8-24-2018

State v. Medina Appellant's Reply Brief Dckt. 45117

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent. vs. JERSSON NEFTALY ROQUE MEDINA Defendant-Appellant,	S.Ct. No. 45117 & 45118 Bannock Co. CR-2016-5675-FE & CR-2016-6942-FE

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Sixth Judicial District of the State of Idaho
In and For the County of Bannock

HONORABLE STEPHEN S. DUNN
Presiding Judge

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A. *The State's Evidence was Constitutionally Insufficient to Establish all the Elements of Conspiracy to Traffic in Heroin Beyond a Reasonable Doubt.*

1. There was no agreement with Sharon Bernal-Valadez to traffic in heroin.

The state asserts that it presented "more than sufficient evidence" to prove an agreement between Mr. Medina and Ms. Bernal-Valadez. In support, it points to Ms. Bernal-Valadez's testimony that she hid a plastic bag obtained from Mr. Medina in her pants, knowing it contained heroin, and that she knew they were taking the heroin to Pocatello to sell it. Further, it notes that Ms. Bernal-Valadez testified that Mr. Joyce wired money to her to pay for heroin. State's Brief, pg. 9-10. However, none of it is evidence of an *agreement* between the two as an agreement is a voluntary arrangement as to a course of action, not an action taken in response to a threat of violence.[1]

Strangely, the state asks this Court to ignore the portion of Ms. Bernal-Valadez's testimony expressly denying the existence of an agreement between herself and Mr. Medina. It is strange because most of that evidence was elicited by the prosecuting attorney during her direct examination of Ms. Bernal-Valadez. See, T pg. 228 - pg. 243. And, as one assumes the state did not knowingly put on false testimony during the trial, why that testimony was the truth during the trial but a lie now is not explained by the state.

[1] www.merriam-webster.com/dictionary/agreement

Instead of making an attempt to explain why only part of the state's evidence elicited through Ms. Bernal-Valadez should be believed, the state resorts to sophistry, inaccurately labeling the argument that there was insufficient evidence of an agreement as an "I-made-my-co-conspirator-do-it defense to the conspiracy charge." State's Brief, pg. 10. That strained attempt to be clever falls far short of its intended mark, however, because there is no conspiracy without an agreement. Lack of an agreement is not an affirmative defense. The existence of an agreement is an element of the offense, which the state must prove beyond a reasonable doubt.

> An essential of a conspiracy is that there should be an agreement or understanding willingly entered into by all the parties to it for the accomplishment of an unlawful purpose. It necessarily involves a concert of action, not in the performance of the overt act, but in reaching the agreement or understanding which is the first necessary element of conspiracy and in pursuance of which the over acts must be done. . . . Participation in a crime actuated solely by the compelling fear of personal harm negatives the very requisites of conspiracy.

United States v. Saglietto, 41 F. Supp. 21, 33 (E.D. Va. 1941). Since the acts which the state claims form the circumstantial evidence of an agreement were involuntary on Ms. Bernal-Valadez's part, there was no agreement between her and Mr. Medina, and consequently no conspiracy.

The state next argues that "generalized fear of harm is no defense to a conspiracy charge." State's Brief, pg. 10, *quoting United States v. Freeman*, 208 F.3d 332, 342 (1st Cir. 2000). That may be true, but when the specific fear of physical harm overcomes the voluntariness of the "agreement" the state has not met its burden of proof. *Sagiletto*, *supra.* In *Freeman*, the defendant said to the co-

conspirator that he "shouldn't fuck with [the defendant] . . . [and that] because of the things that Frankie [Francis] was doing, that he [Freeman] could close the club." *United States v. Freeman*, 208 F.3d 332, 341 (1st Cir. 2000) (alterations in original). That was deemed to be insufficient to show that his participation in the conspiracy's activities were involuntary. *Id.* In *Slater v. United States*, 562 F.2d 58, 62 (1st Cir. 1976), the other case cited by the state, the "[a]ppellant induced the contractor to pay by impliedly threatening to harass the contractor on his present job and to withhold future contracts." That kind of mere "economic threat was not enough to overbear the contractor's will and make his participation in the conspiracy involuntary." *Id.*

Here, the prosecuting attorney elicited far more testimony proving the absence of an agreement than was present in either *Freeman* or *Slater*. Ms. Bernal-Valadez testified about the physical abuse she suffered. T pg. 230, ln. 2-6. She testified that she didn't want to put the drugs in her pants but complied out of fear. When the prosecutor asked, "Why did you put the package down your pants?" she answered: "Well, I put -- I put it because he told me to. And I had to do what he told me. If not, he would get upset with me, and he would tell me mean things, and then he would mistreat me." T pg. 242, ln. 22-25; T pg. 230, ln. 21 – pg. 231, ln. 3. She also testified that Mr. Medina forced her to drive the vehicle once they arrived in Idaho. T pg. 231, ln. 4-9. She later said that, "he would make me think what he wanted when he would hit me. That's what would happen." T pg. 235, ln. 25 – pg. 236, ln. 2. She also testified, "He wouldn't like me questioning him. And then,

that's when the beating started." T pg. 252, ln. 22-25. The state's suggestion its own trial evidence did not show the absence of a voluntary agreement on the part of Ms. Bernal-Valadez is incorrect (as well as demonstrating a lack of understanding of and sensitivity to the dynamics of domestic abuse).

2. There was no agreement with Logan Joyce to traffic in heroin.

The state also contends that it "presented substantial evidence at trial to show Medina and Joyce had an agreement to traffic heroin." State's Brief, pg. 11. But again, that claim does not withstand careful scrutiny.

First the state points to heroin purchases between the "spitters" in Salt Lake City and Mr. Joyce. As Mr. Medina was not among them, that evidence does not show a conspiratorial agreement.

It next asserts that Mr. Joyce was purchasing as much as 130 grams from Mr. Medina for $8000 every two weeks. However, "conspiracy requires proof of 'an agreement to commit a crime other than the crime that consists of the sale itself.' Were the rule otherwise, every narcotics sale would constitute a conspiracy." *United States v. Lennick*, 18 F.3d 814, 819 (9th Cir. 1994), *quoting United States v. Lechuga*, 994 F.2d 346, 347 (7th Cir.) (en banc), *cert. denied*, 114 S.Ct. 482 (1993) (internal citation omitted). Proof that a defendant sold drugs to another person does not prove the existence of a conspiracy. *United States v. Loveland*, 825 F.3d 555, 557 (9th Cir. 2016).

Next, the state writes that:

> Although their exchanges were at times straight cash-for-drug deals (Trial Tr., p.188, L.17 – p.189, L.1.), there were also times when Medina would front the heroin and Joyce would wire Medina money at a later time (Trial Tr., p.154, L.12 – p.156, L.9; p.196, L.24 – p.197, L.5; p.241, Ls.7-23). The jury could infer from this evidence that Medina and Joyce were in an agreement to traffic heroin—namely, Medina would supply Joyce with heroin in exchange for money or "credit," Joyce would sell the heroin to others, and Joyce would then use the proceeds to purchase additional heroin or pay off the "credit" from Medina.

State's Brief, pg. 11. However, this passage is misleading as the "times when Medina would front the heroin" is actually one time. The state's citations to the trial transcript are to three different witnesses all testifying about the same singular event. First, Detective Edgley is testifying about some texts between Mr. Joyce and Mr. Medina. T pg. 154, ln. 12 - pg. 156, ln. 9. Mr. Joyce later testifies about the same texts. T pg. 196, ln. 24 – pg. 197, ln. 5. Finally, Ms. Bernal-Valadez testifies about those same texts. T pg. 241, ln. 24-25.[2]

In fact, there was evidence of only one sale between Mr. Medina and Mr. Joyce, during the April 2 – April 14 time period alleged in the Information, that taking place on April 8 or 9, where $8000 was exchanged for 130 grams of heroin,

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[2] # The state does cite to testimony about negotiations purportedly between Mr. Medina and Detective Edgley where the detective would pay $7000 upfront and owe $1000, but that cannot be part of the conspiracy because it is "well-established that one who acts as a government agent and enters into a purported conspiracy in the secret role of an informer cannot be a co-conspirator." *United States v. Chase*, 372 F.2d 453, 459 (4th Cir.), *cert denied*, 387 U.S. 907 (1967), *citing Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965).

with a $5000 down payment and $300 paid later. As to the pre-charge sales, Mr. Joyce explained, "I would give him money, and he would give me however much heroin." T pg. 188, ln. 26 – pg. 189, ln. 1. That is evidence that Mr. Medina is guilty of a delivery of a controlled substance but is not evidence of a conspiracy.

Finally, the state exaggerates the holding in *United States v. Loveland*, 825 F.3d 555 (9th Cir. 2016), by claiming that evidence of the fronting drugs or supplying them on consignment is sufficient to show a conspiratorial agreement. State's Brief, pg. 12. *Loveland* and the Ninth Circuit cases upon which it relies actually say that fronting is some evidence of an agreement but what must be produced is evidence that the seller has a shared stake in the buyer's illegal venture. 825 F.3d at 560. There is no such evidence here.

3. Alternatively, a new trial is required because this Court cannot determine whether the jury based its finding of a conspiracy based upon an agreement with Joyce or Bernal-Valadez.

The state does not address Mr. Medina's alternative argument that the Court should reverse the conviction even if it finds that the evidence was sufficient as to one of the two named co-conspirators, as it is possible the jurors did not unanimously find that agreement existed. Thus, no reply is required.

B. *The District Court Committed Fundamental Error When It Gave Jury Instruction No. 17.*

Mr. Medina argued that the Conspiracy conviction should be vacated and the matter remanded for a new trial due to fundamental instructional error. Specifically, Jury Instruction 17 set forth several "overt acts" which were not done

by an alleged co-conspirator and/or could not have been taken in furtherance of the conspiracy. R 273. The state concedes the instruction was erroneous and does not address the second and third *Perry* requirements. Instead, it argues the error was harmless, but it is mistaken.

Specifically, the state argues that there was "overwhelming evidence" of overt acts five and six.[3] State's Brief, pg. 33. But, as noted above, Bernal's testimony was that she did not have an agreement with Mr. Medina to distribute controlled substances. The jury no doubt believed her. She was a state's witness and therefore had the imprimatur of the prosecutor. She was testifying against her penal interest. Her testimony in this regard was not impeached by the state, nor was her testimony rebutted in any way at trial. Thus, Ms. Bernal-Valadez's driving of the vehicle could not have been an act done by a co-conspirator in furtherance of the conspiracy.

Nor was Mr. Medina's mere presence in the vehicle an act in furtherance of the conspiracy. His travelling to Idaho to conduct a sale devised by Detective Edgley after Mr. Joyce had been arrested was not done in furtherance of a conspiracy because he and the detective did not have an agreement to Traffic in Heroin together. *United States v. Chase*, *supra*. Even had the sale had been to Mr.

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[3] "5. On or about April 14, 2016, BERNAL drove a vehicle to 4170 Hawthorne in Chubbuck, Idaho and parked.
6. MEDINA, aka "Jeffrey," was a passenger in the vehicle."
R 162.

Joyce, he was just a customer of Mr. Medina, not a co-conspirator. *United States v. Loveland, supra*

The jury instruction was prejudicial because the jury must have returned a guilty verdict on an illegal basis. Only four of the nine overt alleged acts were taken by a named member of the charged conspiracy. But the jury could not have returned a guilty verdict based upon any of those four acts because two of them (#2: Joyce providing information to the police, and #8: Mr. Medina's statements to the police) were not done in *furtherance* of the conspiracy. And the evidence as to overt acts #5 and #6 were also insufficient, as just explained.

III. CONCLUSION

The Conspiracy conviction should be reversed and a judgment of acquittal entered. The remaining Trafficking conviction should be reversed. Alternatively, the conspiracy conviction should be reversed because the court committed fundamental error by permitting the jury to return a guilty verdict based upon overt acts which were not committed by any named or unnamed conspirator and/or could not be done in furtherance of the conspiracy as a matter of law.

Respectfully submitted this 24th day of August, 2018.

/s/ Dennis Benjamin
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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

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Dated and certified this 24th day of August, 2018.

/s/Dennis Benjamin
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