"THE FEDERAL CORNER"

Competing Views on the Granting of a Motion for New Trial

Buck Files

On August 20, 2020, a sharply divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the order of Senior District Judge David Briones of the United States District Court for the Western District of Texas granting the defendant's motion for a new trial. *United States v. Crittenden*, ___F.3d___, 2020 WL 4876721 (5th Cir. 2020) [Panel: Circuit Judges Dennis, Elrod (authored the opinion – 2855 words) and Costa (authored the dissenting opinion – 2315 words)] For any lawyer looking to file a motion for new trial in a federal case, this should be a "must read."

Judge Elrod's opinion reads, in part, as follows:

[An Overview of the Case]

> A jury convicted Samuel Crittenden and his wife Carla Dominguez of possession with intent to distribute 500 grams or more of methamphetamine. The district court granted Crittenden a new trial because the record does not show that he *knew* that the bags he removed from his house—and the bag his wife requested that he bring her—contained methamphetamine or any other controlled substance. Because the district court did not abuse its discretion in granting Crittenden a new trial, we affirm. (emphasis added)

* * *

[The Facts of the Case]

> In 2017, Federal Bureau of Investigation agents received a tip from the Drug Enforcement Agency field office in Juarez, Mexico, that ten pounds of methamphetamine was being stored at a house in El Paso. The FBI agents enlisted a cooperating informant to call Dominguez's phone number, which was associated with the tip, in order to arrange a controlled methamphetamine purchase. In a series of phone calls over the next few days, Dominguez and the informant discussed the informant's ostensible interest in 'windows'—a street term for methamphetamine. The informant met Dominguez in person in the parking lot of a JCPenney where they discussed the sale of 'crystal,' and the informant offered to buy 'ten' for $35,000. The two agreed to meet again after Dominguez had verified how much supply she had.
>
> After the meeting, the agents surveilled Dominguez as she returned to the house she shared with Crittenden. Thereafter, the agents observed the two depart the home in separate cars. One of the agents followed Crittenden to another home on Byway Drive in El Paso, where Crittenden exited his vehicle and went inside. The agent broke off the surveillance and rejoined the remaining agents that had

continued to surveil Dominguez. Dominguez, however, ultimately led the agents back to the Byway Drive residence. *The agents observed a male who was likely Crittenden exit the house and hand Dominguez a black bag through the window of her car*. (emphasis added)

Dominguez then drove away from the house. When law enforcement intercepted her, they found a black leather handbag containing ten bundles of methamphetamine collectively weighing 4.2 kilograms. *Law enforcement then interviewed Crittenden. According to the agents' later testimony, Crittenden stated that he had moved the bags—which were Dominguez's—to the Byway Drive residence, believing that they contained marijuana. When Dominguez asked him to retrieve one of the bags for her, he did so. A resident of the Byway Drive house would later testify that Crittenden had asked him if he could stay at the Byway Drive house and store some personal effects in the attic because he was having a fight with Dominguez.* After receiving consent from the residents of the Byway Drive house to search the attic, law enforcement recovered three roller suitcases filled with 1.65 kilograms of methamphetamine and 47 kilograms of marijuana. (emphasis added)

[The Offenses]

Dominguez and Crittenden were charged in the Western District of Texas with (1) conspiracy to possess with intent to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii); (2) possession with intent to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii); and (3) conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(D), and 846.

[The Testimony at Trial]

At trial, Dominguez took the stand as the sole witness for the defense. She testified that she used to buy marijuana for her and her friends' personal use from an individual named Juan Diaz. *Dominguez stated that this relationship ended when, in 2015, she and Crittenden decided to have a fifth child together and resolved 'to get closer to God and to take care of [their] family together without having any kind of partying or drug use.'* She said that she did not hear from Diaz again until he called her in January of 2017 and asked her if she could retrieve his car, which he said had been left on the U.S. side of the border as a result of a fight he had with his girlfriend, and hold it at her house until his sister could pick it up the following day. Dominguez testified that she agreed and retrieved the car, but when Juan's sister arrived, she took several bags and a large plastic container out of the trunk, gave them to Dominguez, and quickly left before Dominguez could object. (emphasis added)

With regard to the series of phone calls, Dominguez testified that she first did not understand what the calls concerned and assumed they were in regard to some broken windows in her house. When the calls continued, Dominguez stated, she began to suspect that the packages contained drugs or other contraband and that her and her family's lives were in danger, so she went along with meeting the individuals who contacted her in order to get rid of the packages. *Dominguez stated that when she told Crittenden about what was occurring, Crittenden said that he did not want to have anything to do with the matter and that he did not want the packages to be in the house with their children. According to Dominguez, Crittenden then moved the packages to the Byway Drive residence to get them out of the house.*

Dominguez testified that she just instructed Crittenden to 'grab a bag' from the Byway Drive house on the day she met with the informant without specifying the contents of the bag. She stated that Crittenden was not involved in any of the transactions and did not know Diaz. (emphasis added)

[The Result of the Trial]

…the jury convicted both defendants on all counts.

[The Defendant's Motions and the Court's Response]

Crittenden then renewed a properly preserved motion for judgment of acquittal, or, in the alternative, for a new trial. The district court granted the motion for a new trial. *In its memorandum opinion, the district court concluded that the Government failed to prove that Crittenden participated in a conspiracy or that he had the knowledge of the nature of the controlled substance he possessed that was required to convict him of possessing methamphetamine with the intent to distribute.* (emphasis added)

As to the possession count, the court stated,

> *[N]o direct or circumstantial evidence was presented during the first trial to show beyond a reasonable doubt that Mr. Crittenden knew the contraband was comprised of any controlled substances listed on the schedules or that he knew the identity of the controlled substances he possessed.* (emphasis added)

* * *

[The Government Appealed, In Part]

The Government timely appealed the grant of new trial on the possession count. It did not appeal the grant of new trial on the conspiracy counts.

[The Standard of Review]

Unlike a judgment of acquittal based on the sufficiency of the evidence, which this court reviews *de novo* while taking the evidence in the light most favorable to the verdict, 'the decision on a new trial motion is entrusted to the discretion of the district court so [this court] will reverse it only on an abuse of that leeway.' *United States v. Hoffman*, 901 F.3d 523, 552 (5th Cir. 2018). This court thus reviews a district court's grant of a new trial for abuse of discretion, while considering de novo any questions of law that figured into the determination. *United States v. Wall*, 389 F.3d 457, 465 (5th Cir. 2004). 'A district court by definition abuses its discretion when it makes an error of law.' *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996)…

* * *

[Federal Rule of Criminal Procedure § 33(a)]

A district court may grant a new trial under Federal Rule of Criminal Procedure 33(a) 'if the interest of justice so requires.' 'In this Circuit, the generally accepted standard is that a new trial ordinarily should not be granted "unless there would be a miscarriage of justice or the weight of evidence preponderates against the verdict." ' *United States v. Wright*, 634 F.3d 770, 775 (5th Cir. 2011) (quoting *Wall*, 389 F.3d at 466).

[The Government's Argument on Appeal and the Court's Response]

On appeal, the Government argues that the district court 'erroneously found that the government had failed to prove ... that Crittenden *knowingly* possessed a controlled substance.' … We conclude that the district court correctly stated the relevant law and permissibly applied it to the facts of this case.

[§ 841(a)'s Knowledge Requirement]

As to the governing legal principles, the district court properly noted that the 'knowledge requirement [of § 841(a)] may be met by showing that the defendant knew he possessed a substance listed on the schedules.' *McFadden v. United States*, 576 U.S. 186, 192, 135 S.Ct. 2298, 192 L.Ed.2d 260 (2015). The district court also properly concluded that a defendant's mere 'belief' that he possessed a controlled substance—divorced from other factors such as deliberate ignorance—'is not enough to establish knowledge.'

* * *

[Deliberate Indifference Is Not Before the Court]

…the Government has never argued deliberate ignorance in this case, and the jury was not instructed on it. We therefore express no opinion regarding whether the evidence demonstrated Crittenden's deliberate ignorance.

[The Evidence, Or Lack Thereof, Favors the Defendant]

… There was no evidence that the methamphetamine at issue belonged to Crittenden or that Crittenden was attempting to sell the drugs; rather, federal agents seized the methamphetamine from Dominguez pursuant to a transaction the confidential informant set up with Dominguez. Although the jury originally convicted Crittenden of conspiring with Dominguez to sell the drugs, the evidence supposedly showing Crittenden's involvement in any such conspiracy was so insufficient that the Government did not even appeal when the district court granted a new trial on the conspiracy counts.

In fact, the evidence does not show that Crittenden ever laid eyes on the drugs themselves—not when he moved the bags into the Byway Drive residence, and not when he retrieved a bag on Dominguez's instructions. At oral argument, the Government pointed to Dominguez's testimony that Crittenden 'probably' moved the drug packages from their original container to the bags before moving them to the Byway Drive residence. … But Dominguez also admitted that she 'wasn't there' when the drug packages were moved into the bags and therefore *'wouldn't be able to tell you if it was [Crittenden] or someone else.'* At any rate, the district court was not required to credit Dominguez's testimony in granting the motion for new trial. (emphasis added)

* * *

Despite the Government's repeated prodding, Dominguez expressly disavowed telling Crittenden that the bag she asked him to retrieve contained any drugs at all, testifying instead that she told Crittenden to 'just grab a bag.' The evidence shows only that Crittenden complied with Dominguez's request by bringing her a bag. Nothing more. (emphasis added)

Some FBI agents testified that Crittenden told them that he 'believed'—incorrectly, as it turned out—that 'the bags contained marijuana.' That is why he 'removed them … from his home and family' by putting them in the Byway Drive house. But, as previously explained, the district court properly concluded that testimony 'show[ing], if anything, that Mr. Crittenden believed the bags contained marijuana' is insufficient to prove knowledge. As a result, it was not an abuse of discretion for the district court to grant Crittenden a new trial on the basis of insufficient evidence of knowledge. (emphasis added)

* * *

[The Law of the Circuit]

…we are bound by the law of this circuit, which has long afforded district courts 'considerable discretion with respect to Rule 33 motions.' *United States v. Jordan*, 958 F.3d 331, 338 (5th Cir. 2020) (quoting *United States v. Simmons*, 714 F.2d 29, 31 (5th Cir. 1983)). Indeed, this court has stated that a district court may grant a new trial even where 'the evidence is sufficient to support a conviction,' if, upon 'cautiously reweigh[ing] it,' the district court concludes that the evidence

'preponderate[s] heavily against the guilty verdict.' *United States v. Herrera*, 559 F.3d 296, 302 (5th Cir. 2009).

[Preventing A Miscarriage of Justice]

Here, the district 'court did not simply disregard the jury's verdict in favor of one it felt was more reasonable.' *Robertson*, 110 F.3d at 1119. Instead, 'it cautiously reweighed the evidence implicating [Crittenden] and determined that a mistake had been committed. On this basis, having given full respect to the jury's findings, and to prevent a miscarriage of justice, it granted a new trial.' *Id.* at 1119–20.

* * *

For the forgoing reasons, the district court's order granting a new trial is affirmed.

Judge Costa's, dissenting opinion reads, in part, as follows:

The Constitution twice says that juries decide criminal cases. U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI.

* * *

The jury's constitutional role in deciding criminal trials leaves little room for judicial second-guessing. Our review of verdicts is therefore quite limited. *See, e.g.*, *Burks v. United States*, 437 U.S. 1, 16–17, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Likewise, the authority to grant a new trial when there is enough evidence to support the verdict, but the judge would weigh the evidence differently, is in some tension with Article III and the Sixth Amendment. As a result, although we review the grant of a new trial only for abuse of discretion, we have repeatedly warned that its discretion is not unbridled. *United States v. Arnold*, 416 F.3d 349, 360 (5th Cir. 2005);…

* * *

… The district court granted the new-trial motion in a one-page order that said an opinion would follow. That order did not mention anything about weak evidence of knowledge. And despite the fact that the evidence presented at trial would have been freshest in the court's mind when it granted the motion, it took five months to give a reason for doing so.

At a status conference after it finally issued the order explaining the new-trial grant, the court added:

> **I think if it was up to the Fifth Circuit I'm going to get reversed, quite frankly**, but I went over the PSR this morning. Mr. Crittenden is facing 292 to 365 months and I think that's the reason I considered ... granting a new trial because I was very reluctant to issue that type of sentence. (emphasis included in the opinion)

The district court doubled down at Dominguez's sentencing:

> Counsel, as I informed you sometime back, maybe last week, I'm going to grant a new trial for Mr. Crittenden.
>
> I am—his guideline range is 292 to 365 months and he's facing a 20-year mandatory minimum. I can't ... even go the 20-year mandatory minimum on him and I'm certainly not going to go 292 months.
>
> He had a limited role in what his wife was doing and she got him into this. Very limited role.

* * *

Ultimately, this case pits the deference we owe district judges on discretionary matters against the deference judges owe juries. Both the district judge and the jury saw and heard the evidence. … Between the two, the choice is easy given the overwhelming evidence of Crittenden's guilt. I go with the citizens who missed work and had to rearrange family responsibilities because they showed up to do their civic duty. When it comes to commonsense questions like the ones this trial posed, the perspective of a single judge is no match for the collective wisdom that a jury of varied backgrounds and experiences brings to bear.

Yet the district court—now with our court's blessing—concluded that the cross-section of the El Paso community that found Crittenden guilty committed a miscarriage of justice. (I guess I too would have been party to that miscarriage of justice as I think the jury got it right.) This judicial override of the jury's verdict disrespects their service.

My Thoughts

- What a great case. Judge Elrod's opinion gives us a roadmap for the urging of a motion for new trial and Judge Costa's opinion gives us a preview of the Government's anticipated response.
- I've given you a taste. Please read the entire opinion.

Buck Files is a member of TDCLA's Hall of Fame and a former President of the State Bar of Texas. In May, 2016, TDCLA's Board of Directors named Buck as the *author transcendent* of the Texas Criminal Defense Lawyers Association. This is his 245th column or article. He practices in Tyler with the law firm of Bain, Files and Harrison, P.C., and can be reached at bfiles@bainfiles.com or (903) 595-3573.