

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSEL DEAN EIDE,

Defendant.

No. CR01-3010 MWB

ORDER

This matter comes before the Court upon the defendant's motion for judgment of acquittal or in the alternative for a new trial. (Docket #60) After careful consideration of the parties' written and oral arguments, as well as the relevant case law, defendant's motions are denied.

I. BACKGROUND

On August 31, 2001, a jury found the defendant guilty of attempting to manufacture 5 grams or more of methamphetamine (Count I), and of opening/maintaining a place for the purpose of manufacturing, distributing and using methamphetamine (Count II). The defendant subsequently filed a motion for judgment of acquittal or, in the alternative for a new trial.

II. STANDARDS

A. Motion for Judgment of Acquittal

Federal Rule of Criminal Procedure 29 provides in pertinent part:

The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

Fed. R. Crim. P. 29(a). In the Eighth Circuit, the Baker-Burks line of authority restrains the courts' ability to overturn jury verdicts. United States v. Baker, 98 F.3d 330, 338 (8th Cir. 1996); United States v. Burks, 934 F.2d 148, 151 (8th Cir. 1991). See also United States v. Gomez, 165 F.3d 650, 654 (8th Cir. 1999) (observing that the jury's verdict must be upheld if there is an interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt).

In considering a motion for judgment of acquittal based on the sufficiency of the evidence, the Court must "view the evidence in the light most favorable to the government, giving it the benefit of all reasonable inferences." United States v. Causor-Serrato, 234 F.3d 384, 387-88 (8th Cir. 2000); United

States v. Basile, 109 F.3d 1304, 1310 (8th Cir.), United States v. Vig, 167 F.3d 443, 447 (8th Cir. 1999) (observing that "[w]e review the district court's denial of a motion for judgment of acquittal based on the sufficiency of the evidence by viewing the evidence in the light most favorable to the verdict."). The Court can overturn a jury's verdict only if "'a reasonable fact-finder must have entertained a reasonable doubt about the government's proof'" of one of the essential elements of the crime charged. United States v. Kinshaw, 71 F.3d 268, 271 (8th Cir. 1995) (quoting United States v. Nunn, 940 F.2d 1128, 1131 (8th Cir. 1991)). Furthermore, "[t]his standard applies even when the conviction rests entirely on circumstantial evidence." United States v. Davis, 103 F.3d 660, 667 (8th Cir. 1996), cert. denied, 520 U.S. 1258 (1997). A jury verdict should not be overturned lightly. United States v. Washington, 197 F.3d 1214, 1217 (8th Cir. 2000); United States v. Tucker, 169 F.3d 1115, 1116 (8th Cir. 1999).

In addition to allowing a conviction to be based on circumstantial and/or direct evidence, the Eighth Circuit Court of Appeals has instructed that "[t]he evidence need not exclude every reasonable hypothesis except guilt." United States v.

Baker, 98 F.3d 330, 338 (8th Cir. 1996), cert. denied, 520 U.S. 1179 (1997). The Court can neither weigh the evidence nor assess the credibility of the witnesses; these tasks belong exclusively to the jury. United States v. Wells, 63 F.3d 745, 752 (8th Cir. 1995). When considering a judgment of acquittal motion, the Court must keep in mind that it is the jury's job to judge the credibility of witnesses and to resolve contradictions in evidence. United States v. Ireland, 62 F.3d 227, 230 (8th Cir. 1995).

B. Motion for New Trial

Federal Rule of Criminal Procedure 33 provides in relevant part as follows:

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.

Fed. R. Crim. P. 33.

As the United States Court of Appeals for the Eighth Circuit has explained:

When a motion for a new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different from those raised by a motion for judgment of acquittal. The question is not whether the defendant should be acquitted outright, but only whether he should have a new trial . . . [the court] may weigh the

evidence and in so doing evaluate for itself the credibility of the witnesses.

United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980).

"The Court will only set aside the verdict if the evidence weighs heavily enough against the verdict that a miscarriage of justice may have occurred." United States v. Rodriguez, 812 F.2d 414, 417 (8th Cir. 1987). The authority to grant new trials, however, "should be used sparingly and with caution."

United States v. Lincoln, 630 F.2d 1313, 1319

(8th Cir. 1980). Having examined the appropriate standards of review, the Court turns now to its consideration of the defendant's motions.

III. ARGUMENTS AND LEGAL ANALYSIS

A. Baker-Burks v. Davis-Hepp

There are two lines of authority that address the issue of the sufficiency of the evidence. One is referred to as the Baker-Burks line of authority (where evidence would allow a reasonable jury to find a defendant guilty, the court should not grant acquittal) and the other is referred to as the Davis-Hepp line of authority (where the evidence is equally strong to infer innocence as to infer guilt of a defendant, the court has a duty to acquit). See United States v. Baker, 98 F.3d 330, 338 (8th

Cir. 1996); United States v. Burks, 934 F.2d 148, 151 (8th Cir. 1991); United States v. Davis, 103 F.3d 660, 667 (8th Cir. 1996); United States v. Hepp, 656 F.2d 350, 353 (8th Cir. 1981). The defendant argues that the Court should apply the Davis-Hepp standard. The government argues that neither the Baker-Burks nor the Davis-Hepp standard apply to this case.

In United States v. Saborit, 967 F. Supp. 1136, 1138-40 (N.D. Iowa 1997), the court was also asked to determine which line of authority, Baker-Burks or Davis-Hepp, was the appropriate standard of review applicable to motions for judgment of acquittal. Id. In Saborit, the court determined that it did not need to decide which of the two standards was controlling in the Eighth Circuit because the evidence presented at trial was sufficient enough to convict regardless of the standard applied and the court "need not determine the continued legitimacy of the Davis-Hepp standard today nor attempt to harmonize that line of authorities with the Baker-Burks line of authorities." Id. at 1142.

However, the court in Saborit did note, after a discussion which will not be repeated here, that "[t]he Eighth Circuit Court of Appeals has held on over a dozen occasions in the past

ten years that if the evidence reasonably supports two contrary theories, the reviewing court must not disturb the jury's determination." Saborit, 967 F. Supp. at 1140. The court in Saborit concluded that ". . . because the Baker-Burks line of authorities appears to be the currently preferred approach in the Eight Circuit, the court will proceed to analyze the facts of this case under that approach." Id. at 1143. This Court has reviewed the decision in Saborit and is persuaded that it sets out a well-reasoned position. This Court will therefore adhere to that position, as it is, at least for the present, the law of this district.

B. Sufficiency of the Evidence

In his motion for judgment of acquittal or in the alternative for a new trial, the defendant challenges the sufficiency of the evidence (1) to support his convictions and (2) the submission of the quantity of methamphetamine in count one. In support of his argument that the evidence at trial was insufficient to support his conviction, the defendant cites to United States v. Montanye, 996 F.2d 190 (8th Cir. 1993) and United States v. Wagner, 884 F.2d 1090 (8th Cir. 1989). These cases stand for the proposition that in order to establish that

the defendant attempted to manufacture methamphetamine, the government has to show defendant's (1) criminal intent, and (2) conduct constituting a substantial step towards the crime's commission. Montanye, 996 F.2d at 191; Wagner, 884 F.2d. at 1095. The question of "[w]hether a defendant's conduct amounts to a substantial step necessarily depends on the facts of each case. Montanye, 996 F.2d at 191. In Final Jury Instruction No. 6, this Court explained the "substantial step" element:

A substantial step must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime. In order for behavior to be punishable as an attempt, it need not be incompatible with innocence, yet it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute. Crimes such as attempt to manufacture methamphetamine require a defendant to engage in numerous preliminary steps which brand that enterprise as criminal.

The defendant argues that the government did not prove that his conduct constituted a substantial step towards the commission of the crime of attempting to manufacture

methamphetamine. In support of this argument the defendant states the following: there was no direct evidence that he attempted to cook methamphetamine; defendant's mother did not testify that she ever smelled anything unusual at the home; no fingerprints were taken; and, there was another individual who lived at the house and had free access to the house and garage area. The defendant also points out that no anhydrous ammonia, a chemical needed in the manufacturing of methamphetamine, was ever found. The defendant also argues that in order for the government to prove that a "substantial step" was taken in the manufacture of methamphetamine, there must be anhydrous ammonia present.

The government relies on all of the arguments and evidence presented at trial in resistance to defendant's motions, which is summarized as follows:

Patricia Eide, defendant's ex-wife, who said she has been an addict since she was fifteen, testified that she had to move out of the house due to the defendant's use of the house to manufacture methamphetamine. She could constantly smell the odor of ether; she found the blender with residue of ephedrine and she found coffee filters in basement. All of these items

are commonly used in the manufacturing of methamphetamine.

Jolene McFarland, defendant's sister, corroborated Patricia Eide's story by testifying that she had occasion to look in the basement and saw a jar with some liquid, LP tanks, coffee filters and 4-5 bags of a white powder substance.

Phyllis Eide, defendant's mother, testified that she and Jolene McFarland went to the authorities regarding her son's involvement with drugs at the home. Although the defendant argues that his mother never testified to ever smelling anything out of the ordinary at the home, the government points out that the mother did not testify that she was at the defendant's house often, but testified that she had regular contact with her kids and therefore knew what was going on with them.

These three women had a laudatory motive in trying to help this defendant. Their hope was that he would stop attempting to manufacture methamphetamine and not put himself and his family in jeopardy because of the presence in the home of dangerous chemicals. In order to stop him (help him) they gave very damaging testimony to authorities about what he was doing and it was hard for the jury and is hard for this Court to ignore or de-minimize their testimony, especially when the charge

involved an attempt to manufacture methamphetamine.

In furtherance of the government's position they point out that police officers, including Scott Lamp, Special Agent for the Iowa Division of Narcotics Enforcement, testified as to finding a number of items in and around the defendant's home which are commonly used in the manufacturing of methamphetamine, including LP tanks, muriatic acid, funnels, cans of starting fluid, lithium batteries, rags which had a strong odor of anhydrous ammonia, a postal scale, clear baggies, glass tubes, a pot pipe and a glass jar covered by a bucket and a blanket which had a strong smell of ether. This jar was later found by the Iowa Division of Criminal Investigation laboratory to contain ether, pseudoephedrine and a small amount of methamphetamine. (Gov. Ex. 52).

Police officers also testified that they conducted a traffic stop of the defendant and another person just two days prior to the execution of the search warrant. The reason for the stop was that the vehicle that was stopped matched the description of a vehicle potentially involved in theft or attempted theft of anhydrous ammonia. Inside the vehicle, officers found a cut section of a bicycle inner tube, a roll of duct tape and a

plastic container, items which are commonly used for theft of anhydrous ammonia in small quantities for methamphetamine manufacturing.

Further, the government relies on the testimony of Patricia Krahn, criminalist with the Iowa Division of Criminal Investigation. She testified that her examination of photographs, agent notes and substances found at the scene, including the jar smelling of ether, were consistent with being a "bi-product of a previous manufacturing process" and that the defendant would be able to manufacture between 10 and 12 grams of actual (pure) methamphetamine.

The Government therefore argues that the evidence was sufficient to convict the defendant on both counts and that the jury verdict should stand.

C. Quantity

In support of his motion for judgment of acquittal or in the alternative for a new trial, the defendant also argues that the evidence was insufficient to support allowing the jury to decide the issue of the quantity of methamphetamine that was involved. The criminologist's estimate as to the "quantity" that would be, by her calculations, manufactured is set out in detail in

Exhibit 52 which states in pertinent part as follows:

In this case there was a construction of items present that are associated with the manufacture of methamphetamine. With respect to the first step, there was precursor in a prepared form (the white powder of Exhibit B). - - -

The precursor is then combined with anhydrous ammonia and lithium metal. Containers appropriate as reaction vessels were at the scene. Air purifying respirator filters present would protect clandestine operator from the caustic fumes of the anhydrous ammonia. Clandestine laboratory operators obtain lithium metal for Step 2 from lithium batteries, which are disassembled. Seven lithium batteries were found at the site. - - -

Engine starting fluid is a solvent commonly used to extract the methamphetamine from the reaction mixture. The liquid of Exhibit A was consistent with engine starting fluid. Three punctured and eight full engine starting fluid cans were found. - - -

Muriatic acid (hydrochloric acid) was found at the scene. The muriatic acid could be added to the liquid, or it could be combined with aluminum foil balls to generate hydrogen chloride gas.

Exhibit A contained pseudoephedrine... [t]he presence of pseudoephedrine indicates it was used as the precursor. This is the same substance as contained in the powders of Exhibit B. - - -

Due to the presence of prepared precursor and lithium batteries, an intention to

manufacture methamphetamine is indicated. It would have been necessary to obtain anhydrous ammonia for the reaction to go forward. There was also engine starting fluid available to remove the methamphetamine from the reaction mixture.

The estimation of potential yield for future manufacture is based on the amount of precursor at the scene. Exhibit B contained 27.6 grams of precursor. With a 100% yield (maximum theoretical), 100 grams of precursor will produce 92 grams of methamphetamine hydrochloride. (The final product from the clandestine manufacture of methamphetamine is the hydrochloride salt of the drug.) The yield in any chemical synthesis is always less than the maximum theoretical for the lithium-ammonia reduction method. This estimation is based on work done by this laboratory using the "recipes" employed by clandestine laboratory operators in Iowa. Thus, the maximum yield of methamphetamine hydrochloride (actual), using the 27.6 grams of precursor in Exhibit B, would be approximately 25 grams. Assuming 40-50% yield, approximately 10-12 grams could be made.

The values for yield are obtained by the following calculations:
 $27.6 \text{ grams} \times 0.92 \times 0.40 = 10.1 \text{ grams}$;
 $27.6 \text{ grams} \times 0.92 \times 0.50 = 12.6 \text{ grams}$.
The value 0.92 is the stoichiometric conversion factor of pseudoephedrine hydrochloride to methamphetamine hydro-chloride.

The defendant pointed out that there were some weak spots in this "analysis." There are. The words, "an intention to

manufacture methamphetamine is indicated" (emphasis added) is certainly not a flat conclusion usually needed to prove beyond a reasonable doubt. The calculation as to the amount of methamphetamine that could be made, 10 to 12 grams, is based in part on the words "probably average 40-50% of the maximum theoretical." Even if her estimate was twice as high, and the average in this case was only 20 to 25%, that would still yield an answer of 5 to 6 grams which would meet or exceed the 5 grams the defendant was convicted of. It must be remembered however that the charges here involved an attempt to manufacture. The Court specifically concludes that the fact that there was no anhydrous ammonia found at the scene does not require a judgment of acquittal or a new trial.

The defendant argued that the case of United States v. Campos, 132 F.Supp. 2nd 1181 (N.D. Iowa 2001), was a case that was a precedent for his argument that he is entitled to a new trial. Campos was tried for possessing methamphetamine with intent to distribute it. The fighting issue was whether the 50.6 grams of methamphetamine found in his bedroom was for his personal use only. Campos admitted it was his but argued that he did not distribute it. The trial court found that none of

the usual paraphernalia used by drug dealers was present and that the government had failed to carry its burden that Campos had distributed, and granted him a new trial.

As mentioned, Campos was charged with possession with intent to distribute. The key of course is intent to distribute or no intent to distribute. In Eide's case the key is attempt to manufacture or no such an attempt. For all the reasons set out herein the Court is persuaded that Eide made the attempt to manufacture methamphetamine.

The Court is aware that the defendant was also convicted on Count 2 of the indictment of opening or maintaining a place for the purpose of manufacturing, distributing and using a controlled substance, methamphetamine. The defendant has argued that the defendant's house, when utilized as a primary residence, cannot also be opened or maintained as a place for manufacturing, distributing, and using a controlled substance under the statute. The defendant asserts that the statute was not intended to target a person's residence but rather to target a transient location or temporary place or building used primarily or exclusively as a place for illegal drug activity. The defendant has not cited any case authority to support this

argument and this Court knows of no such precedent. Defendant's motions in relation to Count 2 are denied.

IV. CONCLUSION

After careful consideration of all of the evidence and the parties' arguments, this Court is persuaded that viewing the evidence in the light most favorable to the government, there was sufficient evidence for a jury to find the defendant guilty of attempting to manufacture methamphetamine. Specifically, this Court is persuaded that there was enough evidence to find that the defendant took a substantial step or steps towards committing the crime of attempting to manufacture methamphetamine. As stated above, a jury verdict should not be overturned lightly. United States v. Washington, 197 F.3d 1214, 1217 (8th Cir. 2000); United States v. Tucker, 169 F.3d 1115, 1116 (8th Cir. 1999). Furthermore, this Court is not persuaded that a substantial miscarriage of justice had occurred. Defendant's motion for a new trial is denied.

THEREFORE, IT IS HEREBY ORDERED that the defendant Russel Dean Eide's motions for judgment of acquittal and in the alternative for a new trial are each denied.

IT IS SO ORDERED.

DATED this ____ day of November, 2001.

Donald E. O'Brien, Senior Judge
United States District Court
Northern District of Iowa