

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :  
 :  
 Plaintiff, :  
 :  
 v. : Criminal Action No. 06-13 JJF  
 :  
 DEMETRIUS BROWN, :  
 :  
 Defendants. :

MEMORANDUM ORDER

Defendant was Indicted on two counts of possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a) & (b)(1)<sup>©</sup>. Count I alleged possession with intent to distribute more than 50 grams of cocaine base on December 9, 2005, and Count II alleged possession with intent to distribute an unspecified quantity of cocaine base on December 14, 2005. On April 3, 2007, Defendant pled guilty to Count II of the Indictment and acknowledged at the Rule 11 hearing that on or about December 14, 2005, he possessed with the intent to distribute 4.3 grams of cocaine base. Thereafter, the parties requested the Court to conduct an evidentiary hearing to determine whether the quantity of drugs referred to in Count I of the Indictment should be attributed to Defendant as relevant conduct for the purposes of establishing his sentencing guideline range under the United States Sentencing Guidelines ("U.S.S.G."). Specifically, the question presented by the parties is whether 77 grams of cocaine base found on December 9, 2005, in a Chevrolet Lumina in the 2200



block of North Pine Street, should be attributable to Defendant under U.S.S.G. § 1B1.3.<sup>1</sup>

Briefing on the issue was deferred pending the decision of the Court of Appeals for the Third Circuit in United States v. Fisher, 502 F.3d 293 (3d Cir. 2007). In Fisher, the Third Circuit concluded that the preponderance of the evidence standard applies to disputed factual issues relevant to sentencing.

Applying this standard to the evidence and testimony adduced at the hearing, the Court concludes that the Government has established by a preponderance of the evidence that the quantity of drugs found in the Chevrolet Lumina on December 9, 2005, are attributable to Defendant and should be considered as part of the same course of conduct as his conviction for the December 14, 2005 offense of possession with intent to distribute cocaine base. In reaching this conclusion, the Court credits the testimony of Rashan Baul that he sold the Lumina to Defendant. At the time of the sale, Mr. Baul knew Defendant only by his nickname, "Meter

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<sup>1</sup> In pertinent part, "relevant conduct" is described in U.S.S.G. § 1B1.3 as:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and . . .

(2) solely with respect to offenses of a character or which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1) (A) and (1) (B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction . . . .

Man," and recorded that he "[s]old [the car] to Meter Man on 11/26/05," on the back of the bill of sale. (D.I. 46 at 100-101; Govt. Exh. 13.) About a week later Defendant returned to Mr. Baul to get the car repaired because the transmission was slipping. (Id. at 102-103.) Mr. Baul was also able to readily identify Defendant from a picture line-up as the man to whom he had sold the car. (Id. at 105-107, 29-33.)

The Court also credits the testimony of Detective Looney regarding the events of December 8 and 9, 2005. On December 8, 2005, Detective Looney received an informant's tip that a man known as "Meter Man" or "Pack Eater" was selling crack cocaine from a silver Chevrolet Lumina with Delaware temporary tags which was parked in the 2200 block of Pine Street. (Id. at 7-8.) Detective Looney patrolled the area that evening and observed Defendant, whom he knew by the nickname "Meter Man," enter the driver's side of a Lumina matching the description provided by the informant and drive away in the vehicle. No other individuals entered the vehicle. (Id. at 10-16.) On the evening of December 9, 2005, Detective Looney again observed Defendant standing square to and within inches of the driver's side door of the same Lumina. (Id. at 19.) Upon observing Detective Looney, Defendant backed way from the car as if trying to distance himself from it. (Id. at 20.) Detective Looney asked Defendant to identify himself, and Defendant provided Detective Looney with a false name. Detective Looney knew that Defendant had not provided the

correct name, and asked Defendant why he was lying. Defendant referred to some outstanding warrants for his arrest, and Detective Looney asked Defendant not to run. Detective Looney put his car in park, and Defendant fled. (Id. at 21-22.)

