

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)
)
 v.) 1:12-cr-00125-JAW-03
)
APOLINAR ORTIZ-ISLAS)

ORDER ON GOVERNMENT’S MOTION IN LIMINE

The Government moves in limine to determine the admissibility of evidence of a proposed cocaine transaction resulting in the Defendant’s arrest that took place about three months after the arrest of an alleged co-conspirator. The Court concludes that whether the later transaction was part of the charged conspiracy is a jury question and that the Government’s evidence of the Defendant’s involvement in the later transaction is admissible.

I. STATEMENT OF FACTS

A. Procedural Background

The jury has been selected and trial is scheduled to begin on October 15, 2013 in this cocaine trafficking conspiracy case. In anticipation of trial, the Government moved in limine on August 16, 2013 to introduce evidence of Apolinar Ortiz-Islas’ arrest and the seizure of ten kilograms of cocaine in Houston, Texas on September 18, 2012. *Gov’t’s Mot. in Limine Regarding Evid. Intrinsic to the Conspiracy* (ECF No. 160) (*Gov’t’s Mot.*). On September 6, 2013, Mr. Ortiz-Islas objected to the admission of this evidence. *Def.’s Reply in Opp’n to Gov’t’s Mot. in Limine Regarding Evid. Intrinsic to Conspiracy* (ECF No. 175) (*Def.’s Resp.*). On September

10, 2013, the Government replied. *Gov't's Reply in Support of Mot. in Limine Regarding Evid. Intrinsic to the Conspiracy* (ECF No. 176) (*Gov't's Reply*).

B. The Conspiracy According to the Government¹

1. The Superseding Indictment

On August 16, 2012, a federal grand jury in Maine issued a superseding indictment, charging Apolinar Ortiz-Islas, Robert Rossignol and Victor Charles with conspiring to distribute five kilograms or more of cocaine. *Superseding Indictment* (ECF No. 55). The Superseding Indictment alleged that the conspiracy began “no later than January 1, 2011” and continued until “a date unknown, but no earlier than June 28, 2012.” *Id.*

2. The Conspiracy Discovered

On June 27, 2012, special agents with the Homeland Security Investigations Office in Houlton, Maine were watching a motor vehicle as it entered the Houlton Port of Entry. *Gov't's Mot.* at 2. The agents observed the vehicle proceed to a parking lot where the driver, a Canadian citizen named Chad Hallett, received a cardboard box from Robert Rossignol, a United States citizen. *Id.* Law enforcement later stopped Mr. Hallett for speeding and the cardboard box was found to contain nearly \$300,000 in United States currency. *Id.*

Upon questioning, Mr. Hallett revealed that he intended to take the money to Atlantic City, New Jersey, where he was going to meet another Canadian, Mathieu LeBlanc, and that the two of them were going to travel to Houston, Texas to buy

¹ In its motion, the Government made an offer of proof based on its good faith prediction of the evidence at trial. *Gov't's Mot.* at 2, n.2. The Court accepts the Government's proposed facts for purposes of ruling on the motion in limine.

cocaine. *Id.* The police arrested Mr. LeBlanc in Atlantic City. *Id.* Mr. LeBlanc explained that he intended to take the cash to Houston to meet his cocaine supplier, a man named “Polo,” and to buy ten kilograms of cocaine. *Id.*

3. The Conspiracy Explained

Both Mr. Hallett and Mr. LeBlanc talked to the police. They explained in detail how, for nearly two years, they had been making regular trips to Houston to buy cocaine from two men: “Vic” and Polo. *Id.* at 2-3. Vic is Victor Charles; Polo is Apolinar Ortiz-Islas. *Id.* at 3. Mr. Hallett and Mr. LeBlanc revealed that Mr. Rossignol would smuggle cash from Canada into the United States, that the cash would then be taken from Maine to Texas, that Mr. LeBlanc would buy cocaine from Mr. Ortiz-Apolinar, that the cocaine would be taken back to Maine, and that Mr. Rossignol would smuggle the cocaine across the border to Canada. *Id.* at 2-3.

4. The Charges and the Guilty Pleas

The Government issued a sealed criminal complaint against Mr. Hallett, Mr. Rossignol, and Mr. LeBlanc on June 29, 2012. *United States v. Mathieu LeBlanc*, 1:12-cr-00190-JAW *Compl.* (ECF No. 3) (D. Me. June 29, 2012). Mr. Rossignol was indicted on July 18, 2012 and pleaded guilty on March 27, 2013; Mr. Hallett pleaded guilty to an information on August 9, 2012; Mr. LeBlanc pleaded guilty to an information on December 21, 2012; Mr. Charles was indicted on August 16, 2012 and pleaded guilty on April 13, 2013.

5. The Sting and the Arrest

After his arrest on June 28, 2012, Mr. LeBlanc provided the agents with the telephone number for Mr. Ortiz-Islas. *Gov't's Mot.* at 3. He placed a recorded telephone call to Mr. Ortiz-Islas to try and complete the ten kilogram deal and over the next three months, Mr. LeBlanc and Mr. Ortiz-Islas had a series of telephone conversations about completing the deal. *Id.* Mr. LeBlanc convinced Mr. Ortiz-Islas to meet a “friend” that Mr. LeBlanc said he was sending to Texas to pick up the cocaine. *Id.* at 3-4. In truth, the “friend” was an undercover drug agent. *Id.* at 4.

On September 18, 2012, after a series of calls and face-to-face meetings between the friend and Mr. Ortiz-Islas, Mr. Ortiz-Islas directed the undercover agent to a residence in Houston. *Id.* The agent became uncomfortable and contacted Mr. LeBlanc, who was at a conference room at a jail in Maine, and told him that Mr. Ortiz-Islas wanted him to do the deal at a house. *Id.* Mr. LeBlanc got on the phone with Mr. Ortiz-Islas and explained the agent’s concern about doing the drug deal at a residence and not in a more neutral place. *Id.* After much discussion, the agent agreed to go to the house. *Id.*

When the agent arrived at the house, Mr. Ortiz-Islas attempted to get the agent to go inside a garage where three or four men were waiting so that the deal could take place. *Id.* The agent refused and at that point, other agents moved in and arrested all the men, including Mr. Ortiz-Islas, and found ten kilograms of cocaine in a vehicle parked outside the residence. *Id.*

6. The Trial Witnesses

The Government anticipates calling Chad Hallett and Mathieu LeBlanc to testify. *Id.* Mr. LeBlanc will say that he met Mr. Ortiz-Islas through Victor Charles and another man named Kyle McDonnell. *Id.* Mr. McDonnell and Mr. Charles will also testify. The law enforcement officers who arrested Messrs. Hallett and LeBlanc will testify and the agents who worked with Mr. LeBlanc to place a series of telephone calls to Mr. Ortiz-Islas will testify as well. *Id.* The agent who met with Mr. Ortiz-Islas in Houston and the officers who arrested him in Houston will testify. *Id.* 4-5.

C. The Conspiracy According to Apolinar Ortiz-Islas

1. The New Jersey Airport Discussion

Mr. Apolinar Ortiz-Islas' view of the events tracks the Government's until Chad Hallett arrives at an airport in New Jersey to meet Mathieu LeBlanc. *Def.'s Resp.* at 2. On June 28, 2012, the federal agents escorted Mr. Hallett to the airport in New Jersey to meet Mr. LeBlanc. *Id.* Soon after they met, Mr. LeBlanc told Mr. Hallett that he has "another contact here," and Mr. Hallett asked, "to buy more?" *Id.* Mr. Hallett then talked to Mr. LeBlanc about Mr. LeBlanc's mother and how she said it would be Mr. LeBlanc's last trip. *Id.* Mr. Hallett asked Mr. LeBlanc whether he's getting "15 things," and when Mr. LeBlanc responded "huh?", Mr. Hallett asked "How many you take this time, 13?" *Id.* Mr. LeBlanc confirmed "13 or something like that." *Id.* After speaking about the logistics of changing money, Mr. Hallett asked Mr. LeBlanc, "Did Vic call you from there?" Mr. LeBlanc answered, "yeah, about a hundred times, I got the point, a hundred times." *Id.*

In his memorandum, Mr. Ortiz-Islas points out there is no mention of “Polo” in this conversation. *Id.* When Mr. Hallett and Mr. LeBlanc arrived at the New Jersey airport parking lot, they were arrested. *Id.* at 3.

2. Mathieu LeBlanc’s Version

After his arrest, Mr. LeBlanc stated that his connection in Texas was a man named Vic, who was later identified as Victor Charles. *Id.* Mr. LeBlanc said that he met Mr. Charles in Louisiana through a man named Mr. Oliver, and that Mr. Oliver was Mr. LeBlanc’s connection to “Polo” in Houston. *Id.* According to Mr. LeBlanc, Mr. Charles used Polo as his only supplier in Houston, Texas. *Id.*

Although Mr. LeBlanc’s story generally corroborated Mr. Hallett’s, Mr. Ortiz-Islas says that there are some differences in the details. *Id.* Mr. LeBlanc said that the most he ever purchased from Mr. Charles was 7-8 kilograms of cocaine, but Mr. Hallett claimed that Mr. LeBlanc regularly purchased 10-12 kilograms per trip and once as much as 20 kilograms. *Id.* Mr. Hallett later vastly reduced these sums. *Id.* Mr. Hallett said that he had brought cocaine back from Houston from five to seven times. *Id.* In Mr. LeBlanc’s July 6, 2012 proffer, Mr. LeBlanc said that he knew a man named “Ray,” whom Mr. LeBlanc described as someone Polo knows. *Id.*

3. Kyle McDonnell

Mr. Ortiz-Islas identifies Kyle McDonnell as one of the originators of the conspiracy. *Id.* at 4. He says that Mr. McDonnell met Victor Charles a number of years ago through a person named Angel Gonzalez and that Mr. Hallett met Mr. McDonnell on his first trip to Texas. *Id.*

Mr. Ortiz-Islas explains that Mr. McDonnell knew Mr. Oliver in Louisiana and that Mr. Oliver dealt in marijuana. *Id.* Mr. Oliver apparently got the marijuana from a group of Canadians and when these Canadians asked him about cocaine, Mr. Oliver introduced them to Mr. McDonnell. *Id.* For a time, the Canadians dealt through Mr. Oliver and Mr. McDonnell, but when Mr. Oliver failed to pay the Canadians a drug debt, he went into hiding. *Id.*

At this point, Messrs. McDonnell, Charles and Angel Gonzalez were supplying Mr. LeBlanc. *Id.* Mr. McDonnell stated that he had two independent suppliers: (1) Polo, whom he identified as Mr. Ortiz-Islas; and (2) “the Old Man,” whose identity was never established. *Id.* at 4-5. On June 22, 2011, a man named Gary Norris was arrested with eight pounds of marijuana and Mr. McDonnell stopped dealing with the Canadians at this time. *Id.* at 5.

4. Victor Charles

After Mr. McDonnell dropped out of the conspiracy, Victor Charles began dealing directly with the Canadians. *Id.* Mr. Charles said that he had begun doing deals with Mr. McDonnell about a month after Mr. Charles got out of prison in March 2010 and that he had four sources for cocaine: (1) Ray, (2) Roberto, (3) Alex Rodriguez, also known as A-Rod, and (4) Polo, or Apolinar Ortiz-Islas. *Id.* There was an additional supplier named Marcus, but this may have been for marijuana only. *Id.* Mr. Charles said that Messrs. McDonnell and Oliver kicked him out of the operation in September 2011 because his wife, Amy, was acting crazy. *Id.*

5. Post-June 28, 2012 Events

After he was arrested on June 28, 2012, Mr. LeBlanc made a series of phone calls to a number he said belonged to Polo. *Id.* at 6. Mr. LeBlanc told Polo that he could not make the trip because his mother had fallen ill; Messrs. Hallett, McDonnell and Charles all confirmed that Mr. LeBlanc's mother participated in the purchase and sale of the cocaine smuggled from the United States into Canada. *Id.*

During these discussions, Polo told Mr. LeBlanc that the cocaine for the June deal was gone and he did not know when he could get more. *Id.* Both price and quality were being negotiated. *Id.* The June deal was supposed to be for 13-15 kilograms; the September deal was for ten and may have involved more than one supplier. *Id.*

6. September 18, 2012

At the September 18, 2012 meeting with the undercover agent, Mr. Ortiz-Islas was accompanied by his son because Mr. Ortiz-Islas' English is limited. *Id.* Mr. Ortiz-Islas was arrested in the vicinity of a pick-up truck which held ten kilograms of cocaine. *Id.* Two of the four men arrested at the scene were charged in Texas state court with possession with the intent to distribute the cocaine seized. *Id.*

D. The Government's Reply

In its reply, the Government attached a copy of an interview of July 12, 2012 with Mathieu LeBlanc. *Gov't's Reply Attach. 1 at 1-5 (Report of Investigation) (Report)*. During that interview, Mr. LeBlanc told investigators that Mr. Ortiz-Islas was his source for cocaine. *Report at 4.*

In addition, the Government attached a transcript of a telephone call from Mr. LeBlanc to Mr. Ortiz-Islas and his son on July 9, 2012. *Gov't's Reply Attach. 2 (Telephone Call Tr.)*. The Government claims that this transcript reveals that Mr. LeBlanc and Mr. Ortiz-Islas knew each other and that the discussions were about completing the drug deal that had been interrupted by Mr. LeBlanc's June arrest. *Gov't's Reply* at 2-3.

II. THE PARTIES' POSITIONS

A. The Government's Motion

In its motion, the Government seeks to admit evidence of the events after June 28, 2012 leading to Mr. Ortiz-Islas' arrest on September 18, 2012 as part of the charged conspiracy. *Gov't's Mot.* at 5. The Government argues that the post-June 28, 2012 events represent "the completion of the transaction that was contemplated by the conspirators prior to the discovery of the conspiracy." *Id.* Alternatively, the Government says that the evidence is admissible under Federal Rule of Evidence 404(b). *Id.* at 6-9.

B. The Defendant's Position

Mr. Ortiz-Islas first reiterates his contention that the trial of this case should be taking place in Texas, not Maine. *Def.'s Resp.* at 1 ("It does seem a bit ironic that the Government is now seeking to try the case that rightly belongs in Texas in Maine, given its opposition to Defendant's Motion for Change of Venue"). Mr. Ortiz-Islas next asserts that "[t]he Superseding Indictment charges a conspiracy that lasts approximately eighteen months: from January 2011 to June 28, 2012." *Id.* at

7. He contends that “[t]he date the conspiracy ended was the date of Mat[hieu LeBlanc’s arrest.” *Id.* Mr. Ortiz-Islas views the negotiations between Mr. LeBlanc and Mr. Ortiz-Islas as a new conspiracy, not charged in the Superseding Indictment. *Id.* He maintains that the post-June 28, 2012 evidence is not admissible under Federal Rule of Evidence 404(b) because the proposed evidence does not have a special relevance to something other than propensity. *Id.* at 9-10. Finally, he contends the evidence should be excluded under Federal Rule of Evidence 403 as more prejudicial than probative. *Id.* at 11-14.

III. DISCUSSION

A. Venue

Mr. Ortiz-Islas rankles at the Court’s denial at his motion to change venue. He argues that the case “rightly belongs in Texas” and that evidence of the September 18, 2012 transaction “would be better presented in a courtroom closer to the locus of the events in question, namely, Houston, Texas.” *Def.’s Resp.* at 1, 13. On January 13, 2013, Mr. Ortiz-Islas (along with Victor Charles) moved for a change of venue. *Mot. for Change of Venue and Req. for Hr’g on Mot.* (ECF No. 116). The Court carefully considered the issue and, applying the ten factors set forth by the United States Supreme Court in *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240 (1964), it issued a twenty-page decision, denying Mr. Ortiz-Islas’ motion. *Order on the Defs.’ Mot. for Change of Venue and Mot. for Severance* (ECF No. 123). Whether the Court erred in denying Mr. Ortiz-Islas’ motion for change of venue has nothing to do with whether events taking place in Texas in September

2012 are admissible in the upcoming trial. Rightly or wrongly, the trial is taking place in the District of Maine and the Court's application of the Rules of Evidence must not change based on a defendant's repeated contention that he would have found a Texas court more convenient for trial.

B. The Dates of the Conspiracy

In his response, Mr. Ortiz-Islas contends:

The Superseding Indictment charges a conspiracy that lasts approximately eighteen months: from January 2011 to June 28, 2012. The date the conspiracy ended was the date of Mathieu LeBlanc's arrest.

Def.'s Resp. at 7. Mr. Ortiz-Islas is incorrect. Count One of the Superseding Indictment reads in pertinent part:

Beginning on a date unknown, but no later than January 1, 2011 and continuing until a date unknown, but no earlier than June 28, 2012, in the District of Maine and elsewhere, defendant

Apolinar ORTIS-ISLAS, a/k/a "Polo"

knowingly and intentionally conspired with persons known and unknown to commit offenses against the United States, namely, distribution and possession with intent to distribute five kilograms or more of a mixture or substance containing cocaine a Schedule I controlled substance in violation of title 21, United States Code, Section 846 and 841(a)(1).

