

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

FINAL PRETRIAL
CONFERENCE ORDER

LARRY J. WOODS,

03-CR-106-S-2

Defendant.

On December 2, 2003, this court held the final pretrial conference. Defendant Larry Woods was present with his attorney Patrick Stangl. The government was represented by Assistant United States Attorneys Meredith Duchemin and John Vaudreuil.

First we discussed the voir dire questions. The government had one minor change to the statement of the case; neither side had any other proposed changes. A copy of the voir dire questions is attached to this order.

Next we discussed the jury instructions. This was more contentious and will require some input from the court at the final hearing. The government proposed in writing seven sets of changes, some of which were undisputed and which I have incorporated into the instructions packet. Others required more discussion.

First, pursuant to F. R. Crim. Pro. 7(f), I have ordered the government to provide a bill of particulars for Count 1 of the indictment. Specifically, the government must specify the “equipment, chemicals and materials” which underlie the charge in Count 1. The government does not object to providing such a bill. The manner in which the court incorporates the bill of particulars into Count 1 should be discussed at the final hearing.

While discussing the bill of particulars, the government stated that the “chemical” referred to in Count 1 is the same pseudoephedrine that underlies Count 2. This leads to a potential multiplicity problem: if the jury were to convict Woods of Count 1 solely on the ground that he possessed the pseudoephedrine, and also were to convict him of Count 2, that would be two identical convictions based on one set of facts. Although the government suggests that the court could dismiss Count 1 and quash the conviction post-verdict, this is not the most cautious approach when the potential problem is identified pre-trial. There are two obvious ways to prevent a multiplicitous verdict: first, the court could provide a special verdict form for Count 1, requiring the jury to list which chemicals, equipment and materials form the basis of any guilty verdict. So long as the jury listed some item from the bill of particulars other than pseudoephedrine, there would be no multiplicity. A simpler solution would be for the court to strike pseudoephedrine from Count 1 as multiplicitous. Any conviction on Count 1 perforce would be based on something other than pseudoephedrine, and no special verdict form would be needed. The government does not like this proposal and would like to be heard on this issue at the final hearing.

The other major issue was defining the *mens rea* underlying the term “reasonable cause to believe” that appears in both Counts 1 and 2. I agreed with the government that its proposed definition is clearer and simpler than the court’s proposal, and I have changed the court’s instructions to incorporate the government’s definition of the phrase. Woods wants to consider this definition and might wish to be heard at the final hearing on whether he has

a better proposal. The parties had no other substantive issues to bring to the court's attention regarding the universe of jury instructions.

There are some disputed in limine issues that the court will have to resolve at the final hearing. First, the government made an oral motion in limine in light of co-defendant Hedges's decision to plead guilty. Because neither Hedges nor Nicole Dunlap (who was the third person in the van at the time of the traffic stop) will be government witnesses at trial, the government has moved to exclude any evidence of their connection to this case. Specifically, the government wishes to exclude any evidence that Dunlap was not charged at all, as well as any evidence that Hedges resolved this case with a guilty plea and now faces identifiable penalties (which would be the same as those faced by Woods upon conviction). Woods opposes both portions of this motion, believing that he should be allowed to identify Dunlap's and Hedges's alleged roles in the offenses charged against him.

On a related point, the government intends to offer during its case in chief statements made by Dunlap and Hedges to police during the traffic stop which the government contends are lies. The government is not offering the statements under any exception to the hearsay rule because the government is not offering the statements to prove the truth of any matter asserted there; quite the contrary, the government is offering both statements to prove the *falsity* of the matters asserted therein by Hedges and Dunlap. Woods objects on several grounds, but because he just learned of the government's intent last night, he needs a chance to articulate his objections more thoroughly. This matter will need to be addressed at the final hearing.

Woods objects to the government's intent to offer into evidence receipts retrieved by the police from him that show purchases of items the government contends are associated with the manufacture of methamphetamine. Woods argues that the receipt and any purchases reflected therein are irrelevant and highly prejudicial. The government disagrees, claiming that although no conspiracy has been charged, the items listed in Woods's receipt are "inextricably intertwined" in the charges, because the manufacture of methamphetamine involves gathering the equipment and materials necessary. The receipt reflects that Woods was doing exactly that. As a fall back position, the government contends that the receipt is admissible under F. R. Ev. 404(b) to prove Woods's knowledge and intent in the specific intent charges against him.

Woods orally moved to exclude at trial any evidence that the police retrieved from Hedges during the traffic stop. The government responds that its theory of prosecution is that Woods and Hedges were involved in a joint venture to make methamphetamine, so that any contraband found on Hedges is relevant to proving that Woods was part of the scheme. The issue is framed for consideration at the final hearing.

The government has narrowed its expert witness list to Michael J. Larson, a chemist from the Wisconsin State Crime Lab, and Benjamin Poller, a special agent with the Wisconsin Department of Justice, Division of Criminal Investigations. Pursuant to the previously-issued schedule (which was set before we moved the final pretrial conference forward one day), Woods has until close of business today, December 2, 2003, within which to object to admission of testimony from these experts pursuant to F. R. Ev. 702.

The parties had no other substantive matters to bring to the court's attention. Both sides now are predicting a one day trial, with the government resting shortly after lunch and any defense witnesses to follow that same day. One alternate juror will suffice. Woods is released on conditions, so he has access to street clothes. The parties had no other housekeeping issues to bring to the court's attention.

Entered this 2nd day of December, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge