

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
v.) Crim. No. 04-74-B-W
)
LIONEL CORMIER,)
)
Defendant)

**ORDER ON MOTION FOR RELIEF FROM PREJUDICIAL
JOINDER AND MOTION TO STRIKE
AND
RECOMMENDED DECISION ON MOTION
TO SUPPRESS**

This case is before the court on three motions filed by defendant Lionel Cormier, a motion for relief from prejudicial joinder (Docket No. 25), a motion to strike surplusage from the indictment (Docket No. 26) and a motion to suppress identification testimony (Docket No. 27). A hearing was held on all three motions on December 2, 2004, in Portland, Maine. I now **DENY** both the motion for relief from prejudicial joinder and the motion to strike surplusage from the indictment. I further recommend that the court **DENY** the motion to suppress identification.

Motion for Relief from Prejudicial Joinder

Count One of this indictment charges that from March 22, 2003, to June 13, 2003, Defendant conspired with others to possess with intent to distribute drugs. Counts Two and Four allege that on March 22, 2003, and again on June 13, 2003, Defendant possessed with intent to distribute drugs. Count Three alleges that from April 4, 2003, through June 13, 2003, Defendant possessed firearms even though he was a felon. Finally, Count Five alleges that when Defendant committed the offenses described in

Counts One and Four, he used or carried a firearm. The Government represents the evidence at trial would show that Cormier, after forming the drug conspiracy, acquired a Ruger Super Red Hawk Model .454 caliber revolver. Certain of Defendant's co-conspirators aided and abetted the acquisition of this gun. As part of the conspiracy alleged in Count One, Defendant and others allegedly committed the offense alleged in Count Four by robbing a second drug dealer and attempting to rob a third. During the second robbery and the third attempted robbery, Defendant used and carried the Ruger .454 revolver. During the second robbery, Defendant acquired two additional firearms, a Ruger Mark II .22 caliber pistol and a Winchester .32 caliber rifle. The Ruger .454 was recovered near the scene of the third attempted robbery.

Accepting the foregoing recitation of facts as indicative of the Government's case, the possession of firearms in this case is inextricably linked with the drug conspiracy and therefore may be joined for trial with the other counts pursuant to the terms of Federal Rule of Criminal Procedure 8(a). Even if the felon in possession count were severed, evidence of gun possession and use will necessarily be a part of the trial. In his memorandum in support of the motion for relief from prejudicial joinder, Cormier does not argue that the offense was improperly joined under Rule 8(a), although he refuses to concede the joinder was proper. Instead, he moves for relief from what he perceives to be the prejudicial joinder under the terms of Fed.R.Crim.P.14(a). (Mot. for Relief from Prej. Joinder, Docket No. 25, at 2, ¶¶ 1, 3, Legal Discussion).

Applying the guidance of United States v. Neal, 36 F.3d 1190 (1st Cir. 1994), the court has considerable flexibility to fashion remedies to ameliorate any unfair prejudice that could result from the joinder of the felon in possession charge. As the Appeals Court

has noted, the Government can be required to accept stipulations offered by the defendant as to the nature of the previous underlying felony convictions, in order to prevent the jury from learning about the nature of those charges. Additionally, the court can provide curative instructions involving the use the jury should make of the prior convictions. Furthermore, defendant's counsel indicated at oral argument on these motions that he might request that the sentencing enhancements (the subject of the motion to strike surplusage) be bifurcated at trial if they were not stricken as surplusage. Should the court entertain that possibility, it could try these charges in a similar fashion. Given the multitude of available remedies, I am satisfied that the charge need not be severed from the indictment. The motion is **DENIED**.

Motion to Strike Surplusage

The indictment contains, in a section entitled "SENTENCING ALLEGATIONS," several claims by the government concerning drug quantity, the use of firearms, stolen firearms, and brandishing firearms. The government also claims in its sentencing allegations that Mr. Cormier committed the offenses in the indictment less than two years after being released from a sentence and that he was 18 years old at the time that the present crimes were committed. Cormier has moved to strike these sentencing allegations as surplusage.