Superseding Indictment at 1 (ECF No. 55) (emphasis supplied). Here, the grand jury specified that it did not know the date the conspiracy either began or ended, but charged that it began in any event "no later than January 1, 2011," and continued until a time ending "no earlier than June 18, 2012." *Id.*

C. The Charged Conspiracy

“A criminal conspiracy exists when two or more people agree to commit a crime.” *United States v. Monserrate-Valentin*, Nos. 10-1526, 10-2164, 2013 U.S. App. LEXIS 18659, *14 (1st Cir. Sept. 6, 2013). To convict a defendant of participating in a conspiracy, the Government must show “the existence of a conspiracy, the defendant’s knowledge of the conspiracy, and the defendant’s voluntary participation in the conspiracy.” *United States v. Bristol-Martir*, 570 F.3d 29, 29 (1st Cir. 2009) (internal quotation marks omitted). Thus, the First Circuit has emphasized “the importance of determining what kind of agreement or understanding existed as to each defendant, although the agreement need not be express; a tacit understanding may suffice.” *Monserrate-Valentin*, 2013 U.S. App. LEXIS 18659 at *15.

Consistent with these principles, Mr. Ortiz-Islas correctly argues that the Government is required to prove that “the agreement specified in the indictment, and not some other agreement or agreements, existed between at least two people” to commit the crime charged. *See Judge D. Brock Hornby’s 2013 Revisions to Pattern Criminal Jury Instructions for the District Courts of the First Circuit* § 4.18.371(1) (updated Sept. 6, 2013). But “[w]hether there is a single conspiracy, multiple conspiracies, or no conspiracy at all is ordinarily a factual matter for the jury to determine.” *United States v. Mena-Robles*, 4 F.3d 1026, 2033 (1st Cir. 1993); *United States v. Escobar-Figueroa*, 454 F.3d 40, 48 (1st Cir. 2006). Furthermore, “[a] conspiracy endures as long as the co-conspirators endeavor to attain the ‘central criminal purposes’ of the conspiracy.” *United States v. Upton*, 559 F.3d 3, 10 (1st

Cir. 2009) (quoting in part *Grunewald v. United States*, 353 U.S. 391, 401 (1957)). In other words, “the crucial question . . . is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy.” *Grunewald*, 353 U.S. at 397.

Here, the grand jury charged in the Superseding Indictment that Mr. Ortiz-Islas engaged in a cocaine distribution conspiracy with Robert Rossignol and Victor Charles. *Superseding Indictment* at 1. Except for the appearance of the undercover agent (who was introduced to Mr. Ortiz-Islas by Mr. LeBlanc), the players, the modus operandi, and the drug were all identical to prior transactions. Especially when viewed from the perspective of the Government’s proposed evidence against Mr. Ortiz-Islas, whose alleged role was to obtain cocaine from his supplier or suppliers and to sell it to Mr. LeBlanc or Mr. Hallett, the contemplated September 18, 2012 deal was arguably business as usual.

Mr. Ortiz-Islas would have a better point if there was a true temporal gap between Mr. LeBlanc’s arrest and the September 18, 2012 event, but as the transcript of the telephone conversation between Mr. LeBlanc and Mr. Ortiz-Islas reveals, Mr. LeBlanc and Mr. Ortiz-Islas were discussing completing what became the September cocaine transaction as early as July 9, 2012. Although Mr. Ortiz-Islas is certainly permitted to argue that the September transaction was a different conspiracy, the Court will allow the Government to attempt to prove it was part of the conspiracy the grand jury charged. In the Court’s view, comparing the contents

of the superseding indictment and the Government's proffer, there is little danger of a variance between the conspiracy charged and the evidence produced. *See Monserrate-Valentin*, 2013 U.S. App. LEXIS 18659, *17-20.

Since the Court finds that the scope of the conspiracy, including the significance of the circumstances leading up to and surrounding the events of September 18, 2012, is a jury question, Mr. Ortiz-Islas' activities in negotiating and participating in the contemplated sale on September 18, 2012 are admissible under the Rules of Evidence. His statements in which he allegedly arranged to sell cocaine for cash to a person he thought was part of the LeBlanc-Hallett group would be admissible under Federal Rule of Evidence 801(d)(2)(E) if made in furtherance of the charged conspiracy. His actions in taking part in the proposed sale are also admissible under Federal Rules of Evidence 401 and 403.

IV. CONCLUSION

The Court GRANTS the Government's Motion in Limine Regarding Evid. Intrinsic to the Conspiracy (ECF No. 160).

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 8th day of October, 2013

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