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As of: June 21, 2019 6:46 PM Z

United States v. Donate-Cardona

United States Court of Appeals for the Third Circuit

December 10, 2018, Argued; April 4, 2019, Filed

No. 17-1178

Reporter

2019 U.S. App. LEXIS 9985 *; __ Fed. Appx. __; 2019 WL 1500604

UNITED STATES OF AMERICA v. RICARDO ***DONATE-CARDONA***, Appellant

Notice: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[*1]** On Appeal from the District Court of the Virgin Islands. Division of St. Thomas and St. John. (D.C. No. 3-15-cr-00041-003). District Judge: Honorable Curtis V. Gomez.

United States v. Gerandino-Aracena, 758 Fed. Appx. 279, 2019 U.S. App. LEXIS 8579 (3d Cir. V.I., Mar. 21, 2019)

Core Terms

conspirators, kilograms, cocaine, conspiracy, firearms

Case Summary

Overview

HOLDINGS: [1]-Although the Government concededly violated the *Jencks Act*, *18 U.S.C.S. § 3500*, its delay in disclosing reports and notes made by federal agents was brief (one day at most) and both agents were available for cross-examination about the documents in question, so the violation was neither willful nor in reckless disregard of the act, and the district court did not abuse its discretion when it declined to strike the agents' testimony or declare a mistrial; [2]-Because the evidence supported the findings that the conspirators agreed to purchase 150 kilograms of cocaine, that sufficed to support the district court's decision as to drug weight, even if the cash seized was $230,000 short of what was needed to buy 150 kilograms, and therefore resentencing was not required.

Outcome

Judgment of conviction and sentence affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Trials > Jencks Act

Criminal Law & Procedure > Trials > Judicial Discretion

HN1 **Jencks Act**

The *Jencks Act*, *18 U.S.C.S. § 3500*, requires the Government to disclose certain recorded statements of its witnesses. When the Government violates the *Jencks Act*, the remedy (if any) remains at the discretion of the trial court.

Counsel: JEANNINE N. RODRIGUEZ, JNR Law Group, Coral Gables, FL, *Counsel for Appellant.*

JOYCELYN HEWLETT, Acting United States Attorney, SIGRID M. TEJO-SPROTTE, DAVID W. WHITE, Assistant United States Attorney, Office of United States Attorney, St. Thomas, USVI, *Counsel for Appellee.*

Judges: CHAGARES, HARDIMAN, and RESTREPO, *Circuit Judges.*

Opinion by: HARDIMAN

Opinion

OPINION*

(April 4, 2019)

HARDIMAN, *Circuit Judge.*

A jury convicted Ricardo ***Donate-Cardona*** of federal drug trafficking and firearms possession offenses and the District Court sentenced him to 274 months in prison. ***Donate-Cardona*** appeals his judgment of conviction and sentence. We will affirm.

I[1]

Donate-Cardona first raises a claim under ***HN1***[↑] the *Jencks Act*, *18 U.S.C. § 3500*, which requires the Government to disclose certain recorded statements of its witnesses. *United States v. Hill, 976 F.2d 132, 139 (3d Cir. 1992)*. When the Government violates the *Jencks Act*, the remedy (if any) remains at the discretion of the trial court. *See United States v. Jackson, 649 F.2d 967, 972 & n.6 (3d Cir. 1981)*. Our decision in *Jackson* weighs heavily against ***Donate-Cardona***'s *Jencks Act* argument.

Here, as in *Jackson*, a *Jencks Act* violation occurred. The **[*2]** Government concedes that it failed to timely disclose reports and notes made by agents of the Drug Enforcement Administration and the Federal Bureau of Investigation. But the Government's delay was brief (one day at most), and both agents were available for cross-examination about the documents in question. Under these circumstances, the Government's violation was neither "willful" nor "in reckless disregard of its obligation" under the *Jencks Act*. *Jackson, 649 F.2d at 972*. Accordingly, we hold that the District Court did not abuse its discretion when it declined to strike the agents' testimony or declare a mistrial.

II

Donate-Cardona also argues that the District Court violated the *Confrontation Clause of the Sixth Amendment to the Constitution* when it permitted agent Chad Foreman of the Bureau of Alcohol, Tobacco, Firearms, and Explosives to testify about a report prepared by his fellow ATF agent, Steve Waters. ***Donate-Cardona*** correctly notes that Waters did not testify, but he errs when he claims that Foreman's testimony was based only on Waters's report. In fact, Foreman testified to the interstate nexus of the firearms at issue based on his own "original research." Supp. App. 262; *see* Supp. App. 250. Agent Foreman physically examined the firearms both before and during **[*3]** his testimony, and all but one of the guns had markings showing where they were manufactured. Supp. App. 263, 309-10; *cf. Williams v. Illinois, 567 U.S. 50, 62, 70-79, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012)* (plurality opinion) (finding no *Confrontation Clause* violation even though witness hadn't conducted or observed any testing herself). So the admission of Agent Foreman's testimony — which was subject to cross-examination by defense counsel — did not violate the *Confrontation*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1] The District Court had jurisdiction under *18 U.S.C. § 3241*. *United States v. Ayala, 913 F.3d 752, 755 (3d Cir. Mar. 6, 2019)*. We have jurisdiction under ***28 U.S.C. § 1291***.

Clause.[2]

III

We turn next to ***Donate-Cardona***'s contention that the District Court erred when it refused to instruct the jury on multiple conspiracies. In his view, there were separate and distinct conspiracies in St. Thomas and Puerto Rico. The Government counters that the conduct on both islands was part of the same conspiracy. The three-factor test we have applied to make this determination supports the Government's position. *See* United States v. Kelly, 892 F.2d 255, 259 (3d Cir. 1989); *see also* United States v. Greenidge, 495 F.3d 85, 93-95 (3d Cir. 2007) (applying *Kelly*).

First, the evidence shows there was a "common goal among the conspirators," Kelly, 892 F.2d at 259 — namely, to distribute cocaine in both Puerto Rico and St. Thomas. The record shows that the conspirators agreed to ship 150 kilograms of cocaine and several firearms. The guns and 100 kilograms of drugs were meant for St. Thomas, while 50 kilograms were bound for Puerto Rico. Although the destinations included **[*4]** two islands, the conspiracy involved one transaction.

Second, the conspiracy contemplated a "continuous result that [would] not continue without the continuous cooperation of the conspirators." *Id.* (quoting United States v. DeVarona, 872 F.2d 114, 119 (5th Cir. 1989)). An unbroken chain of events confirms the conspiracy's continuous character. At a meeting in Puerto Rico, the conspirators agreed on two payments for the cocaine shipment: about $1.5 million to be paid in Puerto Rico, and $480,000 and three firearms to be paid in St. Thomas. *See* Supp. App. 184-88, 213, 221, 241-42. After the initial payment was made in Puerto Rico, the Government's confidential source (CS) met the conspirators in St. Thomas to exchange the second payment ($480,000 and guns) for what the conspirators thought would be the cocaine.

Third, the dealings of the conspirators overlapped significantly. *See* Kelly, 892 F.2d at 260. ***Donate-Cardona*** and others met the CS in Puerto Rico to negotiate the drug transaction. They boarded a boat together, and the CS recorded the conspirators and a secret compartment on the boat. Later that day, ***Donate-Cardona*** and two conspirators arrived in St. Thomas on the boat they had shown the CS in Puerto Rico. The conspirators then gave the CS the firearms and the **[*5]** second cash payment.

These factors support the Government's claim of a single conspiracy, so the District Court did not err when it declined to give a multiple-conspiracies jury instruction.

IV

Finally, ***Donate-Cardona*** claims entitlement to a new sentence because the District Court should have found him responsible for 133 kilograms of cocaine instead of 150 kilograms. He relies on the fact that the money seized ($1,733,036) would have paid for only 133 kilograms of cocaine (at the agreed-on price of $13,000 per kilogram).

Although ***Donate-Cardona***'s mathematical calculation is accurate, the CS testified that the conspirators agreed to purchase 150 kilograms of cocaine. The CS also testified that he had expected to receive $480,000 in St. Thomas, which would have led to a cash total of $1,963,036 — enough to purchase 151 kilograms of cocaine. Consequently, the District Court weighed the CS's testimony against the $230,000 discrepancy between the cash actually seized and the amount needed to purchase 150 kilograms of cocaine. And it credited that testimony.

In view of the conflicting evidence, we cannot say the District Court clearly erred when it found by a preponderance of the evidence that **[*6]** the conspirators agreed to a 150 kilogram deal. *See*

[2] Even had Agent Foreman's testimony been inadmissible, the error would have been harmless. Agent Mark Joseph of the Drug Enforcement Administration established the interstate nexus based on his experience and physical examination of the firearms at issue. And Joseph's testimony satisfied the five factors stated in Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

United States v. Sau Hung Yeung, 241 F.3d 321, 322 (3d Cir. 2001). The moment ***Donate-Cardona*** agreed to distribute cocaine, he joined a conspiracy in violation of *21 U.S.C. § 846*. *See United States v. Gibbs, 190 F.3d 188, 197 & n.2 (3d Cir. 1999)*. And the CS who participated in (and recorded) the agreement testified that the conspirators agreed to purchase 150 kilograms of cocaine. That suffices to support the District Court's decision as to drug weight, even if the cash seized was $230,000 short of what was needed to buy 150 kilograms. Thus, resentencing is unwarranted.[3]

* * *

For the reasons stated, we will affirm ***Donate-Cardona***'s judgment of conviction and sentence.

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[3] ***Donate-Cardona*** also argues that his judgment of conviction must be set aside because the District Court lacked jurisdiction and because District Judge Gomez presided in violation of the *Appointments Clause of the United States Constitution*. These arguments are foreclosed by our recent opinion in *Ayala, 2019 U.S. App. LEXIS 6792 at *11*.