UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-4194

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE,

VERSUS

BENTON MILEY and BILLIE MARIE TAYLOR,

DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Eastern District of Texas
(:91 CR 86 1)

(December 23, 1992)

Before REAVLEY, SMITH and DEMOSS, Circuit Judges.

DEMOSS, Circuit Judge:[*]

Defendants Benton Miley ("Miley") and Billie Marie Taylor ("Taylor") appeal their convictions for several counts including conspiracy to manufacture methamphetamine. We affirm the convictions.

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I. FACTS & PROCEEDINGS BELOW

During the Summer of 1991, Benton Miley ("Miley") approached Paul Mills, the owner of a chemical supply business near Houston. Miley said that he was in possession of stolen chemicals from Mills's warehouse and that he was unsuccessfully attempting to manufacture methamphetamine with the chemicals. Mills, who was a paid government informant, gave Miley the pager number of a person who could supply the illegal chemicals. In reality, the pager belonged to an undercover Houston narcotics officer, DiMambro.

From July 7, 1991 through July 19, 1991, Miley called the pager repeatedly. Most of their conversations were recorded and played for the jury. During the course of these discussions, DiMambro agreed to sell Miley 55 pounds of ephedrine for $25,000. They agreed to consummate the sale in a restaurant parking lot in Liberty, Texas on July 19, 1991.

Miley arrived at the restaurant in a pickup truck driven by his sister, Jacquelyn Miley ("Jacquelyn"), with a passenger, his girlfriend, Taylor. When DiMambro arrived at the restaurant, Miley left the pickup truck and entered the officer's vehicle. Miley was carrying a briefcase, presumably containing the purchase money. However, Miley opened the briefcase and produced a sawed-off shotgun and a bottle of nitric acid threatening DiMambro with both. Taylor immediately entered the officer's car, removed the container of ephedrine, and placed it in the bed of the pickup truck. Miley then put the shotgun and the acid back in the brief case, and Taylor returned the briefcase to the pickup truck. Eventually, the

surveillance officers began approaching and DiMambro fled his vehicle. Miley, Jacquelyn and Taylor were arrested.

On July 20, 1991, officers of the Houston Police Department were called to the home of Randal Yanez ("Yanez") and Robin Hutchinson ("Hutchinson"), Miley's niece. Yanez and Hutchinson told the officers that they had discovered items in their garage that did not belong to them and which they felt were unsafe. Yanez directed the officers to heating mantels, glassware, chemicals, and other items used to manufacture methamphetamine. During the trial, Miley testified that he put all of these items into the garage.

Miley, Taylor, and Jacquelyn were tried before a jury on an eight count superseding indictment. During the trial, Jacquelyn pled guilty to count 4, possessing a firearm in relation to a drug trafficking offense, and count 5, being a felon in possession of a firearm. The jury convicted both Miley and Taylor of the remaining counts:

Count 1: conspiracy to manufacture methamphetamine in violation of Title 21 U.S.C. § 846;

Count 2: possession of a listed chemical with the intent to manufacture methamphetamine in violation of Title 21 U.S.C. § 841(d)(1);

Count 3: possession of a firearm in relation to a drug trafficking crime in violation of Title 21 U.S.C. § 924(c); and

Counts 7 and 8: possession of an unregistered firearm in violation of Title 26, U.S.C. § 5861.

Miley was also convicted of count 6, being a felon in possession of a firearm in violation of Title 18, U.S.C. § 922(g).

Miley was sentenced to life imprisonment under count 1, 120 months consecutive imprisonment for count 3, and 120 months concurrent imprisonment for counts 2, 6 and 7. Taylor was sentenced to 292 months imprisonment for count 1, 120 months consecutive imprisonment for count 3, and 120 months concurrent imprisonment for both counts 2 and 8. Both Miley and Taylor appeal their convictions.

II. Entrapment

Miley raised entrapment as an affirmative defense. This defense requires defendant to show that (1) he was induced by the government to commit the offense, and (2) he was not predisposed to commit the offense. United States v. Pruneda-Gonzalez, 935 F.2d 190 (5th Cir. 1992). Miley has the initial burden to prove that the government's conduct created a substantial risk that an offense would be committed by a person other than one ready to commit it. Then the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. United States v. Johnson, 872 F.2d 612 (5th Cir. 1989). Miley's entrapment defense was rejected by the jury, and this court "looks to the evidence to determine whether, viewing reasonable inferences and credibility choices in the light most favorable to the Government, a reasonable jury could find, beyond a reasonable doubt, that the defendant was predisposed to commit the offense." Id.; United States v. Arditti, 955 F.2d 331, 342 (5th Cir. 1992).

