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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal No. 00-115
	)	
vs.	)	
	)	
ELOY VAZQUEZ-GARCIA and	)	ORDER
JUAN CARLOS SOSA-ALVARADO,	)	
	)	
Defendants.	)	

A trial in this case commenced on May 7, 2001. The jury returned guilty verdicts against both defendants, Eloy Vazquez-Garcia and Juan Carlos Sosa-Alvarado, on May 9. The jury found Vazquez-Garcia and Sosa-Alvarado guilty of being part of a conspiracy to distribute methamphetamine in excess of 500 grams along with knowingly and intentionally attempting to possess with intent to distribute methamphetamine in excess of 500 grams. On May 29, Sosa-Alvarado filed a motion for a new trial, which was resisted by the government on May 30. The motion was denied by this Court on May 31. On June 4, Vazquez-Garcia filed a motion for a new trial, which was denied by this Court on June 6. Then on June 20, Vazquez-Garcia filed a motion requesting this Court reconsider its Order denying a new trial, which was later joined by Sosa-Alvarado. The Court granted the motion to reconsider on June 21, and held a hearing on the motion for a new trial on July 31. Following the hearing, Vazquez-Garcia filed a brief in support of the motion on August 10, and Sosa-Alvarado filed a motion to join in the brief on August 21. The government did not submit a brief. The matter is now fully submitted.

I. APPLICABLE LAW

Federal Rule of Criminal Procedure 33 states in part: "On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require." However, "'[t]he authority to grant new trials should be used sparingly and with caution.'" *United States v. Huerta-Orozco*, 132 F.Supp.2d 763, 773 (N.D. Iowa 2001) (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)). When a defendant's request for a new trial is grounded upon "newly discovered evidence," he has three years after the verdict to make the motion. *See* FED. R. CRIM. P. 33. In such a motion based on "newly discovered evidence," defendant must show due diligence in discovering and presenting such evidence. The focus is on "whether, after the trial, the defendant learned of evidence that he reasonably could not have known about at the time of trial and, if so, how that evidence may have affected the outcome." *See United States v. DeLuca* 945 F.Supp. 409, 412 (D.R.I. 1996).

The requirements for a defendant to show he has acted with "due dilligence" are stringent. *Id.* Defendant must demonstrate: 1) existence of new evidence, 2) that failure to discover new evidence was not owing to lack of due diligence, 3) relevance of evidence to material issue, 4) probability that evidence would lead to acquittal on retrial, and 5) that evidence is not merely cumulative or impeaching. *See United States v. Earles*, 983 F.Supp. 1236, 1246 (N.D. Iowa 1997), *appeal dismissed*, 1998 WL 391185 (8th Cir. 1998) (citing *United States v. Johnson*, 114 F.3d 808, 815 (8th Cir. 1997) (other citation omitted)). "Motions for new trial . . . are difficult to win" and are to be "'viewed with disfavor.'" *United States v. Gray Bear*, 116 F.3d 349, 350 (8th Cir. 1997) (quoting *United States v. Coleman*, 460 F.2d 1038, 1040 (8th Cir. 1972) (per curiam)).

II. FACTS

In this case, both defendants assert the affidavit of Richard "Blue" Krehbiel constitutes "newly discovered evidence" that warrants this Court order a new trial. Krehbiel appeared at the July 31, 2001 hearing by telephone from the federal penitentiary in Terre Haute, Indiana; also participating by telephone was his attorney, Murray Bell. The parties all agreed to allow Krehbiel to testify by telephone at this hearing.

Krehbiel reported at the hearing that prior to his incarceration in Terre Haute, he was housed in the Newton Correctional Facility in Newton, Iowa. He testified that he knew defendant Vazquez-Garcia as they were "cellies"[1] on the "lower tier" in the Newton facility prior to February 2001, and he was familiar with defendant Sosa-Alvarado who also lived on the "lower tier." It is clear, however, that Krehbiel knew Vazquez-Garcia better than he knew Sosa-Alvarado, as he would help Vazquez-Garcia with his English and help him write letters. Krehbiel explained that part of the reason he did not know Sosa-Alvarado well is that he speaks only Spanish, while Krehbiel speaks only a little Spanish.

Sometime in February 2001, Krehbiel was moved to the "upper tier" in the Newton Correctional Facility. On approximately February 22, 2001, Krehbiel reported he was sitting in the "day room" reading the newspaper, and directly behind him at a separate table were two other men, Guy Hall and Tabo Olivarez. Krehbiel testified that he overheard Hall tell Olivarez that if he didn't receive $6000 from Sosa-Alvarado, he was going to lie against him at his trial. Hall allegedly also told Olivarez that he had already given some false information to the police

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[1] While the record clearly shows that Krehbiel used the word "cellies" to describe his relationship with Vazquez-Garcia, it is unclear whether he meant they were roommates in a cell or whether they were housed on the same "tier" of the prison.

regarding Sosa-Alvarado's conduct, and that he would do it again at trial if he didn't receive the money. Krehbiel testified that it appeared Hall was telling this information to Olivarez because Olivarez spoke both English and Spanish, and was known as an unofficial translator for inmates who did not speak one language or the other, such as Sosa-Alvarado.

Krehbiel then took two days to decide whether to involve himself in this matter, but testified that it weighed on his conscience enough that he thought he should write down what he heard. Krehbiel prepared an affidavit dated February 24, 2001 that was notarized by Renae Sliger, an employee of the Newton Correctional Facility. The affidavit detailed the incident in the day room and the information which Krehbiel overheard Hall convey to Olivarez. On the same day, Krehbiel testified he folded up the affidavit and put it in a sealed envelope. He then gave it to a "tier tender"[2] to slide it under the cell door of Vazquez-Garcia. Krehbiel decided to give it to Vazquez-Garcia because he knew Sosa-Alvarado didn't speak any English, and the affidavit was written in English.

At the hearing, Sosa-Alvarado testified he received Krehbiel's affidavit on February 25, 2001. He testified that Vazquez-Garcia had delivered the closed envelope to him on that day. He testified that he never discussed the affidavit with Vazquez-Garcia, and that he did not have Vazquez-Garcia translate it for him. Sosa-Alvarado stated he had his cell mate translate the letter for him on February 25 or sometime shortly thereafter. Sosa-Alvarado admitted that despite knowing that Guy Hall was listed as a witness who would testify against him, he did not share this affidavit with his attorney or with Vazquez-Garcia until after the jury had been

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[2] It appears to the Court that a "tier tender" is someone who makes deliveries to the tiers, though it is not clear whether the people who fill such a position are prisoners or employees of the facility.

impaneled on the first day of trial, May 7, 2001. Vazquez-Garcia did not testify at the hearing.

At trial, Guy Hall did testify against both Vazquez-Garcia and Sosa-Alvarado. Prior to his testimony, however, the Court was made aware of the affidavit now at issue. Outside the presence of the jury, Hall was questioned regarding whether he ever made the statements to Olivarez that Krehbiel reported in his affidavit. Hall testified he had never made such statements. The affidavit, marked Defendants' Exhibit 1 at trial, was not admitted into evidence.

Hall went on to testify before the jury regarding his role in delivering drugs back and forth from Iowa to California, and Vazquez-Garcia and Sosa-Alvarado's involvement in this scheme. Hall testified that he and his girlfriend, Lori Rockey, were provided vehicles by Vazquez-Garcia[3] and Misty Rockey in Iowa to take to California. Upon their return to Iowa, they would deliver a separate vehicle to Vazquez-Garcia and Misty Rockey and receive payment. Hall also testified that he met Sosa-Alvarado in California, and that Sosa-Alvarado also was involved in the vehicle exchange and payment for such delivery. Hall admitted before the jury that he pled guilty to a charge of conspiracy to distribute methamphetamine, and could benefit from a substantial assistance reduction in his sentence for his cooperation with the government.

III. THE COURT'S FINDINGS

Sosa-Alvarado admitted to understanding what Krehbiel's affidavit said as it was translated into Spanish for him shortly after he received it on February 25, 2001. He admitted he was aware Guy Hall was listed as a witness against him long before the trial began on May 7, 2001. He answered a question from his attorney at the hearing as follows:

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[3] Hall testified he also knew Vazquez-Garcia by the name David Barbosa.

Q: Did you understand that this document might help you in trial?

A: I don't know. Perhaps. Maybe.

See July 31, 2001 Hearing on Motion Transcript at 24. The Court finds the fact that Sosa-Alvarado did not share what he thought "perhaps" would be a helpful piece of evidence with his attorney in the ten week period of time leading up to his trial shows a lack of due diligence by Sosa-Alvarado. *See Johnson*, 114 F.3d at 815.

With respect to Vazquez-Garcia, he and Sosa-Alvarado were both housed on the lower-tier together at the Newton Correctional Facility during the relevant ten-week time period of February 25 through May 7, 2001. The record indicates they would see each other on a daily basis. Vazquez-Garcia was the recipient of the sealed envelope containing the Krehbiel affidavit. This Court finds it is not plausible or credible that Vazquez-Garcia, a co-defendant with Sosa-Alvarado in an impending trial, did not inquire into what was contained in the envelope and therefore he too lacked due diligence. *See Johnson*, 114 F.3d at 815.

In the alternative, even assuming Sosa-Alvarado did act with due diligence and it is credible Vazquez-Garcia did not inquire into the contents of the sealed envelope, the Court finds their motions should not be granted because the Krehbiel affidavit would be merely impeaching of Hall's testimony at trial and is not likely to lead to an acquittal on retrial. *See Johnson*, 114 F.3d at 816 (affirming district court's holding that newly discovered evidence, the deposition testimony of witnesses of similar robberies while the defendant was incarcerated, would be merely cumulative or impeaching and was not likely to lead to an acquittal). Hall's testimony was consistent with the testimony of the other witnesses at the trial regarding the details of the conspiracy. Hall drove vehicles back and forth from Iowa to California with his girlfriend, Lori

Rockey, from February to April 2000. They made such trips at the request of Misty Rockey, Lori's daughter, and her boyfriend, Vazquez-Garcia. While in California, they met Sosa-Alvarado during exchanges of vehicles in which drugs, and possibly money, were being transported. Hall's testimony regarding the transportation of vehicles containing drugs and money was corroborated by Lori Rockey. After Lori Rockey and Guy Hall were arrested on April 25, 2000 as part of a traffic stop and subsequent search by police in California, they made a controlled delivery of seized methamphetamine and cocaine to Vazquez-Garcia and Misty Rockey in Des Moines, Iowa. Misty Rockey met Hall and Lori Rockey to make the exchange, but was arrested as she attempted to take possession of the vehicle that contained the drugs. Subsequent to her arrest, she cooperated with the police and made a controlled phone call to Vazquez-Garcia who was then arrested on April 26, 2000 in an attempt to get possession of the vehicle that contained the drugs. Misty Rockey continued to cooperate with police, as she also made a controlled phone call to set up a vehicle exchange, which led to the arrest of Sosa-Alvarado in Iowa on April 29, 2000. The Court finds that the impeaching affidavit of Krehbiel is not likely to lead to an acquittal in a second trial of either Vazquez-Garcia or Sosa-Alvarado in light of the events that occurred from April 25 to April 29, 2000 in California and in Iowa, and the weight of the evidence from the testimony of the government's witnesses.

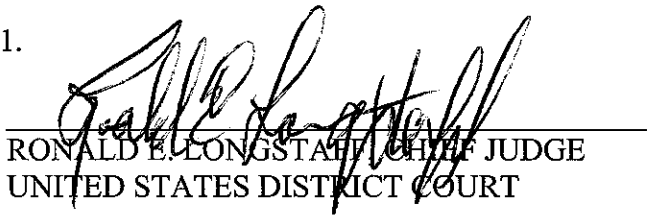
Further, even if this Court were to admit the newly discovered evidence – Krehbiel's testimony – to a jury in a second trial, the Court finds a reasonable jury would not find the evidence credible. *See Williams v. Brimeyer*, 116 F.3d at 349, 350 (8th Cir. 1997) (finding an appropriate question for a district court judge to answer in considering a motion for a new trial based on newly discovered evidence is whether a jury at a second trial would find the new

evidence credible). Krehbiel himself would be subject to impeachment due to his numerous previous convictions.

Therefore, for the above stated reasons, both defendants' motions for a new trial are denied.

IT IS SO ORDERED.

Dated this 23rd day of August, 2001.



RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT