FILED
United States Court of Appeals
Tenth circuit

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ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ORLANDO MARTINEZ, Defendant-Appellant.	)	Nos. 89-1130[1] 89-1138 (D.C. No. 88-CR-240) (District of Colorado)

ORDER AND JUDGMENT[2]

Before McKAY and SETH, Circuit Judges, and PARKER,[3] District Judge.

These two appeals arise out of the same case. No. 89-1130 arose pursuant to the defendant's pro se notice of appeal for which he has filed a separate pro se set of briefs. No. 89-1138 arose pursuant to a notice of appeal filed on behalf of the defendant by the Federal Public Defender. The Federal Public

1 In case number 89-1130, the court unanimously ordered that it be submitted on the briefs. Case number 89-1138 was argued by the Federal Public Defender.

2 This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

3 Honorable James A. Parker, United States District Judge for the District of New Mexico, sitting by designation.

Defender filed briefs addressing issues in case No. 89-1138. The pro se defendant addressed issues raised in both cases.

Defendant was convicted on two drug counts. The first was for possession of cocaine with intent to distribute, and the second was for the possession of heroin with intent to distribute. On appeal, defendant's counsel raises two issues. The first issue challenges the trial court's admission of "other crimes or wrongs" evidence pursuant to Federal Rules of Evidence 403 and 404(b). The second issue challenges the trial court's assessment of a two-level increase for an aggravated role in the offense.

Admission of Rule 404(b) Evidence

Defendant was arrested in a vehicle operated by a Mr. Owens. When arrested, defendant was removed from the car and frisked. The arresting officer seized from his person $1,334 in currency, "Sno-seals" (used for packaging cocaine), balloons (used for packaging heroin), and baggies which were falling from his person onto the street. Additional paraphernalia were found on the seat of the car in plain view. A warrant authorized search of the vehicle produced 32.08 grams of heroin and 75.23 grams of cocaine from false-bottomed cans on the floorboard of the vehicle. The additional paraphernalia included gram weighing scales, a "Metalert" device used for valuing the quality of gold in jewelry, and documents establishing the defendant's possession and control of the vehicle. Of additional significance were items taken from the trunk including a bag and a sock each containing money and a man's gold and diamond ring.

Over objection, the trial court admitted evidence of two transactions occurring a few days prior to the day of the arrest. In one transaction an undercover police officer testified that the defendant gave him one gram of cocaine in exchange for a VCR. The officer further testified that the defendant advised him at that time that defendant was more interested in trading cocaine for jewelry. The undercover officer also testified that a few days later defendant gave him three grams of cocaine in exchange for gold chains and at that meeting defendant reiterated his interest in rings and other jewelry. The government's stated reasons for the proffer of evidence of these two prior transactions was that they would tend to prove intent, identity, and operation. However, the limiting instruction given by the trial court to the jury stated that the prior acts could be used to show "state of mind or intent, motive, identity, or absence of mistake or accident." Record, supp. vol. 9, at 144.

In United States v. Kendall, 766 F.2d 1426 (10th Cir. 1985), we held that in order to admit Rule 404(b) evidence "the trial court must specifically identify the purpose for which such evidence is offered and a broad statement merely invoking or restating Rule 404(b) will not suffice." Id. at 1436. In this case the trial court did not rely on the purposes identified by the government for admitting the evidence. Instead, the trial court identified at least two additional possible purposes for the evidence in its instructions to the jury. We do not believe that the trial court was merely restating Rule 404(b). Thus, we do not hold that the trial court violated the Kendall rule. However, in giving its limiting instruction to the jury, the trial court went beyond the purposes relied upon by the government for including the evidence; and the trial court described each of the purposes it identified as independently fulfilling Rule 404(b). Thus, we hold that each of the purposes identified by the trial court in its limiting instruction must independently fulfill the requirements of Rule 404(b) under the facts of this case.

With regard to the purposes of showing intent, absence of mistake, and identity, defendant argues that the prior transactions were not sufficiently similar to constitute signature transactions; and thus they did not fulfill these purposes under Rule 404(b). We conclude, however, that the record clearly supports the observation that these two prior transactions contained common characteristics with the charged transaction. Therefore, the evidence of the two prior transactions was proper for these three purposes under Rule 404(b). Huddleston v. United States, 485 U.S. 681, 685-86 (1988). Testimony about the two earlier transactions clearly went to establishing the defendant's preferred method of dealing for jewelry. Jewelry was found as a part of the search in the case charged. Although not a large quantity, its presence in the trunk with other paraphernalia instead of on the hand of the defendant makes the requisite tie between the former acts and the case charged. In addition to the jewelry, the presence of the "Metalert" device used for valuing jewelry further strengthens the tie. We find no abuse in the trial court's decision to admit this evidence under Rule 404(b). We likewise find no abuse in the trial court's finding of no unfair prejudice under Rule 403.

We also conclude that the record supports the trial court's decision to submit this evidence on the issue of intent. Although defense counsel stipulated that intent was not an issue, the government never acceded to that stipulation and was entitled to establish intent as a part of its case. Although the defendant stipulated concerning intent, he specifically contested that the drugs involved were his and insofar as the court is concerned, that puts the issue of intent squarely in the case.

The use of the two prior transactions for the purpose of proving motive presents a much closer case. Defendant argues that the two transactions do not provide a motive for the charged transaction, but instead merely indicate that defendant had shown a willingness to possess and sell drugs. Defendant correctly points out that prior acts evidence is not admissible to prove predisposition or character. However, we hold that these prior acts prove a motive sufficiently strong to provide a proper purpose for admitting the prior acts. The two prior acts involved defendant trading drugs for a VCR and jewelry. In addition, defendant stated that he wished to trade drugs for jewelry in the future. We believe that these transactions do not merely show the defendant's character. Instead, these acts prove that defendant had a motive to exchange drugs for goods, preferable jewelry.

In sum, we conclude that all the bases upon which the trial court permitted the jury to consider the other crimes' evidence were proper and that the trial court properly weighed the prejudice against the probative value.

Two-Point Adjustment Under Sentencing Guidelines Section 3B1.1(c)

Defendant next argues that the district court improperly applied section 3B1.1(c) of the Sentencing Guidelines to increase defendant's offense level by two levels. Defendant claims that there was insufficient evidence to conclude that he was an organizer, leader, manager, or supervisor of any criminal activity. Defendant argues that he acted alone. We hold, however, that the evidence is sufficient to demonstrate that defendant supervised Mr. Owens, the driver, in the offense of conviction. That is sufficient to satisfy this section. United States v. Herrera, 878 F.2d 997, 1000-02 (7th Cir. 1989).

Defendant's Sixteen Additional Issues

In his pro se brief, defendant raises the following sixteen additional issues:

1. Whether the evidence was sufficient to convict defendant-appellant of the crime charged.

2. Whether the trial court erred in denying defendant-appellant's motion to suppress and quash Detective Dunham's testimony pertaining to purchase of stolen property and selling cocaine.

3. Whether the trial court erred in denying defendant-appellant's motion to suppress impounding of vehicle and motion to return money and other personal property found on person.

4. Whether the trial court erred in denying defendant-appellant's motion to suppress first warrant.

5. Whether the trial court erred in denying defendant-appellant's motion to suppress both arrest warrants.

6. Whether the trial court erred in denying defendant-appellant's motion to suppress second warrant and failure to take defendant in front of magistrate.

7. Whether the trial court erred in denying defendant-appellant's motion to produce writ.

8. Whether the trial court erred in denying defendant-appellant's motion to suppress service of warrant entered.

9. Whether the trial court erred in denying defendant-appellant's motion for access to the law library.

10. Whether the trial court erred in denying defendant-appellant's motion to quash indictment.

11. Whether the trial court erred in denying defendant-appellant's motion alleging inadequate time to prepare motions for a proper defense.

12. Whether the trial court erred in denying defendant-appellant's motion requesting a copy of the grand jury transcript.

13. Whether the trial court erred in denying defendant-appellant's motion alleging entrapment.

14. Whether the trial court erred in not hearing the defendant-appellant's motion regarding the photographic identification.

15. Whether the trial court erred in denying defendant-appellant's motion to suppress paraphernalia.

16. Whether the trial court erred in denying defendant-appellant's motion challenging his detainment at the Federal Correctional Institution.

We have reviewed appellant's pro se brief and the record. We have done so with extra care, allowing for the fact that the pro se appellant is not trained in law. We have therefore taken extra care to make sure that we consider the issues broadly to make sure that a lack of legal training has not caused the overlooking of a fairly presented issue. With that in mind, we conclude that none of the issues raised by the pro se appellant presents an issue which rises to the level of reversible error.

AFFIRMED.

Entered for the Court

Monroe G. McKay
Circuit Judge