One judge in this District has already ruled on a motion to strike sentencing allegations from an indictment. I am satisfied that given the current state of the law, his reasoning is equally applicable to this case and I will follow it:

Given this District's interpretation of Blakely v. Washington, 124 S.Ct. 2531 (2004), see, e.g., United States v. Fanfan, 2004 WL 1723114 (D. Me. June 28, 2004); United States v. Zompa, 326 F.Supp.2d 176 (D.Me.2004), the government must include such allegations in order to

obtain what it considers an appropriate sentence under the United States Sentencing Guidelines. Perhaps by the time of trial in this case, the Supreme Court will have decided *Fanfan* and *Booker* and given us clear guidance on how the federal Guidelines are to be administered post-*Blakely*, or perhaps the defendant will decide to waive *Blakely* issues and let the judge rather than the jury decide sentencing factors, or perhaps the sentencing factors can be bifurcated and tried later to the same jury if the defendant is convicted, but until then the sentencing allegations are proper in the Indictment.

United States v. Baert, Crim. No. 03-116-P-H, 2004 WL 2009275, 2004 U.S. Dist.

LEXIS 17911 (D.Me. Sept. 8, 2004). The motion to strike surplusage is **DENIED**.

Recommended Decision on Motion to Suppress Identification

Cormier has moved to suppress evidence that a witness identified him during a pretrial identification procedure that was impermissibly suggestive. United States v. Lopez-Lopez, 282 F.3d 1, 10 (1st Cir. 2002) (“Pretrial identification evidence is subject to constitutional limitations under the Due Process Clause.”) As the case law recognizes motions of this nature are analyzed under a two-pronged approach. United States v. Watson, 76 F.3d 4, 6 (1st Cir. 1996). First, the court must determine whether the procedure used to obtain the identification was impermissibly suggestive. Id. If it was, then the court must decide whether the identification itself was reliable under the totality of the circumstances, notwithstanding the suggestive identification procedures used by the police. Id. If the police procedure used to obtain the witness identification was impermissibly suggestive, then the Government must prove by clear and convincing evidence that the identification was nevertheless reliable before the witness makes an in-court identification or the prior out-of-court identification is admitted. United States v. Wade, 388 U.S. 218 (1967).

Under the procedure adopted in Maine state courts, the defendant has the burden of coming forward with evidence of the impropriety or suggestiveness of the police identification procedures before the Government must meet its heightened burden of clear and convincing evidence regarding the independent reliability of the witness's identification. See State v. Cefalo, 396 A.2d 233 (1979). Once the defendant produces evidence that raises an issue of suggestiveness, the Government still must satisfy the court that the procedure was not unduly suggestive.¹ At the defendant's request and with the consent of both parties, that procedure was followed at the evidentiary hearing I conducted in this case. The defendant's counsel requested that I rule upon the first prong of the analysis after the presentation of certain initial evidence. I did so, finding that the procedure of the photo line-up was not unduly suggestive. The Government then chose not to present any additional evidence regarding the witness's independent basis for identification. Accordingly, my proposed findings are circumscribed to the issue of the suggestiveness of the procedure used.

Proposed Findings of Fact

According to Mark Waltz, a police officer with the Brunswick, Maine police department, Lionel Cormier and two other individuals became suspects in an attempted armed robbery of a drug dealer in the Brunswick area. Located in the woods nearby the scene of the crime was a discarded firearm police traced back to the Kittery Trading Post in Kittery, Maine. From that business the police learned the name of the gun's purchaser.

¹ I do not believe the Maine procedure compels the conclusion that defendant has a burden of persuasion in regard to the issue of suggestiveness, even though Cefalo and other Maine cases may suggest that to be the case. I have analyzed this motion as though the Government has the ultimate burden of establishing that the identification procedure is not unduly suggestive, as it would for any factual issue raised by way of a motion to suppress. I simply have not analyzed the Government's evidence under the heightened burden required when an identification procedure is found to be unduly suggestive.

Once they located that individual, he acknowledged that he was a “straw purchaser.” He had been approached by someone in the parking lot of the Trading Post and he had bought the gun for that individual. He did not know the person’s name nor did Waltz believe that he had given a very specific description of the individual, although he did describe speaking with him in the parking lot and accepting money from him for the transaction.

After the witness had been interviewed by another officer, Waltz, with the assistance of a “crime analyst” working for the Brunswick Police Department, put together three separate photo arrays of six photographs each. In each of the photo arrays one of the three suspects appeared. Waltz took all three photo arrays to the witness and showed them to him. The officer merely asked the witness if he knew anyone in any of the photos. The witness recognized Lionel Cormier’s photograph, photo # 4 in the third array shown to him, and identified him as the man for whom he had purchased the gun approximately five and one half months earlier.

As Cormier points out, his photograph depicts an individual with somewhat darker skin tone than that displayed by the individuals in the other five photographs. However, all six men in the photographs are clearly Caucasian males, with bald heads and two of them, including Cormier, have moustaches. It appears in the photograph that Cormier may have a suntan, although the testimony at the hearing was that he suffers from a kidney infection that may affect his skin color. The significant thing in my mind is that there is nothing about Cormier’s photograph that makes it stand out from all of the rest of the pictures. In fact Waltz testified that the crime analyst attempted to make all of the photographs have some “distracting” feature so as to eliminate the notion that one

was more suggestive than the other. For instance another individual pictured on the array is bare-chested with visible tattoos and a chain around his neck. This tactic was employed because the only photograph of Cormier available to the police was the picture used in the photo array and it was not a standard police booking photograph. The police were cognizant that his skin tone, in the photograph, was darker than that of the other individuals, but the defendant's dark complexion was not the pivotal description given them by the witness when describing the individual for whom he purchased the gun.

Cormier argues that the photo was unduly suggestive not because it matches the description given by the witness and none of the other photos do; rather, he bases his argument primarily upon the police description of Cormier found on a wanted poster that describes him as having a "dark complexion." That wanted poster, which includes the same picture as the photo array, was prepared by the police at a separate time and for a separate purpose than the witness's identification of Cormier. There is nothing in the record to suggest that the witness ever saw the wanted poster or was in any way influenced by it. The fact that the police themselves used the term dark complexion when preparing the wanted poster does not make the photo array suggestive in any way under the circumstances the witness viewed it.

The witness in this case was not an individual who was the victim of Cormier's criminal conduct. While that fact may go primarily to the witness's independent basis for the identification, it is part of the totality of the circumstances that I must consider in assessing whether the photo array prepared by the police was suggestive. The witness viewing the array was not an emotionally distraught victim looking at a picture geared to his own hurried description of an assailant. He was told that the gun he had unlawfully

purchased for a third party had been used in an attempted robbery, but the police did not tell him which of the individuals they suspected in the robbery nor did they give the witness a physical description of their suspect. Thus there was nothing unduly suggestive about the presentation of this photo array to the witness. I am satisfied that the Government has met its burden of establishing that the photo array was not unduly suggestive and therefore there is no reason to suppress evidence in connection with its presentation to the witness.

Conclusion

For the foregoing reasons, I now **DENY** Defendant's Motion for Relief from Prejudicial Joinder (Docket No. 25) and Defendant's Motion to Strike Surplusage (Docket No. 26) and further **RECOMMEND** that the court **DENY** Defendant's Motion to Suppress (Docket No. 27).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated: December 3, 2004

/s/Margaret J. Kravchuk
U.S. Magistrate Judge

Defendant

LIONEL CORMIER (1)

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Pending Counts

CONTROLLED SUBSTANCE -
SELL, DISTRIBUTE, OR
DISPENSE IN VIOLATION OF
TITLE 21, SECTION 841(a)(1)
and 841(b)(1)(C) and 846
(1)

CONTROLLED SUBSTANCE -
SELL, DISTRIBUTE, OR
DISPENSE - POSSESSION
WITH INTENT TO
DISTRIBUTE AND
DISTRIBUTION OF
OXYCONTIN AND PERCOCET
IN VIOLATION OF TITLE 21,
SECTION 841(a)(1) and
841(b)(1)(C) AND TITLE 18,
SECTION 2 - AIDING AND
ABETTING
(2)

UNLAWFUL TRANSPORT OF
FIREARMS, ETC. - FELON IN
POSSESSION OF FIREARM IN
VIOLATION OF TITLE 18,
SECTION 922(g)(1) and 924(e)
(3)

MARIJUANA - SELL,
DISTRIBUTE, OR DISPENSE -
POSSESSION WITH INTENT

Disposition

TO DISTRIBUTE AND
DISTRIBUTION OF
MARIJUANA IN VIOLATION
OF TITLE 21, SECTION
841(a)(1) and (b)(1)(D) AND
TITLE 18, SECTION 2 - AIDING
AND ABETTING
(4)

VIOLENT
CRIME/DRUGS/MACHINE
GUN - USE OF FIREARM IN
DRUG TRAFFICKING CRIME
IN VIOLATION OF TITLE 18,
SECTION 924(c)(1)(A)(ii)
(5)

**Highest Offense Level
(Opening)**

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

None

Complaints

None

Disposition

Plaintiff

USA

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