

No. 10-10110

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID VAUGHT, AKA "POWDER,"

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION
THE HONORABLE TERRY MEANS PRESIDING

Reply Brief of the Appellant, David Vaught

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A conspiracy to distribute between a buyer and a seller requires a separate agreement to distribute over and beyond the buy. The government proved that David Vaught bought large quantities of methamphetamine from the Riojas organization in a series of spot dealings. Can a series of one-off buys of resale quantities, without more, sustain a conspiracy conviction?

Reply Argument

Introduction

The distinguishing feature of a conspiracy is the agreement to violate the law.¹ For drug sales, the sales themselves can't form the substantive conspiracy because they have no separate criminal object.² There must be an agreement over and beyond the sale—an agreement that the buyer will further distribute.³

The evidence showed that Vaught was a freelancer, buying methamphetamine from disparate dealers and selling it to his own customers for his own profit.⁴ What is more important is that it also showed that Eric Riojas didn't take any action or have any interest in furthering any of these subsequent sales.⁵ His involvement stopped at Vaught's cash buys.⁶

The government argues that it didn't need to prove Riojas's active stimulation to further Vaught's sales because this court has already held that evidence of large drug sales over time is sufficient to support a conspiracy conviction.⁷ It misconstrues

¹ *Ianelli v. United States*, 420 U.S. 770, 777 (1975).

² *United States v. Lechuga*, 994 F.2d 346, 349 (7th Cir.) (en banc), *cert. denied*, 126 L. Ed. 2d 433, 114 S. Ct. 482 (1993).

³ *See United States v. Maserati*, 1 F.3d 330, 336 (5th Cir. 1993).

⁴ *See* R 483.1-5; 500.5 to 501.2; 507.19-23.

⁵ R 508.5-15.

⁶ R 505.13-16.

⁷ Gov't. Br. at 14; *compare United States v. Casel*, 995 F.2d 1299, 1305 (5th Cir. 1993) (amount of drugs bought or sold does not by itself suffice to establish participation in a conspiracy).

prolonged cooperation—the quantum of evidence needed to establish a drug buyer’s participation in his seller’s conspiracy.

Prolonged Cooperation

The government says that the Supreme Court held that evidence of supplying large quantities of drugs over an extended period is, alone, sufficient to sustain a conspiracy conviction,⁸ but that wasn’t *Direct Sales’s* holding.⁹ *Direct Sales* held, in fact, that there is a fairly broad latitude of immunity from conspiracy for a continuous course of sales, even those made with knowledge of the buyer’s wrongful use.¹⁰ The Court upheld the conspiracy conviction because the company *had actively stimulated its buyer’s purchases*.¹¹ It had refashioned its forms and quantities to get around the Bureau of Narcotics’s warnings; it showed him how to reorder tablets to take advantage of its quantity discounts; and it later translated its discounts to him into its net price.¹² So, it hadn’t just sold him large quantities of morphine sulfate over time, but had *joined both mind and hand* with him to make his illicit sales possible.”¹³

⁸ Gov’t. Br. at 14.

⁹ *Direct Sales, Co. v. United States*, 319 U.S. 703 (1943).

¹⁰ *Id.* at 712 n. 8.

¹¹ *Id.* at 705.

¹² *Id.* at 707.

¹³ *Id.* at 713.

Wyche,¹⁴ *Torres*,¹⁵ and *Casel*¹⁶ are consistent; they all exhibit evidence of the seller's active stimulation of further sales down the line. In *Wyche*, at least one conspirator received a share of the profits in exchange for his work selling the methamphetamine, and the defendant used one conspirator to deliver drugs to another.¹⁷ In *Torres*, the supplier regularly fronted the drug buys—an indication of an on-going relationship of mutual trust and cooperation between them rather than a series of one-off buys.¹⁸ And in *Casel*, the court found that that drugs were sold on partial credit so the conspirators had a stake in the success of each other's business.¹⁹

Here, there was no evidence that Vaught shared in any of the Riojas's profits; that Riojas ever fronted any of his buys; or that Vaught used a middle man for further distribution of Riojas's methamphetamine. Unlike the Direct Sales company, Riojas didn't do anything to stimulate Vaught's further sales. Indeed, he didn't care about the fate of the methamphetamine once he sold it to Vaught.²⁰

¹⁴ *United States v. Wyche*, 2003 WL 1922966 (5th Cir. 2003).

¹⁵ *United States v. Torres*, 212 Fed. Appx. 361 (5th Cir. 2007).

¹⁶ *United States v. Casel*, 995 F.2d 1299 (5th Cir. 1993).

¹⁷ *Wyche*, 2003 WL 1922966. Compare *Lechuga*, 994 F.2d at 350 (if someone assisted defendant in distributing drugs to at least one other dealer farther down the chain of distribution, then defendant was a conspirator).

¹⁸ *Torres*, 212 Fed. Appx. at 366.

¹⁹ *Casel*, 995 F.2d at 1306.

²⁰ R 508.5-15.

The Government's "Constellation" of Circumstantial Facts

The government argues that the conviction should stand because Vaught shared with Riojas the common goal of distributing methamphetamine.²¹ Its argument is overbroad; all methamphetamine dealers have the goal of distributing methamphetamine, but they aren't all co-conspirators.

For a single conspiracy, the indispensable factor is the agreement to pursue the same criminal objective.²² Here, it would be the further distribution of what Riojas sold to Vaught. Riojas's suspicion, or even knowledge, that his methamphetamine might be further distributed isn't enough to put Vaught in Riojas's conspiracy.²³ There had to be an agreement to further distribute. And the government didn't prove one. Riojas's involvement, by his own admission, ended at the point of sale²⁴ and Vaught's "tacit right" to sell in North Richland Hills wasn't an agreement at all.²⁵

²¹ Gov't. Br. at 18.

²² *Salinas v. United States*, 522 U.S. 52, 64 (1997).

²³ *Direct Sales*, 319 U.S. at 713; see also *United States v. Boidi*, 568 F.3d 24, 30 (1st Cir. 2009) (knowledge that a buyer intends to resell the product doesn't necessarily establish his inclusion in the conspiracy).

²⁴ R 505.13-16.

²⁵ R 505.21 to 506.15.

Substantial Evidence

The government argues that once it has proved the existence of a conspiracy, it need only present slight evidence to connect an individual to it.²⁶ That is error.²⁷ This court may uphold a criminal conspiracy conviction only upon showing of *substantial evidence* of an individual's connection to a particular conspiracy.²⁸ And the government's general cite to 67 pages of the record and one sentence summation of Vaught's "agreement to, knowledge of, and voluntary participation in," an ongoing conspiracy constitutes a failure to argue the issue adequately.²⁹ Vaught's principal brief demonstrates how the circumstantial evidence doesn't support the conviction.

Conclusion

The government prosecuted David Vaught on the flawed theory that a drug buyer is transmogrified into a co-conspirator with his seller merely because of a number of large drug buys. Since it didn't present sufficient evidence of an agreement over and beyond the cash buys or substantial evidence of Vaught's connection to the Riojas conspiracy, his conviction should be reversed.

²⁶ Gov't. Br. at 21.

²⁷ *United States v. Malatesta*, 590 F.2d 1379, 1382 (5th Cir. 1979) (en banc).

²⁸ *Id.*; see also *United States v. Turner*, 319 F.3d 716, 723 n. 8 (5th Cir. 2003).

²⁹ See *United States v. Beaumont*, 972 F.2d 553, 563 (5th Cir. 1992).

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