

IP 06-0025-CR 1 H/F USA v McCotry
Judge David F. Hamilton

Signed on 6/14/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
MCCOTRY, JAMES E,)	CAUSE NO. IP06-0025-CR-01-H/F
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) CAUSE NO. IP 06-CR-25-01-H/F
)
JAMES E. McCOTRY,)
)
 Defendant.)

ENTRY ON GOVERNMENT’S RULE 404(b) MOTION

Defendant James McCotry has been indicted under 21 U.S.C. § 841(a)(1) on two counts of possessing cocaine base with intent to distribute and one count of possessing marijuana with intent to distribute. The cocaine base and marijuana turned up in a search of McCotry’s apartment on December 7, 2005, and McCotry was arrested at that time. Two weeks later, on December 21, 2005, he was released from pretrial detention. The government plans to offer evidence that on December 23rd, just two days after his release, McCotry sold less than two grams of cocaine base to a confidential informant. The government has filed a motion asking for a pretrial determination that evidence of the later sale is admissible under Rule 404(b) of the Federal Rules of Evidence. The government’s Rule 404(b) motion is denied, though without prejudice to later reconsideration.

Rule 404(b) of the Federal Rules of Evidence prohibits admission of evidence of a person's past wrongs or other acts to prove the character of the person in order to show action in conformity therewith. Evidence of a person's other acts or wrongs may be admitted for another purpose, including "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" As applied in criminal cases, Rule 404(b) reflects long experience showing that evidence of bad acts of the defendant may be valuable in some circumstances, but that admission of such evidence poses a significant risk that the jury will impermissibly infer a propensity to perform criminal acts. *E.g.*, *United States v. Macedo*, 406 F.3d 778, 792 (7th Cir. 2005), citing *United States v. Beasley*, 809 F.2d 1273, 1278 (7th Cir. 1987). To balance these risks, the district court has discretion to admit evidence of another "bad act" by the accused under Rule 404(b) where (1) the evidence is directed toward a matter in issue other than the accused's propensity to commit the crime charged, (2) the act is "similar and close enough in time to be relevant" to that matter in issue, (3) the evidence would be sufficient to support a jury finding that the accused committed the other act, and (4) the probative value of the evidence is not substantially outweighed by the danger of prejudice to the accused. *United States v. Chavis*, 429 F.3d 662, 667 (7th Cir. 2005); *United States v. Kuipers*, 49 F.3d 1254, 1258 (7th Cir. 1995).

The charged violations of 21 U.S.C. § 841(a)(1), three counts of possessing drugs with the intent to distribute them, all require the government to prove the element of specific intent. See *Chavis*, 429 F.3d at 667; *United States v. Puckett*,

405 F.3d 589, 596 (7th Cir. 2005). Although Rule 404(b) permits evidence of prior bad acts to show intent, it does not automatically follow that such evidence is admissible simply because the crime charged requires a showing of specific intent. *United States v. Jones*, 389 F.3d 753, 757-58 (7th Cir. 2004) (district court erroneously admitted evidence of defendant's prior drug distribution convictions, but error was harmless), *vacated on other grounds*, 125 S.Ct. 2948 (2005), *and reaffirmed in relevant part on remand*, 144 Fed. Appx. 563 (7th Cir. 2005); see also *Chavis*, 429 F.3d at 668 ("a prior conviction introduced solely for its own sake is propensity evidence"). In *Jones*, the defendant appealed his conviction for possession of cocaine with intent to distribute, arguing that evidence of his prior drug-related convictions should not have been admitted under Rule 404(b). Noting that propensity and intent are often separated by only a fine line, the Seventh Circuit explained that the government must offer more than just the theory that intent is proven by other acts. Without more detail, the use of a bare prior conviction, the court warned, amounted to the "once a drug dealer, always a drug dealer" propensity argument prohibited by Rule 404. *Jones*, 389 F.3d at 757.

To show that evidence is being offered for a material purpose other than propensity, the government must show "the more forward-looking fact of purpose, design, or volition to commit" the crime, which becomes more apparent, for example, where the defendant claims he possessed the controlled substance for personal use or claims that he did not know what the substance was. *Id.* at 757-

58. The court's reasoning in *Jones* teaches that introduction of the prior bad acts, without more, "can prove nothing but propensity, which is not enough to take the evidence out of the exclusionary principle established by Rule 404(b)." *Id.* at 758.

In *Chavis*, the defendant was convicted of conspiracy and possession of crack cocaine with intent to distribute. He argued that evidence of his prior conviction for possessing crack cocaine with intent to distribute should have been excluded under Rule 404(b). *Chavis*, 429 F.3d at 667. Relying on its reasoning in *Jones*, the Seventh Circuit upheld the district court's admission of the conviction, explaining that the defendant, by advancing the defense theory that he was just "a clueless bystander," gave the prior act "the requisite relevance to satisfy 404(b)." *Id.* at 668. Because of this defense theory, and because intent was a specific element of the crime, the court found the evidence was offered for a material purpose other than propensity. The court took care to emphasize, however, that the "defense theory provide[d] the additional relevance *necessary* for a prior conviction to satisfy Rule 404(b) as intent evidence." *Id.* (emphasis added).¹

At this point in this case, the government has offered no specific theory of relevance for McCotry's alleged sale of crack two weeks after the charged offense.

¹Also relying on *Jones*, Judge Cudahy found that the admission of the prior conviction was error. He asserted that Rule 404(b) required a more direct joining of the issue as to intent, motive, knowledge, or other Rule 404(b) purposes. *Id.* at 672-73 (Cudahy, J., concurring) (also finding error was harmless).

Also, McCotry has not yet signaled that he will present a defense theory that renders the later sale relevant enough to allow its use under Rule 404(b), as required by *Jones* and *Chavis*. All that is before the court is the argument that because intent is an element of the offenses charged, and because McCotry later sold a controlled substance, evidence of the later sale proves his intent to distribute controlled substances as of December 7, 2005. Without more, there is no sufficient basis for determining whether the evidence will be offered for a purpose other than propensity.

The court also cannot determine at this stage whether the probative value of the evidence of the later sale is substantially outweighed by the danger of prejudice it presents. This balancing test will also be affected by the theories advanced by the parties, especially the theory of defense. It is also relevant here that the evidence at issue on the government's Rule 404(b) motion involves an act that took place *after* the crime charged. While the Seventh Circuit has recognized that evidence of subsequent acts may be admitted under Rule 404(b), the "chronological relationship between the charged offense and the other act" may play an important role in determining the probative value of such evidence. *United States v. Anifowoshe*, 307 F.3d 643, 646-47 (7th Cir. 2002), citing *United States v. Betts*, 16 F.3d 748, 757 (7th Cir. 1994), *abrogated on other grounds by United States v. Mills*, 122 F.3d 346 (7th Cir. 1997); see also *United States v. Hinshaw*, 2002 WL 31870561 (N.D. Ill. 2002). For example, evidence that the defendant knew the nature of a substance on a date *after* he was arrested for

possession of the substance may be entitled to less weight than evidence of prior knowledge.

At this point in the case, the government has failed to show either that its evidence supports its case on a material issue other than propensity, or that the probative value of such evidence is not substantially outweighed by the danger of prejudice. Accordingly, the government's Rule 404(b) motion is denied. The court does not reach the issues of proximity and similarity, or of the weight of the evidence. The denial is without prejudice to renewal of the issue if warranted by further development of the case.

So ordered.

Date: June 14, 2006

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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