IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES DAVIS,

Defendant.

REPORT AND RECOMMENDATION

11-cr-78-wmc

REPORT

On September 14, 2011, defendant James Davis knowingly and voluntarily pled guilty to Count 7 of the indictment, which charged him with possessing with intent to distribute over 280 grams of cocaine base (crack cocaine). Even so, Davis has reserved his right to obtain a court ruling on his motion to "quash" Count 7 (dkt. 15). Davis contends that the government could not have proved beyond a reasonable doubt at trial that he possessed the drugs that formed the basis of Count 7, namely the 141.5 grams of crack found in the Pizza Hut restroom and the 160 grams of crack seized from the apartment of Davis's girlfriend.

It is hard to reconcile Davis's continued pursuit of this motion with his guilty plea. Davis did not file a motion to *suppress* the 141.5 grams crack cocaine because he has no basis for seeking relief under the exclusionary rule.[1] Instead, Davis filed a motion to dismiss Count 7 on the basis that the government's evidence was insufficient to prove his constructive possession of this crack beyond a reasonable doubt. But while his motion was pending–indeed, before the government even filed its brief in opposition–Davis pled guilty (not nolo contendere) and admitted under oath that he possessed all of this crack. Perhaps to keep

[1] Suppression probably wouldn't have helped Davis since the court would be allowed to consider suppressed but otherwise reliable evidence for purposes of sentencing, *see* U.S.S.G. § 6A1.3(a).

this case moving toward resolution, the government agreed that it would not rely on Davis's admissions at this guilty plea in opposing his motion. *See* Gov. Br., dkt. 24, at 2-3.

This was a no-cost concession by the government because the court need not reach the facts to deny Davis's motion. Count 7 comports with the requirements of F.R. Crim. Pro. 7(c)[2]: it states the elements of the charged offense, apprises Davis of the charge and enables Davis to plead the judgment as a bar to future prosecution for the same offense. This is all that is required. *United States v. Sandoval*, 347 F.3d 627, 632 (7th Cir. 2003). What Davis really wants is a pretrial ruling from the court that the facts underlying Count 7 are insufficient to establish his constructive possession of the crack cocaine. This is the equivalent of summary judgment, a procedure that does not exist in a criminal case. *United States v. Browning*, 436 F.3d 780, 781 (7th Cir. 2006); *United States v. Thomas*, 150 F.3d 743, 747 (7th Cir. 1998) (Easterbrook, J., concurring). There is absolutely no basis for this court to "quash" Count 7.[3]

If Davis genuinely believed that the government could not prove constructive possession beyond a reasonable doubt, then he should have put the government to its proof at trial. Davis remains free at sentencing to challenge the amount of crack attributed to him, but now the government only needs to prove his possession by a preponderance of the evidence. *United States v. Tanner*, 628 F.3d 890, 907 (7th Cir. 2010).

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[2] Cited as Rule "11(c)" by the government.

[3] While maintaining its position that it is irrelevant, the government repeats in its brief the robust evidence it proffered at Davis's plea hearing establishing his possession of the crack charged against him in Count 7. *See* dkt. 24 at 2-3. The government is correct: this evidence is irrelevant to the court's determination of Davis's motion.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that the court deny defendant James Davis's motion to quash Count 7 of the indictment.

Entered this 12th day of October, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge