

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. CR 10-116 BDB

HAROLD WELLS,

Defendant.

MEMORANDUM OPINION
IN SUPPORT OF
ORDER RULING ON MOTION FOR ACQUITTAL

FOLLOWING nine days of evidence, the jury found Defendant, Harold Wells, guilty of carrying and possession of a firearm during a drug trafficking crime; conspiring with John Gray to possess with intent to distribute methamphetamine in an amount greater than 500 grams; conspiracy to steal and seize money from a drug dealer; stealing funds from the United States; and using a telephone to facilitate a conspiracy to distribute drugs. Defendant Wells now moves for acquittal of all charges [doc. 253]. The Court agrees there was insufficient evidence to support the firearm charge. In all other respects, however, the motion lacks merit and will be Denied.

Conspiracy to Possess With Intent to Distribute

Defendant makes several arguments in support of his motion for acquittal on this count. First, he contends his agreement with Gray was at best a conspiracy to

allow someone else to sell methamphetamine. He suggests that conspiracy not to enforce the laws is not a drug crime, although it might perhaps constitute misprision of a felony. As Defendant acknowledges, however, the evidence presented at trial must be viewed in the light most favorable to the Government. *See United States v. Schene*, 543 F.3d 627, 639 (10th Cir. 2008). There was evidence that both Gray and Defendant were actively encouraging “Joker” to return to Tulsa with methamphetamine to sell, rather than simply looking the other way while he did his business. This active involvement distinguishes this case from the one posited by Defendant, in which law enforcement officers merely agree not to enforce the laws against a certain individual.¹

Defendant next argues the evidence does not support a finding of “interdependence” here, and therefore the conspiracy count must fail. A defendant's activities are interdependent with those of other conspirators if those actions facilitated the endeavors of other alleged conspirators or facilitated the venture as a whole. *See United States v. Heckard*, 238 F.3d 1222, 1230 (10th Cir. 2001). Defendant maintains his intention, and Gray’s as well, was not to facilitate Joker’s drug-selling venture, but to arrest Joker’s customers and ultimately Joker himself. There was evidence, however, from the wiretaps on Defendant’s telephone, indicating neither he nor Gray ever intended to arrest Joker, and did not intend to

¹The Court has not researched the issue of whether an agreement not to enforce controlled-substance laws against a certain individual might constitute conspiracy with that individual to violate those laws. Given the evidence in this case, it is not necessary to do so.

arrest all of his customers either. Instead, this evidence indicated Gray and Defendant intended to facilitate Joker's sale of methamphetamine to more than one buyer, arrest only one of the buyers, and allow Joker to depart Tulsa with the proceeds of his activities. Defendant's argument is therefore not supported by the evidence as that evidence is viewed in the light most favorable to the Government.

Defendant also argues there could be no conspiracy as a matter of law, because his only co-conspirators were government agents, Joker and a confidential informant named Ryan Logsdon. It is true that under Tenth Circuit precedent, a defendant may not be convicted of conspiracy if the only other members of the conspiracy are government agents or informants. *See United States v. Barboa*, 777 F.2d 1420, 1422 (10th Cir.1985). Again, however, Defendant's argument depends on a view of the evidence that is in a light most favorable to him rather than to the government. Defendant points out that the person who was going to perform the actual drug transaction, Joker, was a government agent. This is immaterial because the crime here was the agreement to engage in a transaction or transactions, not the actual transaction itself. Defendant also argues that Gray was not involved in the conspiracy because all he was doing was listening to Defendant, and he was not actively participating in the events. There was evidence, however, that Gray initially was quite involved in the proposed activities. While he subsequently indicated at one point that he was not "playing," at least at that particular time, he still participated in discussions with Defendant concerning the location of the proposed

transactions, how to prevent Joker from being compromised, and other aspects of the activities that a jury could find to constitute active participation in planning. There was sufficient evidence, therefore, to support a determination that Gray and Defendant conspired together, along with government agents and informants, to commit the offense alleged in this count of the indictment.

Defendant's final argument is that he was merely engaged in legitimate law enforcement activities by agreeing to overlook certain drug transactions in order to attain a more important objective. He points out that the Tenth Circuit has specifically stated that law enforcement officers must be given leeway to complete several transactions with a suspect, in order to "probe the depth and extent of a criminal enterprise, to determine whether coconspirators exist, and to trace the drug deeper into the distribution hierarchy." *United States v. Scull*, 321 F.3d 1270, 1277 (10th Cir. 2003). This is a legitimate argument, and one that Defendant was able to make to the jury. The jury, however, rejected it, and there was evidence supporting the jury's decision. This evidence included wiretaps indicating Defendant had no plans to trace Joker's suppliers, to use Joker for any "larger" purpose, or to arrest Joker at the end of a series of transactions. Instead, there was evidence Defendant and Gray agreed with Joker to facilitate Joker's sale of methamphetamine in Tulsa, allowing certain of his customers to walk off with a substantial amount of methamphetamine while they arrested only one and allowed Joker to leave with his proceeds. Viewing the evidence in the light most favorable to the Government, the

jury could determine that Gray and Defendant agreed to help Joker, a major supplier of methamphetamine, to operate in Tulsa while arresting only a more minor player, one of his customers. This is not an example of legitimate law enforcement activity. *See, e.g., U.S. v. Ohlson*, 552 F.2d 1347 (9th Cir. 1977) (upholding conspiracy conviction on very similar facts).

Carrying Firearm During and in Relation to Drug Trafficking Offense

Defendant maintains there was insufficient evidence to support this conviction, which is count 5 of the indictment. He argues there was no showing that he carried his firearm “during and in relation to” count 7, the drug trafficking offense of which he was also convicted. To support a conviction under 18 U.S.C. § 924(c), there must be evidence of some direct connection between the firearm and the drug offense. *See United States v. Radcliff*, 331 F.3d 1153, 1158 (10th Cir. 2003). The Government must show the defendant intended that the firearm be used in the offense. *Id.* The Tenth Circuit has also described this test as requiring that the firearm play an integral role in the offense, and that the defendant must intend that the firearm be available for use during the offense. *see United States v. Iiland*, 254 F.3d 1264, 1273-74 (10th Cir.2001) (reviewing Tenth Circuit case law).

Significantly, the drug trafficking offense involved in this case is a conspiracy offense, rather than a distribution offense. A defendant cannot be convicted under 18 U.S.C. § 924(c) merely because he carries a firearm at times while he is participating in a drug-related conspiracy. *See United States v. Lasanta*, 978 F.2d

1300, 1309 (2d Cir.1992), *overruled on other grounds by Florida v. White*, 526 U.S. 559 (1999). Tenth Circuit case law indicates, rather, that a defendant must carry the firearm during an overt act in furtherance of the conspiracy, or at least during an attempted overt act. In *United States v. Richardson*, 86 F.3d 1537, 1549 (10th Cir. 1996), the defendant carried firearms in his vehicle while he was on his way to a drug transaction. The transaction was called off when defendant realized he and his co-conspirator were being followed by law enforcement officers. The Tenth Circuit discussed a number of prior Tenth Circuit cases as well as cases from other circuits, all of which had involved the carrying of a firearm during an overt act furthering a conspiracy, and then held there was sufficient evidence to support the “during and in relation to” requirement of § 924(c).

The Court has located several cases involving law enforcement officers such as Defendant, who were carrying service weapons, and were convicted under § 924(c). While the underlying offenses in these cases were not necessarily conspiracy offenses, they each fit the pattern established by the conspiracy cases discussed by the Tenth Circuit in *Richardson*. In other words, each of them involved the carrying of a firearm during the course of an overt act or attempted overt act such as a drug transaction, an attempted “ripoff” of a drug dealer, or the transportation of controlled substances by vehicle. *See, e.g., United States v. Radcliff, supra* (using gun to deter interference with a crime satisfies “during and in relation to” requirement; defendant law enforcement officer escorted his wife, who was transporting

methamphetamine in her vehicle, while he was dressed in uniform, carrying his service weapon, and driving his police unit); *United States v. Haynes*, 582 F.3d 686, (7th Cir. 2009) (police officer carried firearm during attempted ripoff of drug dealer, which occurred when officer stopped dealer's vehicle while dressed in full service uniform, including his weapon); *United States v. Sanchez-Berrios*, 424 F.3d 65, 78 (1st Cir. 2005) (defendant officer carried firearm during a drug transport); *United States v. Moore*, 363 F.3d 631 (7th Cir.2004), *rev'd sub nom. by Young v. United States*, 543 U.S. 1100, 125 S.Ct. 1019, 160 L.Ed.2d 1001 (2005) (defendant police officers were convicted under § 924(c) for carrying firearms while engaging in acts of robbery and extortion and while escorting drug couriers around); *United States v. Patterson*, 348 F.3d 218, 227 (7th Cir.2003) (defendant possessed his service revolver while attempting to steal narcotics and money; court found "in relation to" requirement satisfied because plan required the defendant to pretend to be performing a legitimate police raid, which required legitimate-looking officers, which in turn, required them to carry firearms; also, jury could have found that the firearm provided the defendant with a needed sense of security during the incident).

In this case, the Government first argues generally that the evidence showed Defendant carried his firearm "during the time period of the conspiracy" and that Gray and Defendant lent their status and authority to Joker, gave him advice on concealment and law enforcement interdiction methods, and helped him avoid arrest by other officers. With one exception discussed below, however, none of these

activities placed Defendant and his firearm in physical proximity to Joker and to any drug transaction, real or contrived. It is difficult to discern how Defendant's possession of a firearm would further any aspect of the conspiracy while Defendant was on the telephone talking to Joker or Gray, or was in the abstract lending his status and authority to Joker's activities. This is nothing more than an argument that because Defendant carried a firearm as part of his law-enforcement duties, at the same time he was engaged in the conspiracy, he violated § 924(c). As discussed above, this argument stretches the statute too far. *See United States v. Lasanta, supra*, 978 F.2d at 1309 (to sustain the § 924 conviction, "...we would have to conclude that any time a conspirator carried a gun during the course of a conspiracy, he or she violated this provision. We are not prepared to do so.").

The only specific act pointed out by the Government is a meeting held between Joker and Defendant, in Defendant's patrol unit. There is evidence that Defendant was in uniform and had his service weapon with him during that meeting. The Government argues that Defendant's possession of the weapon during this meeting "is just as if [Defendant] were outside a drug dealer's business offering protection and assurance of safety." Even viewing the facts in the light most favorable to the Government, however, the Court cannot accept this characterization of the meeting. There is no evidence that Joker carried any controlled substances or drug-sale proceeds with him during the meeting; there is no evidence that a drug transaction was going to occur during or after the meeting; and

there is no evidence that any third party was expected to be present at the meeting. Thus, there is no evidence that Defendant was protecting Joker in any way or was lending Joker his status and authority as a law enforcement officer, including the authority provided by his firearm, to Joker during the meeting. In fact, the wiretapped conversation shows that Defendant and Joker did not want any third party to see Joker meeting with a uniformed officer in a police vehicle and took pains to conceal the meeting. In sum, there was no transportation of drugs to be protected, or security to be provided during a drug transaction, or potential customers to be impressed by Joker's affiliation with an armed police officer. There was not even an attempt to carry out an overt act such as meeting a supplier or customer. This meeting simply had none of the earmarks of a situation in which a firearm could potentially be useful in furthering the drug conspiracy involved in this case. The Court therefore holds there was insufficient evidence that Defendant carried a firearm "in relation to" the drug conspiracy of which he was convicted.

Use of a Communications Facility to Commit Felony Drug Offense

Defendant's only argument with respect to this conviction, for violation of 21 U.S.C. § 843(b), is that there was no evidence of a drug conspiracy, so the use of a telephone by Defendant is irrelevant. As discussed above, there was sufficient evidence to support the conspiracy conviction, and Defendant's argument fails for that reason.

Counts 8 and 9

These counts concern the theft of money at the hotel room. Defendant stands on the arguments he made at the close of the government's case and again at the close of all the evidence. The videotape of the activities in the hotel room, standing alone, is sufficient to support these convictions. In addition, testimony from Mr. Gray corroborated the contents of the videotape. Defendant's arguments concerning these counts are not convincing.

Quantity of Methamphetamine

Defendant contends there was insufficient evidence that the conspiracy involved a quantity of methamphetamine greater than 500 grams. Defendant acknowledges this issue may be a sentencing issue. The Court agrees, and will address this issue at the appropriate time.

Conclusion

Based on the foregoing, Defendant's Rule 29 motion for acquittal (Doc. 253) will be denied, except that it will be granted as to Count 5, the firearm count.



BRUCE D. BLACK
Chief Judge, District of New Mexico
Sitting by Designation