

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Case No. 04:10-cr-00162-FJG
)
 THEODORE WIGGINS,)
)
 Defendant.)

**THEODORE S. WIGGINS'S MOTION FOR JUDGMENT OF ACQUITTAL
AT THE CLOSE OF THE GOVERNMENT'S EVIDENCE AS TO COUNT
ONE AND EIGHT,
WITH SUGGESTIONS IN SUPPORT**

Comes now Theodore S. Wiggins, by attorney, pursuant to FRE 611(a) and does move this Honorable Court for its Judgment of Acquittal at the Close of the Government's evidence as to Counts One and Eight. The grounds for this request, and suggestions in support thereof, will be set forth hereinafter.

Failure of Proof as to Count One

As to Count One, the government has failed to prove that Defendant, Theodore Wiggins, new of the conspiracy that is the subject of this litigation and, furthermore, failed to prove any overt act on the part of Defendant, Theodore Wiggins, in furtherance of the conspiracy.

Those who have no knowledge of the conspiracy are not conspirators. *U. S. v. Falcone*, 311 U.S. 205, 210, 61 S.Ct. 204, 85 L.Ed. 128 (1940). Proof of association or acquaintance alone is not enough to establish the conspiracy. *U.S. v.*

Apker, 705 F.2d 293, 298 (8th Cir. 1983).

Records of telephone conversations offered into evidence only involved Shawn Hampton and a person identified only as “Theo.” The only evidence linking defendant, Theodore S. Wiggins, to “Theo” came by way of hearsay statements made by confessed members of the conspiracy that is the subject of this litigation. The established law in the Eight Circuit is set forth in *U.S. v. Bell*, 573 F.2d 1040, 1043 (8th Cir. 1978) as follows:

It is well established that an out-of-court declaration of a coconspirator is admissible against a defendant if the government demonstrates (1) that a conspiracy existed; (2) that the defendant and the declarant were members of the conspiracy; and (3) that the declaration was made during the course and furtherance of the conspiracy.

There is no proof, absent the testimony of the confessed conspirators, that defendant, Theodore S. Wiggins, was the same person as the person identified as “Theo” in the recorded telephone conversations.

The only other evidence of the identity of “Theo” as defendant, Theodore S. Wiggins, came from testimony of DET Stanze and Miller who, on March 19, 2010 (BATES 000827) overheard a conversation between Hampton and “Theo” in which Hampton directed “Theo” to go to 62nd and Jackson; and confirmed that

“Theo” was in a green car. DET Stanze then witnessed a green Chrysler Lebaron which travelled to 62nd and Jackson and, “met with Hampton’s vehicle, the dark GMC, SUV, license WEP-D42, Missouri.” DET Stanze’s narrative continues that, “Approximately two minutes later the Green Chrysler Lebaron left 62 and Jackson was followed to 59th Street and 71 highway where the vehicle stopped at a red light. Det. Stanze pulled up next to the vehicle where Det. Stanze and Det. Miller made a positive identification of Theodore Wiggins, who was the front seat passenger. The driver was an unknown female. Note: Digital photos were also taken of Wiggins in the vehicle.” Finally, DET Stanze reports that, “Investigators believe the meeting between Hampton and Wiggins at 62nd and Jackson confirmed the pre-arranged 28 gram cocaine transaction.”

It is important to note that:

1. The Detectives did not identify the occupant “Hampton’s vehicle”.
2. The Detectives did not report observation of any illegal activity.
3. The Detectives did not photograph the “meeting of the two vehicles”.
4. The Detectives failed to arrest the occupants of either vehicle, when they clearly had probable cause to do so.
5. The Detectives failed to prove that the green Chrysler Lebaron they observed was the “green car” mentioned in the referenced telephone recording.

The report of DET Stanze and Miller fail to prove a connection between defendant, Theodore S. Wiggins, and the person identified only as “Theo”. Furthermore, it fails to prove any activity made in furtherance of the charged conspiracy.

Failure of Proof as to Count Eight

The government failed to prove that Defendant, Theodore Wiggins, sold cocaine on April 15, 2010. The uncontroverted evidence is that undercover Officer Troy Schwalm, in ordered to set up a drug purchase, called 816-606-8723, a number supplied to him by law enforcement officers as one belonging to an unknown drug dealer. In his original report of the transaction (BATES 000833) Officer Schwalm identifies the suspect as “UNKNOWN”. IN his supplemental report of the transaction (BATES 000835), in the “Summary Narrative”, Officer Schwalm states, “The suspect had been identified during a previous narcotics investigation as a Cocaine Base trafficker who frequented the “Old Northeast” area of Kansas City, Missouri and utilized the cellular telephone number 816-606-8723. The supplemental report, in the “Narrative” section never identifies either suspect as defendant, Theodore S. Wiggins, nor does it provide an explanation of how the reporting officer, who previously reported the suspect as “UNKNOWN” became known to him to be Theodore S. Wiggins. In the “Narrative” portion of the Supplemental report, Officer Schwalm refers to the two suspects not by name but

as “The suspects [who] occupied a silver Chrysler “Sebring” 4-door with Missouri license plate HA3U0F.” The Supplemental report (BATES 000835) does not contain any indication of the date it was completed but does indicate that it was approved on 05/04/2010, some 19 days after the transaction. The reporting officer failed to arrest Suspect 1 and, therefore, there is no positive means of Suspect 1’s true identity. Additionally, the supplemental report clearly states that, “Surveillance detectives assisting during the narcotics purchase included; Sgt. Price, Det. Hugley, Det. Travaglione and Det. Onik with the Kansas City Police Department, Street Crimes Unit.” None of these officers made a video recoding of the transaction.

Conclusion

WHEREFORE, in light of the foregoing, Mr. Wiggins prays this Honorable Court to grant his Motion for Judgment of Acquittal at the Close of the Government’s Evidence as to Counts One and Eight for insufficiency of the evidence.

Respectfully submitted,

/s/ Michael W. Walker
DUCHARDT & WALKER, LLP
Michael W. Walker 29425
5545 N Oak Trafficway, Suite 8
Kansas City, MO 64118
TEL 816.455.6511
FAX 816.455.6595
mwwalk@sbcglobal.net
ATTORNEY FOR DEFENDANT,
THEODORE S. WIGGINS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served electronically via the CM/ECF filing system, this 6 day of June, 2012, upon the following:

Brent Venneman, Assistant United States Attorney

/s/ Michael W. Walker

Michael W. Walker