During a foot chase with Defendant, Detective Looney heard Defendant drop what he believed was a plastic item or items on the ground. (Id.) After an unsuccessful chase, Detective Looney returned to retrieve the object(s) that Defendant dropped and found a plastic scale of the type often used by drug dealers to weigh narcotics for distribution and a green pipe-like substance in a plastic bag. (Id. at 22-23.) Upon returning to the Lumina, Detective Looney discovered, in plain view, among other items, numerous clear plastic knotted bags containing a substance later determined to be cocaine. (Id. at 24, 3-4; Govt. Exh. 1, 1A.)

In view of the direct evidence establishing Defendant's ownership of the Chevrolet Lumina in the form of Mr. Baul's testimony and Detective Looney's observations on the evening of December 8, 2005<sup>2</sup>, as well as the circumstantial evidence concerning Defendant's admitted prior history of selling cocaine and crack cocaine; his prior felony drug convictions for

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<sup>2</sup> United States v. Iafelice, 978 F.2d 92, 97 (3d Cir. 1992) (ownership and operation of a vehicle are "highly relevant facts" in evaluating a defendant's knowledge of and control over drugs contained in the vehicle, because "[c]ommon sense counsels that an owner and operator of a vehicle usually has dominion and control over the objects in his or her vehicle of which he or she is aware, and usually knows what is in that vehicle").

maintaining a dwelling for keeping a controlled substance, trafficking between 5 and 50 grams of cocaine, possessing a controlled substance within a thousand feet of a school zone, and selling crack cocaine in the 2200 block of North Pine Street on December 14, 2005; and Defendant's actions on the evening of December 9, 2005, including his attempt to distance himself from the Lumina and his flight from Detective Looney,<sup>3</sup> the Court concludes that the Government has demonstrated that it is more likely than not that Defendant was the owner of the Chevy Lumina and possessed the drugs found inside the Lumina, with the intent to distribute those drugs.<sup>4</sup> Defendant directs the Court to several cases from this Circuit holding that dominion and control over narcotics for purposes of establishing possession is not established by mere proximity to or presence on the property where drugs are located. However, each of these cases concerns the higher burden of proof, proof beyond a reasonable doubt, that is required to sustain a criminal conviction for offenses with a possession element. See e.g., United States v. Jenkins, 90 F.3d

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<sup>3</sup> United States v. Green, 25 F.3d 206, 210 (3d Cir. 1994) (acknowledging that flight from the scene of a crime is admissible to prove consciousness of guilt)

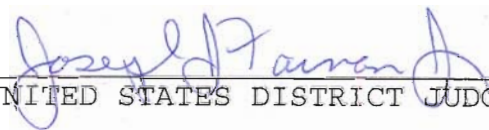
<sup>4</sup> The Court notes that during cross-examination there was some hesitation on the part of Detective Looney to confirm that Defendant had dropped the plastic scale during the foot chase, since Detective Looney did not see the item drop, but only heard it hit the ground. In reaching its determination that the Government has proven the 77 grams of cocaine found in the vehicle are attributable to Defendant, the Court has not given this testimony full weight.

814, 818 (3d Cir. 1996) (distinguishing Iafelice in the context of a determining whether sufficient evidence existed to support a conviction for possession with intent to distribute); United States v. Brown, 3 F.3d 673, 680 (3d Cir. 1993) (discussing possession in the context of reviewing a jury verdict for the sufficiency of the evidence and determining whether "there is substantial evidence from which any rational trier of fact could find guilt beyond a reasonable doubt."") (emphasis added, citations omitted). In contrast, the burden of proof required to establish relevant conduct is the much lower preponderance of the evidence standard, and on the record here, the Court concludes that for purposes of calculating a sentencing guideline range, the Government has established, by a preponderance of the evidence, that Defendant was responsible for at least 50 grams of cocaine base such that his base offense level should be enhanced to a Level 30 pursuant to U.S.S.G. § 2D1.1(c)(5).

The Court will schedule a sentencing date for Defendant by separate Order.

It is so ORDERED.

January 16, 2008  
DATE

  
UNITED STATES DISTRICT JUDGE