IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 05 CR 853
v.	)	Judge Elaine Bucklo
	)	
ASAD ABOASAF	)	
	)	

GOVERNMENT'S SANTIAGO PROFFER

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, submits the following proffer of evidence as to the admission at trial of certain co-conspirator statements against defendant ASAD ABOASAF pursuant to Fed.R.Evid. ("Rule") 801(d)(2)(E). This proffer sets forth the evidence relating to the scheme to defraud charged in Count One of the indictment, which charges that Aboasaf, along with others known and unknown to the grand jury, engaged in a scheme to defraud the United States Department of Agriculture's Food Stamp Program, in violation of Title 18, United States Code, Section 1343 and 2.

I. Governing Law

A. General Principles

Rule 801(d)(2)(E) provides that a "statement" is not hearsay if it "is offered against a party" and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Admission of such coconspirator statements against the defendants is proper where the government establishes, by a preponderance of the evidence that (1) a conspiracy or joint venture existed; (2) the defendants and the person making the cited statements were members of the particular conspiracy or joint venture; and (3) the statements were made during the course and in furtherance of the conspiracy or joint venture. Bourjaily v. United States, 483 U.S. 171, 175 (1987); United States v. Westmoreland, 312 F.3d 302, 309 (7th Cir. 2002).

In this Circuit, the preferred way for the government to make its preliminary "coconspirator statement" factual showings is by the filing of a pretrial written proffer of the government's evidence. United States v. Centracchio, 265 F.3d 518, 522 n.l (7th Cir. 2001). United States v. Haynie, 179 F.3d 1048, 1050 (7th Cir. 1999).

1. Membership in and Existence of the Conspiracy

The court should consider the proffered coconspirator statements in determining both the existence of a conspiracy and a defendant's participation in it. Bourjaily, 483 U.S. at 180 (1987); Fed. R. Evid. 801(d)(2)(E) ("the contents of the statements shall be considered..."). The admissibility of conspirators' declarations "is not contingent on demonstrating by non-hearsay evidence either the conspiracy or a given defendant's participation." United States v. Martinez de Ortiz, 907 F. 2d 629, 634 (7th Cir. 1990) (en banc). However, the contents of the proffered coconspirator statements "are not alone sufficient" to establish the existence of a conspiracy and a defendant's participation in it. Fed. R. Evid. 801(d)(2)(E). "The Court must consider in addition [to the coconspirator statements themselves] the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or the evidence corroborating the contents of the statement. . . ." Fed. R. Evid. 801 advisory committee's notes (1997 Amendment).

The evidence showing a defendant's membership in a conspiracy may be either direct or circumstantial evidence. United States v. Irorere, 228 F.3d 816, 823 (7th Cir. 2000); United States v. Patterson, 213 F.Supp.2d 900, 910-11 (N.D. Ill. 2002). Indeed, "[b]ecause of the secretive character of conspiracies, direct evidence is elusive, and hence the existence and the defendants' participation can usually be established only by circumstantial evidence." United States v. Redwine, 715 F.2d 315, 319 (7th Cir.

1983) cert. denied, 467 U.S. 1216 (1984).

Certain principles of general conspiracy law are relevant to the Rule 801(d)(2)(E) inquiries to be made as to the existence of a conspiracy or joint venture and a defendant's membership in it. As the Supreme Court stated:

> A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. [citation omitted]. The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. [citation omitted] If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators.

Salinas v. United States, 522 U.S. 52, 63-4 (1997).

For instance, the government need not prove that a defendant knew each and every detail of the conspiracy or played more than a minor role in the conspiracy. Any of the defendants may be found guilty even if they joined or terminated their relationship with core conspirators at different times. United States v. Morrow, 971 F.Supp. 1254, 1256-57 (N.D. Ill. 1997) (citing United States v. Noble, 754 F.2d 1324, 1329 (7th Cir. 1985), cert denied, 474 U.S. 818 (1985)).

2. The "In Furtherance Of" Requirement

It has always been clear the court can consider a proffered coconspirator statement itself in determining whether it was made "in furtherance" of the conspiracy. United States v. Shoffner, 826 F. 2d 619, 627 n.12 (7th Cir. 1987). In determining whether a statement was made "in furtherance" of the conspiracy, courts look for a reasonable basis upon which to conclude that the statement furthered the conspiracy. Id. at 628; United States v. Oliva, No. 02 CR 275, 2003 WL 367062, at 6 (N.D. Ill. Feb. 12, 2003). Under the reasonable basis standard, a statement may be susceptible to alternative interpretations and still be "in furtherance" of the conspiracy. Oliva, 2003 WL 367062, at 6; Shoffner, 826 F.2d at 628. The "statement need not have been made exclusively, or even primarily, to further the

conspiracy" in order to be admissible under the coconspirator exception. United States v. Johnson, 200 F.3d 529, 533 (7th Cir. 2000); United States v. Powers, 75 F.3d 335, 340 (7th Cir. 1996). It is immaterial that statements otherwise "in furtherance" were made to a government witness or agent. Mahkimetas, 991 F.2d 379, 383 (7th Cir. 1985); Morrow, 971 F.Supp. at 1258.

Not surprisingly, given the government's "relatively low burden of proof" on this issue, Shoffner, 826 F.2d at 628, the Seventh Circuit has upheld the admission of a wide variety of coconspirator statements. For example, statements used to recruit potential co-conspirators, id., update others on a conspiracy's progress, United States v. Potts, 840 F.2d 368, 371 (7th Cir. 1987), control damage to an ongoing conspiracy, United States v Van Daal Wyk, 840 F.2d 494, 499 (7th Cir. 1988), plan or review co-conspirators' exploits, United States v. Molt, 772 F.2d 366, 369 (7th Cir. 1985), cert. denied, 475 U.S. 1081 (1986), and attempt to conceal the conspiracy, United States v. Kaden, 819 F.2d 813, 820 (7th Cir. 1987), have been approved as "in furtherance of" conspiracies. Olivia, 2003 WL 367062, at 6. Furthermore, conversations regarding the sale of drugs and the arrangement of payment and/or delivery have been held to have been made in furtherance of the conspiracy. Oliva, 2003 WL 367062 at 6. "Conspiracy is a serious business, and talk about it among or by the conspirators should not be presumed to be unrelated to the accomplishment of the conspiracy's goals." United States v. Pallais, 921 F.2d 684, 688 (7th Cir. 1990).

It is also clear that "statements made during the course of and in furtherance of a conspiracy, even in its embryonic stages, are admissible against those who arrive late to join a going concern." United States v. Potts, 840 F.2d at 372 (citing cases). Moreover, "conversations made by conspirators to prospective coconspirators for membership purposes are acts in furtherance of the conspiracy." United States v. Shoffner, 826 F.2d at 628 (quoting and citing cases). A conspirator who has become less active in the conspiracy nevertheless

is liable for his conspirators' further statements unless he openly disavows the conspiracy or reports it to the police. United States v. Maloney, 71 F.3d 645, 654-55 (7th Cir. 1995) (mere inactivity on the part of the conspirator is not sufficient to constitute withdrawal).

So, in general, statements that are "part of the information flow between conspirators intended to help each perform his role" are statements "in furtherance." United States v. Gajo, 290 F.3d 922, 929 (7th Cir. 2002); United States v. Hunt, 272 F. 3d 488, 495 (7th Cir. 2001). Similarly, assurances that a coconspirator can be trusted or relied upon to perform his role are considered to further the conspiracy. United States v. Buishas, 791 F.2d 1310, 1315 (7th Cir. 1986). In addition, statements designed to conceal a conspiracy also are deemed to be "in furtherance" where ongoing concealment is a purpose of the conspiracy. Gajo, 290 F.3d at 928-29. Therefore, "[s]tatements made to keep coconspirators informed about the progress of the conspiracy, to recruit others, or to control damage to the conspiracy are in furtherance of the conspiracy." United States v. Stephenson, 53 F.3d 836, 845 (7th Cir. 1995); see Hunt, 272 F.3d at 495 (although defendant was not involved in the actual sale of drugs, statements regarding his participation in and protection of the proceeds of the drug conspiracy by laundering and counting its money were admissible).

B. The Absence of Confrontation Issues With Coconspirator Statements.

No separate Sixth Amendment "confrontation clause" issues are posed at a joint trial by the use against a defendant of a non-testifying co-defendant/co-conspirator's statements admitted for the truth of the matters asserted. "[T]he requirements for admission under Rule 801(d)(2)(E) are identical to the requirements of the Confrontation Clause," so there is "no constitutional problem" once the Rule's requirements are met. Bourjaily, 483 U.S. at 182-83; United States v. Ceballos, 302 F.3d 679, 689 n.2 (7th Cir. 2002) (confrontation clause of the Sixth Amendment does not apply to Statements admitted in furtherance of a conspiracy); United States v. Patterson, 171 F.Supp.2d 804,806 (N.D. Ill. 2001)(citing United States v.

Singleton, 125 F.3d 1097, 1107 (7th Cir. 1997)). This means, in weighing the admissibility of the proffered coconspirator statements, the trial court does not consider whether the co-conspirator/declarant is "unavailable," United States v. Inadi, 475 U.S. 387, 400 (1986), nor does the court engage in an independent inquiry into the "reliability" of a proffered statement. Bourjaily, 483 U.S. at 182-183.

As applicable here, this long-standing rule was not affected by the Supreme Court's recent decision in *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the prosecution introduced a tape-recorded statement made before trial by the defendant's wife to law enforcement. *Id.* at 38. At trial, however, the wife was unavailable as a witness due to the state's spousal privilege law, and thus the defendant did not have an opportunity to cross-examine her. *Id.* at 40. The Court ruled that admission of the statement violated the Confrontation Clause, holding that where the government offers an unavailable declarant's hearsay that is "testimonial" in nature, the Confrontation Clause requires actual confrontation, that is, cross-examination, regardless of how reliable the statement may be. *Id.* at 51-52. As examples of "testimonial" statements, the Court listed prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. *Id.* at 68.

However, the *Crawford* decision itself makes clear that its holding does *not* apply where (1) a statement, though testimonial in nature, is not offered for the truth of the matter asserted, *id.* at 59 n.9; (2) the declarant testifies at trial and is subject to cross-examination regarding the prior statement, *id.* at 59 n.9; (3) the statement is non-testimonial, *id.* at 60; or (4) the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination, *id.* at 59.[1]

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[1]Another exception to the confrontation requirement applies where the defendant procured the declarant's unavailability, that is, "forfeiture by wrong-doing", *see* 541 U.S. at 62 (citing *Reynolds v. United States*, 98 U.S. 145, 168-169 (1879)); *see also* Fed. R. Evid. 804(b)(6).

In the instant case, the government will offer non-testimonial co-conspirator statements. Under *Crawford*, co-conspirator statements are "by their nature . . . not testimonial." *Id.* at 56; *United States v. Jenkins*, 419 F.3d 614, 618 (7th Cir. 2005) ("*Crawford* did not change the rules as to the admissibility of co-conspirator statements"). Therefore, because co-conspirator statements are not "testimonial" hearsay statements, *Crawford* is not implicated, and those statements may be admitted without offending the Sixth Amendment.

C. Alternative Bases for Admissibility of Statements

Various statements made during the course of a conspiracy are independently admissible and do not require a Rule 801(d)(2)(E) analysis. A defendant's own statements, for example, are admissible against him pursuant to Rule 801(d)(2)(A), without reference to the co-conspirator statement rule.

A defendant's own admissions are powerfully relevant to establish the factual predicates for the admission of co-conspirator statements against him. United States v. Godinez, 110 F.3d 448, 455 (7th Cir. 1997). The coconspirator statement rule is also not implicated where the relevant verbal declaration is not a "statement" within the meaning of Rule 801(a), that is, not an "assertion" subject to verification; an example would be an order or a suggestion. See United states v. Tuchow, 768 F.2d 855, 868 n.18 (7th Cir. 1985).

Moreover, the coconspirator statement analysis is also not implicated where the relevant verbal declaration is not offered in evidence to prove the truth of the matter asserted and therefore, does not constitute "hearsay" as defined by Federal Rule of Evidence 801(c). Accordingly, statements by alleged co-conspirators may be admitted against a defendant, without establishing the Bourlaily factual predicates set forth above, when such statements are offered simply to show, for instance, the existence, the illegality, or the nature or scope of the charged conspiracy. Gajo, 290 F.3d at 929-30.

II. Overview of the Conspiracy And Its Participants

Count One of the indictment charges that, from approximately May, 2002 until September 2003, Aboasaf, along with others known and unknown to the grand jury, participated in a scheme to defraud the United States Department of Agriculture Food Stamp Program. The scheme involved the exchange of food stamp benefits for cash in violation of the rules and regulations of the Food Stamp Program at two grocery stores associated with the defendant, namely Sam's Food Mart and Lion Food Market. The defendant was a primary signatory on the store bank accounts for both of these stores and therefore had access to the proceeds of the venture.

III. Statements Made During And In Furtherance Of The Conspiracy

The government seeks, through the testimony of case agent Mireille Swain and that of a cooperating individual, to introduce three transactions recorded by the cooperating individual in Lion Food Market, in which she exchanged food stamp benefits for cash with employees of the defendant.

On June 2, 2003, the cooperating individual, equipped with a body recorder and provided with a Link card containing EBT food stamp benefits, went into Lion Food and successfully exchanged $150 in food stamp benefits for $90 in cash. The cashier, who was not identified, required her to purchase a few small items totaling approximately $10 before he was willing to complete the transaction.

Similarly, on June 17, 2003, the cooperating individual, equipped with a body recorder and provided with a Link card containing EBT food stamp benefits, went into Lion Food and successfully exchanged approximately $360 in food stamp benefits for $200 in cash. She conducted the exchange with an unidentified cashier, who was coached through the transaction by another employee at the store's counter. The second individual also instructed the cooperating individual that she must purchase $5 worth of items in order to

exchange her food stamp benefits for cash. The first individual explained to her, "[t]he reason why I want you to come out with some bags, you know?" He then marked her Link card with nail polish and told her to show the mark to the cashier if she were to return to the store to engage in other food-stamp-for-cash transactions.

On August 1, 2002, the cooperating individual again returned to Lion Food Market and exchanged approximately $210 in food stamp benefits for $115 in cash. During the transaction, other individuals are heard also exchanging their food stamp benefits for cash. Two cashiers engaged in her transaction: one "swiping" her Link card and the second one handing her the money.

V. CONCLUSION

This proffer provides just a summary of part of the evidence in the form of statements in furtherance of the conspiracy and co-conspirators' statements that the government will seek to introduce at trial in this case. Based on this summary, the government respectfully requests that this court find that the government's proffer established the prerequisites for admission of co-conspirators' statements; that Aboasaf, his store employees, and Link card recipients entered into a joint venture to exchange Link food stamp benefits for cash in violation of the rules and regulations of the Food Stamp Program, and that the statements summarized above were made in furtherance of the conspiracy.

For all these reasons, the government respectfully requests that the Court allow the government to introduce the coconspirator statements identified herein pursuant to Fed. R. Evid. 801(d)(2)(E).

Respectfully submitted,

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