

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

UNITED STATES OF AMERICA :
 :
 v. :
 :
 :

MOTION FOR NEW TRIAL
(Fed. R. Crim. P. 33)

The defendant herein, , by and through his undersigned attorney, moves pursuant to Rule 33 of the Federal Rules of Criminal Procedure for a new trial and in support of such motion, shows unto the court the following:

1. Defendant was charged in a two-count indictment returned on September 27, 1993 in which he is charged in Count One with possessing with intent to distribute 150.43 grams (net weight) of cocaine base ("crack") and in Count Two with carry or using firearms in connection with a drug trafficking offense. Both offenses are alleged to have occurred on or about June 16, 1993.

The government's evidence tended to show the following:

2. The Winston-Salem Police Department received a Crimestoppers tip on June 16, 1993 which indicated that a load of crack had just been brought from New York to [REDACTED] in Winston-Salem. The tip indicated that the suspects were a black male named [REDACTED] a black female named [REDACTED] and that several firearms were located in the apartment.

3. Surveillance was set up on the apartment by Officers

Richardson and McCandlish.

4. Detective Cook had also received notification of the Crimestoppers tip and had been to the location earlier in the day. He returned to the apartments while working on another matter and observed two black males and a black female exit [REDACTED] enter a gray Ford Taurus (described in the Crimestoppers tip), and proceed to leave the apartment complex.

5. Detective Cook radioed to the officers conducting the surveillance his observations.

6. As the Ford Taurus exited the parking lot onto Motor Road, Officer Richardson noticed that the female did not have her seatbelt fastened and began to follow the vehicle. After Officer McCandlish arrived he effectuated a stop of the vehicle.

7. While Officer Richardson spoke to the female passenger, Officer McCandlish spoke to the driver, XYZ, and learned that he did not have a driver's license.

8. Detective Cook and was advised by Officer McCandlish that he was placing the driver under arrest for not having a driver's license.

9. Prior to the vehicle being searched incident to the driver's arrest, the defendant, Vance Gibson, who was seated in the rear of the vehicle, was requested to exit the vehicle. As the defendant exited the vehicle, detective Cook observed that he had a small red pouch sticking from his pant pocket.

10. Detective Cook asked defendant for permission to search his person and was given consent.

11. When Detective Cook reached for the red pouch, the defendant

indicated that he could search it also. Inside the red pouch were five glassine packages which tested positive for a controlled substance (at the time thought to be cocaine) but which were later determined to be heroin.

12. Defendant was searched by Detective Cook and Officer Richardson placed him in his patrol vehicle. Prior to being placed in the patrol vehicle, defendant was again searched by Officer Richardson and no contraband was found.

13. Defendant was transported to the clerk's office and placed in a holding cell. Officer Richardson returned to his patrol vehicle and discovered twenty-one glassine packets of crack wedged between the back seat of the vehicle.

14. Detective Cook went to [REDACTED] with other officers and obtained consent to search this apartment from Cecelia Shepard.

15. A search of the apartment revealed 150.43 grams of crack on a plate located between the mattresses on the bed in [REDACTED] bedroom, and also revealed numerous weapons found next to the crack between the mattresses and in other various places in the apartment.

16. Defendant and Ms. XYZ were charged with the 150.43 grams of crack and the weapons found in the apartment. Scott XYZ was charged in state court, but not indicted in federal court.

17. Defendant filed a pretrial motion to suppress evidence relating to the drugs found in the red pouch, in the police vehicle and relating to any statements made by the defendant as a result of his arrest. After a hearing, the court denied the defendant's motion.

18. During the trial of this action, defendant objected to the introduction of testimony and evidence relating to the drugs seized during the roadside search of defendant and recovered from the police vehicle. Defendant's objection was overruled.

19. During the court's instructions to the jury, the court charged that "the proof need not establish with certainty the exact amount of cocaine base (crack) possessed. It is sufficient if the evidence establishes beyond a reasonable doubt that any amount of cocaine base (crack) was possessed with intent to distribute."

20. After the court completed the charge to the jury, defendant's attorney requested the court to instruct the jury that in order to find the defendant guilty of Count One of the indictment, it had to find that the defendant possessed with the intent to distribute the 150.43 grams of cocaine base ("crack") found in the apartment. The request was denied.

SUMMARY OF ARGUMENT

21. The defendant is entitled to a new trial on one or more the following grounds: (1) the government's proof of the possession of heroin and crack at the time of arrest, admitted as substitute evidence, fatally varied from the offense charged in Count One, i.e., possession of crack at the Motor Road residence; (2) the evidence of the heroin possession would only have been admissible as a prior similar act, pursuant to Fed. R. Evid. 404(b), but the court did not consider its admissibility under the Rule and did not give a limiting instruction; and (3) the lack of any clarifying instruction likely caused jury confusion and created the substantial risk that the jury's

verdict was not unanimous in that some jurors may have been persuaded that the defendant possessed crack at the residence while other jurors based their verdicts on having been persuaded that the defendant possessed heroin at the time of his arrest.

ARGUMENT

22. The defendant was indicted with possession with intent to distribute the 150.43 grams of cocaine base ("crack") found during the search of the [REDACTED]. The drugs seized from the apartment represented a separate and distinct seizure from the drugs seized as a result of the search of defendant's person and those recovered from Officer Richardson's patrol vehicle. While the drug amount is not normally an essential element of the charge of possession with intent to distribute, United States v. Uwaeme, 975 F.2d 1016, 1018 (4th Cir. 1992), it is essential when there is more than one seizure of drugs and the indictment is based on a specific seizure.

23. The government contended throughout the trial that the drugs seized from the defendant and recovered from the patrol vehicle related to the drugs found in the apartment. It failed, however, to include those drug amounts in the indictment. Had it done so, then the jury could have considered the additional drugs in their consideration of Count One. By failing to include the drug amounts, the evidence relating to the stop of the Ford Taurus and the seizure resulting therefrom would have been admissible only pursuant to Rule 404(b) of the Federal Rules of Evidence. If such evidence had been admitted pursuant to Rule 404(b), the court would have had to give a limiting instruction at the time of its admission and again during its final

instructions to the jury. Such instruction would have informed the jury for what purposes it could consider the evidence.

24. Without a limiting instruction or an instruction that the jury had to find that the defendant possessed the 150.43 grams of cocaine base ("crack") found in the apartment before it could find the defendant guilty of Count One, the jury could have based its guilty verdict on the possession of the heroin found in the red pouch, the twenty-one packages of crack found in the patrol vehicle or the crack found in the apartment. A guilty verdict based on any possession other than the drugs found at the apartment would not be permissible. Under the circumstances it is highly possible that all jurors felt that the defendant possessed some quantity of drugs, but were not unanimous as to which drugs they believed he possessed. In order to justify conviction, the jury would have had to unanimously agreed that he possessed the 150.43 grams of crack found in the apartment.

25. In United States v. Elliot, 849 F.2d 886 (4th Cir. 1988), the court held that each distinct act of delivery of controlled substances can be separately prosecuted under federal statutes proscribing participation in any aspect of the chain of distribution of controlled substances. In light of such holding, it can be argued that each distinct act of possession of controlled substances can be separately prosecuted. If such is the case, then when a specific act of possession forms the basis for an indictment, it would appear that it would be necessary for the court to instruct the jury that it must find beyond a reasonable doubt that a defendant possessed the drugs relating to the specific act of possession alleged in the indictment before it

could find the defendant guilty.

26. Rule 7(c)(1) of the Federal Rules of Criminal Procedure, provides that an indictment shall be a "plain, concise and definite written statement of the essential facts constituting the offense charged."

This mandate of the rule... is met through the satisfaction of two requirements. The indictment must charge all the essential elements of a criminal offense and sufficiently apprise the defendant of what he must be prepared to meet so he will not be misled while preparing his defense, and it must protect the defendant against later prosecution for the same offense. United States v. Hayes, 775 F.2d 1279, 1282 (4th Cir. 1985), citing Russell v. United States, 369 U.S. 749, 763-764, 82 S.Ct. 1038, 1046-1047, 8 L.Ed.2d 240 (1962).

These requirements reflect the "substantial safeguards" to a criminal defendant which an indictment is designed to provide. Russell v. United States, 369 U.S. at 763.

27. The general rule is that the language of an indictment may not be altered or amended except by resubmission to the grand jury. Ex Parte Bain, 121 U.S. 1, 9-10 (1887); Stirone v. United States, 361 U.S. 212, 218-219. In the present case, the indictment was based on the seizure of 150.43 grams of cocaine base ("crack") seized from Apartment 19 at 222 Motor Road in Winston-Salem, North Carolina on June 16, 1993. To allow the jury to base its verdict on a different quantity of drugs found on defendant's person and in a police vehicle on the same day would in effect be the same as amending the indictment to include another theory of guilt without resubmission to the grand jury. The case law clearly shows that this is not permissible.

28. There is no dispute in the evidence that the defendant did

not have on his person or in his possession a firearm at the time he was stopped in the Ford Taurus on [REDACTED]. The charge in Count Two of the indictment was based on the possession of the drugs alleged in Count One. Without the requested instruction limiting the jury's consideration to the drugs found in the apartment, the jury could have based its verdict of guilty to Count Two on the defendant's possession of some other drugs. It is likely that there was jury confusion as to what act of possession was charged in Count One: the actual possession of heroin at the time of the arrest or the constructive possession of crack cocaine at the Motor Road residence. A guilty verdict based on this theory would not be supported by the evidence. The defendant would have had to have the weapons on him or at his disposal to aid him in a drug trafficking offense. If all of the weapons were at the apartment, they certainly were not available to the defendant when he was in the vehicle.

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Certificate of Service

I hereby certify that a copy of the foregoing was served upon:

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by hand delivery this the 20th day of January, 1994.

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