Miley claims that the government failed to meet its burden to prove predisposition. His argument primarily centers on his own testimony that he came to Mills's warehouse for plumbing supplies and that DiMambro and Mills repeatedly insisted that he manufacture methamphetamine. The jury simply chose not to believe this. Miley further argues that the government, through its informant, Mills, induced him into purchasing the illegal chemicals because Mills gave him the undercover agent's beeper number and supplied him with a thermometer and adapter to use in manufacturing the methamphetamine.

The government points to other evidence showing Miley's predisposition: (1) Miley initiated the first discussion Mills concerning the manufacture of methamphetamine; (2) Miley sought after officer DiMambro after receiving his pager number and being told DiMambro could supply illegal chemicals; (3) Miley repeatedly contacted DiMambro in this regard; and (4) DiMambro made other contacts in which Miley intimated he was currently manufacturing methamphetamine and needed methylamine to provide it in powder form. We hold that the government presented sufficient proof of Miley's predisposition.

III. Conspiracy and Possession Offenses

Miley was convicted under counts one and two of the indictment, which charge, respectively, that Miley (1) conspired, in violation of § 846, to manufacture methamphetamine in violation of § 841(a)(1), and (2) possessed ephedrine, a listed chemical, with the intent to manufacture methamphetamine in violation of §

841 (d)(1). Miley asserts that he was improperly prosecuted for the same offense because the evidence at trial shows that possession of ephedrine, which is punishable under § 841(d)(1), was the only proof that he was involved in the conspiracy in violation of § 846, therefore, the government incorrectly applied § 841(a)(1).

Congress' interest in enacting § 841(d) was to provide for prosecution of certain behavior, possession of chemicals, that could not be reached under § 841(a). United States v. Perrone, 936 F.2d 1403 (2nd Cir.), clarified, 949 F.2d 36, 37-38 (2nd Cir. 1991) (§ 841(d) does not disturb prosecution under §841(a), instead §841(d) allows for the prosecution of additional behavior which may not be reachable under §841(a)). Congress provided a lighter penalty (10 yrs. maximum) under § 841(d) than under § 841(a)(1) (10 yrs. minimum). Miley asserts that the evidence failed to prove that he engaged in any criminal conduct beyond that which is prosecutable under § 841(d). Miley relies on Perrone in which the Second Circuit reversed a conviction for a § 841(a)(1) violation because the evidence was sufficient to show only a violation of § 841(d). Id., cited in United States v. Stone, 960 F.2d 426, 431 n.1 (5th Cir. 1992) (Stone's conviction under § 841(a)(1) upheld because the basis for conviction was not merely defendant's possession of ephedrine; it was his numerous expressions of intent to manufacture methamphetamine). Miley is correct that under Perrone and Stone, there must be additional evidence to support a conviction of the § 841(a)(1) conspiracy beyond the minimum

necessary to sustain a conviction under § 841(d). Id. However, such additional evidence exists in this case, as outlined in the next section of this opinion, making Perrone inapplicable here.

This case passes muster under Blockburger[1] because both offenses require proof of a fact not necessarily required by the other, even with the substantial overlap in the proof offered at trial. United States v. Stovall, 825 F.2d 817, 822 (5th Cir. 1987). Here the essence of the conspiracy charge was the agreement to manufacture methamphetamine. In no way was possession of a precursor chemical necessary to that offense. United States v. Prati, 861 F.2d 817, 822 (5th Cir. 1988). Likewise, no agreement was necessary for a conviction under § 841(d). Miley was properly convicted and sentenced for both offenses.

IV. Sufficiency of the Evidence

In deciding sufficiency of evidence, the Court shall determine whether, when viewing evidence and all inferences that may be reasonably drawn from that evidence in a light most favorable to the jury's verdict, a rational jury could have found essential elements of the offense beyond a reasonable doubt. United States v. Zuniga-Salinas, 945 F.2d 1302 (5th Cir. 1991). The elements necessary for a drug conspiracy are (1) the existence of an agreement to manufacture methamphetamine, that each defendant had (2) knowledge of the agreement and (3) voluntarily participated in

[1] Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

the conspiracy. United States v. Carter, 953 F.2d 1449, 1454 (5th Cir. 1992).

Miley and Taylor assert that there was insufficient evidence to support the jury's verdict on count one because there was no evidence of an agreement to manufacture methamphetamine. Miley maintained throughout the trial that he was acting on his own behalf in attempting to acquire ephedrine. Neither Jacquelyn nor Taylor are referred to in the tapes; only an agreement between Mills, the informant, and Miley is eluded to in the tapes. Miley concludes that viewing the evidence most favorably to the government, the only agreement was between Miley, Mills and DiMambro. See United States v. Martino, 648 F.2d 367, 404-405 (5th Cir. 1981) (there can be no indictable conspiracy with a government informer; a government agent cannot be a co-conspirator). Miley contends that the only evidence linking Jacquelyn and Taylor to the conspiracy is their presence at the scene of the arrest.

The following is an outline of the evidence presented by the government that clearly established a conspiracy to manufacture methamphetamine among Miley, Taylor, and/or unknown others:

(1) In his initial contact with Mills, Miley told him that he knew who had burglarized his warehouse, that he had bought phenylacetic acid from the burglars, and that he was "cooking it" without success;

(2) During one of Miley's discussions with Mills about the manufacture of methamphetamine, Taylor was with him.

(3) Mills told Miley that the pager number he gave Miley belonged to a person who could furnish him with chemicals;

(4) In Miley's first conversation with DiMambro, he told DiMambro that he other unnamed persons were attempting to make methamphetamine;

(5) In a conversation with DiMambro, who returned Miley's page, Miley told DiMambro he would be willing to exchange methamphetamine for a gallon of methylamine 40%. Subsequently, Miley told DiMambro that he could not do the transaction as an exchange because the people with whom he was working would not agree;

(6) In another conversation with DiMambro, Miley told him that he wanted ephedrine "to go into a venture with his people from California for the manufacture of methamphetamine." Miley responded to DiMambro's questions regarding problems in the manufacturing process by stating that he felt "these other people were doing [something] wrong," and "we just can't get it to go and I've lost a lot of money."

(7) In several taped conversations where the transaction to sell ephedrine was being set up, Miley revealed that more people were involved in the conspiracy.

a) On July 17, 1991, Miley told DiMambro that his "people from out in California" were in town, and that there would not be a problem with the asking price for the ephedrine. Miley also said that the "California people" had everything they needed, except the ephedrine. Miley also bragged that the group manufactured seven pounds of methamphetamine per day.

b) During the morning of July 18, 1991, Miley and DiMambro briefly discussed the anticipated sale of ephedrine, and then Miley again spoke about his failed manufacturing attempts. He told DiMambro that he obtained a thermometer from Mills and that he had four or five people "look at it with him" to see if he could produce methamphetamine.

c) When Miley and DiMambro agreed to meet in a parking lot in Liberty, Texas, Miley said that he would probably be bringing a guy from California because "it's his money." Miley explained that his man could confirm the authenticity of the chemical, and then Miley would hand over the money to DiMambro.

d) DiMambro recorded another conversation confirming the time for the exchange. Miley said he would bring a couple of girls instead of the man from

California, because he needed someone to "cover his back."

e) On the day of the sale, Miley arrived at the restaurant with Jacquelyn and Taylor. DiMambro was wearing a body recording device and was monitored throughout the transaction by other agents. DiMambro asked to see the money, and Miley took the briefcase from Taylor and exited the truck. Upon entering DiMambro's car, Miley pulled out of the briefcase a shotgun and held it on DiMambro while the women moved the chemicals from the car to the truck. Taylor then retrieved the briefcase from Miley while Jacquelyn held a revolver on DiMambro.

f) Taylor's purse contained a recipe for manufacturing methamphetamine. Her fingerprints were also found on another recipe for methamphetamine found at Miley's niece's house.

In light of Miley's statements to DiMambro and Mills, Taylor's possession of methamphetamine recipes, and Miley and Taylor's forcible dispossession of the chemicals from Dimambro, we hold that the verdicts were supported by sufficient evidence.

V. Taylor's Sufficiency of the Evidence Arguments

Taylor challenges the sufficiency of the evidence on her convictions for possession of ephedrine, possession of a firearm in relation to a drug trafficking crime and possession of an unregistered firearm.

1) Possession of Ephedrine.

Title 21 U.S.C. § 841(d) requires proof that a defendant knowingly and intentionally possessed a precursor chemical with the intent to manufacture a controlled substance. United States v. Martinez, 950 F.2d 222, 224 (5th Cir. 1991).

The evidence shows that Taylor removed the bucket of ephedrine from officer DiMambro's car herself. Taylor argues that there is no evidence that she knew that ephedrine was in the bucket. The government asserts that from the circumstances surrounding her acquisition of the bucket, one could infer that she knew the contents. Moreover, the government invokes the Pinkerton[2] rule to hold Taylor liable for all subsequent offenses of her co-conspirators, committed in furtherance of the conspiracy.

2) Possession of a firearm in relation to a drug trafficking crime (count 3) and possession of an unregistered firearm (count 8).

The elements for a violation of Title 26, U.S.C. § 5861(d) are the knowing possession of a sawed-off shotgun that has not been registered as required. United States v. Anderson, 885 F.2d 1248 (5th Cir. 1989). To obtain a conviction for using a firearm in a drug trafficking crime, the jury had to find that the defendant, during or in relationship to a drug trafficking crime, used or carried, a firearm. United States v. Oinck, 889 F.2d 1425, 1431 (5th Cir. 1989).

While sitting in DiMambro's vehicle, Miley opened his briefcase, removed the firearm and pointed it at DiMambro. Taylor then retrieved the ephedrine from the back seat, and Miley returned the firearm to the briefcase. Subsequently, Taylor retrieved the briefcase. Clearly the weapon was used in the course of a drug offense. Taylor claims that there is no evidence that she saw the

[2] Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

gun, and thereafter, knew that it had been returned to the briefcase. We agree with the government that when she retrieved the briefcase, it was reasonable to conclude that she knew the firearm was in the briefcase because it was plainly visible while Miley held it on DiMambro but no longer visible when she retrieved the briefcase. However, the government also correctly points to Pinkerton to hold her liable for the firearm offenses committed in furtherance of the drug conspiracy.

VI. Sentencing

The district court's sentence will be upheld as long as it results from a correct application of the guidelines to factual findings which are not clearly erroneous. United States v. Sarasti, 869 F.2d 805, 806 (5th Cir. 1989). The applicable sentencing guideline for conspiracy to manufacture methamphetamine is U.S.S.G. § 2D1.4, and that guideline requires U.S.S.G. § 2D1.1 to govern, as if the object of the conspiracy - the manufacture of methamphetamine - had been completed. If the conspiracy was uncompleted or if no drugs were seized, the district court shall approximate the amount. See U.S.S.G. § 2D1.4, comment notes 1 and 2. Here no working lab was seized, so the district court estimated the amount of methamphetamine producible using the negotiated amount of ephedrine, fifty-five pounds.

Initially, Taylor challenges the district court's approximation based on the negotiated sale of fifty-five pounds of ephedrine. She argues that because the ephedrine was never weighed, either before or after the arrests and seizures, the

district court's use of the fifty-five pound figure was clearly erroneous. The government responds that the negotiated amount controls the base level offense, and therefore, whether the ephedrine was ever weighed is immaterial. Furthermore, Mills' uncontradicted testimony indicated that he supplied the government with fifty pounds of ephedrine to use in the reverse sting operation. However, the difference between the amount of ephedrine negotiated for and what Mills actually supplied would not change the guideline calculations.

Both Taylor and Miley contend that the district court should not have used U.S.S.G. § 2D1.1 to determine the offense level, because certain chemicals necessary for methamphetamine production were missing, and therefore, the completion of the conspiracy was impossible. This argument is not supported by the evidence. There are two methods for manufacturing methamphetamine: the P2P method and the ephedrine method. Berens, the forensic chemist for the D.E.A., testified that using the ephedrine method, fifty-five pounds of ephedrine could produce fifteen to twenty kilograms of pure methamphetamine. Although, the chemicals found in Houston were those necessary for the P2P method of production, as was the adulterated phenylacetic acid brought by Miley and Taylor to Liberty, Texas, Berens testified that methamphetamine by either process could be manufactured with the amount and type of equipment obtained from Yanez and Hutchinson's garage. Additionally, Miley told DiMambro that his "California people" had everything they needed, except the ephedrine for the production of methamphetamine.

The district court did not erroneously find that fifty-five pounds of ephedrine would produce 14.96 kilograms of pure methamphetamine, resulting in an offense level of 40 for Taylor and offense level of 44 for Miley. Under level 44, Miley was sentenced to life imprisonment. Taylor's criminal history category was determined to be level 1, and coupled with an offense level of 40, a guideline range of 292-365 months resulted. The district court chose to sentence Taylor to the lowest figure of the range, 292 months imprisonment.

Because Taylor and Miley fail to demonstrate that the district court either incorrectly applied the guidelines or applied them to clearly erroneous fact findings, their sentences will not be disturbed.

VII. Motion to Suppress

At trial, the government introduced several items removed from Yanez and Hutchinson's garage. Yanez and Hutchinson had called the Houston Police Department to their home upon their discovery of items in their garage that did not belong to them and which they felt were unsafe. Yanez directed the officers to heating mantels, glassware, chemicals, and other items used to manufacture methamphetamine. During the trial, Miley testified that he placed all of these items into the garage.

Miley filed a motion to suppress all of the items removed from the garage, arguing that the items were obtained by the police in an illegal search that was conducted without a warrant and with a

coerced consent. The district court overruled the motion. On appeal, Miley makes the same contentions.

The uncontroverted evidence established that the initial discovery of the items was by private citizens, Yanez and Hutchinson, and therefore, no government action occurred until these private citizens requested the police to "come and take away these things." A "search" by private citizens does not invoke Fourth Amendment protection. Coolidge v. New Hampshire, 403 U.S. 443, 487-490 (1971); United States v. Ramirez, 810 F.2d 1338, 1342 (5th Cir. 1987). The fourth amendment applies only to actions of the government. When evidence is retrieved by a private individual, it may be admitted at a criminal trial. Id. Moreover, these individuals did not act as instruments or agents of the government because, "where the government has offered no form of compensation . . ., did not initiate the idea that [the private parties] would conduct a search, and [the private parties] lacked specific knowledge that [they] intended a search, . . . " the private parties are not instruments or agents of the government. Id., citing United States v. Bazan, 807 F.2d 1200, 1204 (5th Cir. 1986). The trial court's decision to deny Miley's motion to suppress was correct.

VIII. Government's Conduct

Miley argues that because the government supplied him with various items to facilitate his manufacture of methamphetamine, including an amount of ephedrine that would insure his life sentence, the government's conduct was outrageous and a violation

of his Fifth Amendment right to due process. See United States v. Russell, 93 S.Ct. 1673 (1973). This argument is similar to the sentencing entrapment claim in United States v. Tobias, 662 F.2d 381, 386 (5th Cir. 1981).

The government asserts that Miley requested a drum of ephedrine from the undercover officer, and that a drum is equivalent to fifty-five pounds. Furthermore, during a conversation with DiMambro in which DiMambro confirmed that he would deliver "about fifty-five pounds" of ephedrine to Miley, Miley responded, "that'll work."

Government infiltration of criminal activity is a recognized and permissible means of investigation even though the government agent supplies something of value to the criminal. Tobias at 386. However, the government may not instigate the criminal activity, provide the place, equipment, supplies and know-how, and run the entire operation with only meager assistance from the defendant without violating fundamental fairness. Id; See also, United States v. Jones, 839 F.2d 1041, 1053 (5th Cir. 1988) (Tobias is the outer limit of conduct that will not be considered outrageous; government's conduct did not reach the level of outrageousness found in Tobias because the government did not suggest scheme, nor did government pay for the necessary material or provide the lab site, government supplied scientific expertise and direction, as in Tobias). In this case, the government's conduct was clearly not outrageous especially given the fact that Miley initially contacted the informant, Mills.

IX. Sentencing Guidelines

Miley contends that the Sentencing Reform Act required the Sentencing Commission to submit a report to Congress before the guidelines could take effect. Miley contends that this "requirement" was not followed and therefore the guidelines have no legal effect. This Court has previously held this argument invalid. United States v. White, 869 F.2d 822, 829 (5th Cir. 1989) (the Court will not scrutinize the timeliness of reports intended solely for the benefit of Congress).

Miley also contends that the guidelines are in violation of the Presentment Clause of the United States Constitution. This Court has likewise addressed this same argument in United States v. Zapata-Alvarez, 911 F.2d 1025, 1027 (5th Cir. 1990) and held that the guidelines do not violate the Presentment Clause because enabling legislation for the guidelines was presented to and signed by the President.

AFFIRMED.