington, Delaware.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE