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

FILED
DES MOINES, IOWA
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SOUTHERN DISTRICT OF IA

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	Criminal No. 01-231
	)	
vs.	)	
	)	
JUAN DIEGO HERNANDEZ-RUIZ,	)	
	)	
Defendant.	)	
	)	

A two count indictment was returned on December 12, 2001 against defendant Juan Diego Hernandez-Ruiz ("Hernandez"). In Count I, Hernandez is charged with his role in a conspiracy to knowingly and intentionally distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine and/or 5 grams or more of actual methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846. In Count III he is charged with knowing and intentional possession with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine and/or 5 grams or more of actual methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). The court held a bench trial on this matter on March 5, 2002 and now enters the following findings of fact, conclusions of law, and judgment.

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I. FINDINGS OF FACT

On November 16, 2001 a confidential informant ("CI") contacted Kenneth O'Brien, a police officer for the City of West Des Moines, about an individual that was attempting to sell one pound quantities of methamphetamine. The individual who was attempting to sell methamphetamine has since been identified as Mucio Montesinos. O'Brien asked the CI to arrange a meeting with Montesinos in which he would be 'undercover.'

On November 20, 2001 O'Brien met with the CI and Montesinos in the parking lot of the Osco Drug Store located at 104 East Euclid in Des Moines, Iowa. At that meeting, O'Brien got in Montesinos's car with Montesinos and the CI. O'Brien does not speak Spanish and Montesinos speaks little English. Nevertheless, O'Brien and Montesinos successfully negotiated the purchase of one pound of methamphetamine for $11,000.

Towards the end of the November 20 meeting, O'Brien asked for a sample of the methamphetamine and Montesinos agreed. Montesinos and the CI left O'Brien at the Osco Drug Store parking lot and went to an apartment building located at 253 Franklin Street in Des Moines.[1] Montesinos entered the apartment building, exited a short time later and returned with the CI to the Osco Drug Store parking lot to meet O'Brien. Upon returning to the Osco Drug Store parking lot, Montesinos gave O'Brien a small sample of methamphetamine.[2] O'Brien gave his pager number to Montesinos and Montesinos gave his cellular phone number to O'Brien. They agreed to contact each other the following day to arrange delivery of the one pound of methamphetamine.

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[1] Montesinos and the CI were under surveillance by other law enforcement officers.

[2] Lab results later revealed this sample of methamphetamine was 1.48 grams with a 12% purity ratio.

The next day, November 21, 2001, O'Brien planned to meet with Montesinos and recorded all of his conversations with Montesinos.[3] O'Brien placed a call to Montesinos at approximately noon, and the two agreed to meet in the parking lot at the Target Store on Euclid Avenue, Des Moines, Iowa at 2:00 p.m. to complete the transaction. A short time later, Montesinos called back to ask whether O'Brien wanted "one or two." O'Brien believes that Montesinos was asking him whether he wanted one or two pounds of methamphetamine, and O'Brien answered that he only had enough money for one pound.

Montesinos did not arrive at the Target store parking lot at 2:00 p.m, and O'Brien called to find out when he would arrive. Montesinos informed O'Brien that he was on his way. When Montesinos still did not arrive, O'Brien called him again at approximately 2:25 p.m., and Montesinos informed him that he would be there in two minutes. During these conversations, O'Brien and Montesinos struggled to communicate with each other.

When Montesinos finally arrived, he was driving a white Nissan Sentra and there was a passenger in the car. The passenger was later identified as defendant Hernandez. Montesinos parked his car next to the driver's side of a white truck in which O'Brien was waiting. O'Brien got out of his truck to enter Montesinos's car as they had done during their meeting the previous day, but Montesinos exited his vehicle and indicated that he and O'Brien should get in O'Brien's truck. They did so, while Hernandez remained in the front passenger seat of Montesinos's car.

O'Brien testified that he was alarmed by Hernandez's presence at the scene. O'Brien testified he feared Hernandez might be there to rob him, as is common among drug dealers, or

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[3] The recording of these conversations was played for the Court at the trial. Defendant presented his own interpreter to interpret for the Court words which Montesinos spoke in Spanish on the recording.

that Hernandez might be armed.[4] O'Brien asked Montesinos who the passenger was, whether Hernandez was "cool" and whether he "worked for" Montesinos. Both parties agree that Montesinos answered in the affirmative, although he did not elaborate on the relationship he had with Hernandez. O'Brien interpreted Montesinos's reply to indicate that Hernandez worked for Montesinos. Due to the language barrier, it is unclear exactly whether Montesinos understood O'Brien's question, and what he meant when he answered in the affirmative.

O'Brien accepted Montesino's answer, and then he testified that they spent the next several minutes attempting to communicate.[5] O'Brien assumed that the methamphetamine was still in Montesinos's car, with Hernandez, because Montesinos was not carrying anything and O'Brien could not see it on his person. O'Brien asked Montesinos to have Hernandez show him the drugs. Due to the language barrier, Montesinos appeared to not completely understand O'Brien's request. Montesinos told Hernandez in Spanish, out of the window of O'Brien's truck, to "move." Hernandez exited the passenger side of the white Nissan and got back in on the driver's side. It was then still apparent that O'Brien was not satisfied, and Montesinos again told Hernandez to move. Hernandez then lifted up his shirt toward O'Brien as if to indicate that he did not have anything under his shirt. O'Brien indicated that it is a common practice for individuals involved in an illegal drug transaction to indicate they are 'clean' – meaning they are not armed or wearing a wire – by lifting up their shirt.

O'Brien continued to ask to see the drugs, and Montesinos asked to see the money. Finally, Montesinos understood O'Brien's question and told him the drugs were in his pants.

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[4] O'Brien also indicated that Hernandez appeared to be acting as a 'look-out.'

[5] O'Brien testified at the hearing that it was apparent to him that Montesinos did not understand much of what he said to him.

O'Brien reached under his seat for a roll of "flash money" while Montesinos simultaneously pulled a white bag containing the pound of methamphetamine[6] from the front of this pants. At that time, O'Brien gave the arrest signal to the surveillance officers who moved in and arrested Montesinos and Hernandez. As the officers converged on the two parked vehicles, Hernandez started the white Nissan, but did not attempt to escape.

Montesinos testified in a preliminary hearing for Hernandez in state court on December 5, 2001.[7] In that hearing, Montesinos testified against the advice of his counsel. He admitted selling the narcotics to O'Brien on November 21, 2001. He testified that Hernandez was just riding with him, did not have knowledge of the methamphetamine transaction and was not a part of the transaction. He indicated Hernandez was not going to get paid for doing anything in connection with this incident. Montesinos indicated that Hernandez was a friend whom he had known for two months and that he had merely asked Hernandez to drive around with him on that day. *See* Defendant's Exhibit A, at 25 - 30 (Transcript of Preliminary Hearing in Polk County, *Iowa v. Hernandez*, Criminal No. 161018, held on December 5, 2001). On cross-examination, Montesinos indicated that he did not say anything to Hernandez in Spanish to cause him to lift up his shirt, and that he does not know why Hernandez lifted up his shirt.

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[6] Lab results later revealed this was 442.7 grams of methamphetamine that was 15% pure.

[7] This transcript was admitted into the record at trial without objection from the government. Counsel stated they believed it fell within the exception stated by Federal Rule of Evidence 804(b)(1), as it was former testimony and the declarant was unavailable. Hernandez did not call Montesinos to the stand at his trial in this case because counsel for Montesinos informed counsel for Hernandez that Montesinos would exercise his Fifth Amendment privilege if he was called to testify.

II. CONCLUSIONS OF LAW

To convict Hernandez of the underlying crimes charged in the indictment, the government needs to prove that defendant aided and abetted the primary actor, Montesinos. The government must show that Hernandez associated himself with the unlawful venture, participated in it as something he wished to bring about, and by his action sought to make the activity succeed. *U.S. v. Clark*, 980 F.2d 1143 (8th Cir. 1992). Under the government's theory that Hernandez aided and abetted Montesinos in the aforementioned methamphetamine transaction, the government must present evidence establishing beyond a reasonable doubt that: (1) Hernandez knew that the crime of possession and distribution of methamphetamine was being committed or was going to be committed; (2) Hernandez knowingly acted in some way for the purpose of causing, encouraging or aiding the possession and distribution of methamphetamine; (3) Hernandez knew that the substance to be distributed was a controlled substance and intended that some or all of the controlled substance would be distributed to another person. *See United States v. Lanier*, 838 F.2d 281, 284 (8th Cir. 1988); and EIGHTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS § 5.01 (West 2000).

Knowledge of participation in the illegal transaction at issue is required to be found guilty of aiding and abetting. *See, e.g., U.S. v. Moody*, 462 F.2d 1307 (8th Cir. 1972) and *United States v. Roan Eagle*, 867 F.2d 436, 445 (8th Cir.), *cert denied*, 490 U.S. 1028 (1989). The government is required to prove that Hernandez had knowledge of Montesinos activities beyond a reasonable doubt. The Court finds the government has not met its burden.

When O'Brien arrived at the scene, he expected to enter Montesino's vehicle in order to perform the drug transaction. Montesino made clear that he wanted to get into O'Brien's vehicle. This indicates that, for whatever reason, Montesino did not want to perform the drug

transaction in his car where Hernandez was seated. Nothing presented at trial suggests that Hernandez necessarily would have known what happened in O'Brien's vehicle. No drugs or other relevant items were found in the Nissan Sentra. In fact, Hernandez was seated in a car that was low to the ground, while O'Brien and Montesino were seated in a full-size truck. It seems unlikely that Hernandez would have been able to see what was going on in the truck, which would have been above his line of vision. *See* Government's Exh. 11 (indicating the top of the roof of the Sentra was approximately the same height as the bottom of the window on the passenger side of O'Brien's truck).

Further, the Court finds that Hernandez's activities do not adequately demonstrate that he held adequate knowledge about the drug transaction. Three actions are at issue. First, O'Brien testified that Hernandez behaved as a 'look-out.' The Court has heard the recording of the transaction. It indicates that everything happened quite rapidly, and O'Brien did not have an extended period of time to observe Hernandez's activities; and, during the short time in which he did have an opportunity to observe Hernandez, he was struggling to engage in a broken conversation, intermixing Spanish and English, with Montesinos. O'Brien was not in an opportune position to observe what Hernandez was doing, nor to see if he was behaving as a 'look-out.' Second, O'Brien testified that Hernandez lifted up his shirt and that this is an action commonly performed in the illegal drug trade industry to indicate that the person is not armed or wearing a wire. The Court is disturbed by this action by Hernandez, and agrees that this may in some circumstances indicate that the person who lifts up his shirt knows about the drug transaction and is trying to communicate with someone involved in the transaction. Under the circumstances in this case, however, the Court does not find that this action indicates Hernandez had the requisite knowledge beyond a reasonable doubt. Hernandez lifted up his shirt during a

period of confused conversation between O'Brien and Montesino. While Hernandez appeared to be attempting to obey the commands of Montesino, Montesino was trying to tell Hernandez what to do based upon what his understanding of what O'Brien wanted – and those two were unable to effectively communicate with each other. Third and finally, while testimony indicated Hernandez started the vehicle he was sitting in when converged upon by law enforcement, the Court finds this response does not indicate that, beyond a reasonable doubt, he knew about the drugs and on-going transaction.

Alternatively, assuming Hernandez possessed the requisite knowledge, the Court finds that the government has not shown that Hernandez acted to aid or encourage commission of the crimes at issue. O'Brien's testimony that he acted as a 'look-out' is not reliable as he was not in a position to observe what Hernandez was doing. When Hernandez moved from the passenger side to the driver's side of the vehicle and lifted his shirt up, the record reveals he was only responding to the commands given to him in Spanish by Montesino. The government has not established beyond a reasonable doubt that these actions aided or encouraged the drug transaction.[8]

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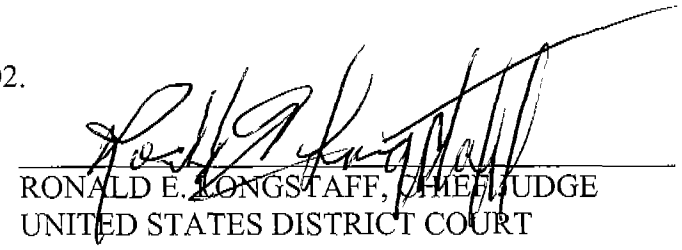
[8] The Court notes that it has not relied on the testimony of Montesinos in state court on December 5, 2001 in reaching this decision. While the parties agree that the transcript of that testimony is admissible under Federal Rule of Evidence 804(b)(1), as it is former testimony, the Court finds it also qualifies as a statement against interest under Rule 804(b)(3). The last sentence of that rule states: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." FED. R. EVID. 804(b)(3). In this instance, it is doubtful that Montesinos has exposed himself to additional liability by his exculpatory statements regarding Hernandez. However, the Court finds it unnecessary to evaluate the trustworthiness of Montesinos's statements as it does not rely on his confession.

III. JUDGMENT

A verdict shall be entered in favor of defendant.

IT IS SO ORDERED.

Dated this 13th day of March, 2002.



RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT