

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

UNITED STATES OF AMERICA                   :  
  :  
v.    :  
  :  
  :  
RANDOL PHILIP DUNCAN                    :

: Criminal No. 3:02CR122(CFD)

**RULING ON MOTION  
FOR JUDGMENT OF ACQUITTAL**

**I. Background**

On December 17, 2002, the grand jury returned a two-count superseding indictment against Randol Philip Duncan (“Duncan”) charging in Count One that, on or about March 26, 2002, Duncan possessed with intent to distribute and distributed 500 grams or more of a mixture and substance containing a detectable amount of cocaine and, in Count Two that, on or about March 27, 2002, Duncan possessed with intent to distribute and distributed a mixture and substance containing a detectable amount of cocaine. In response to these charges, Duncan interposed a defense of entrapment.

Trial was held on the superseding indictment between January 14, 2003 and January 17, 2003. At the close of the Government’s evidence, Duncan moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29(a) on the basis that the Government had not sustained its burden of proof as to the amount of cocaine sold or the authentication of the cocaine. The Court denied that motion. Following Duncan’s presentation of evidence, he renewed his Rule 29(a) motion, arguing that the Government had not proved his predisposition beyond a reasonable doubt. The Court denied that motion as well.

On January 17, 2003, Duncan was convicted on Count One and acquitted on Count Two. The jury concluded that Duncan delivered cocaine to Miguel Soto on March 26, 2002, but not on March 27, 2002. The jury also concluded that the amount of cocaine distributed by Duncan on March 26 exceeded 500 grams.

On January 22, 2003, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, Duncan renewed his motion for judgment of acquittal [Doc. #53]. In support of his motion, Duncan argues that (1) the Government failed to prove beyond a reasonable doubt that he was predisposed to commit the offense, and (2) the Government failed to prove beyond a reasonable doubt that the quantity of the mixture and substance containing cocaine for the March 26 delivery exceeded 500 grams.

For the reasons discussed below, Duncan's motion for judgment of acquittal [Doc. #53] is DENIED.

## **II. Standard**

Under Rule 29 of the Federal Rules of Criminal Procedure, the Court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a); see also Fed R. Crim. P. 29(c) (post-verdict motion). "A defendant challenging the sufficiency of the evidence supporting a conviction faces a 'heavy burden.'" United States v. Glenn, 312 F.3d 58, 63 (2d Cir. 2002) (quoting United States v. Matthews, 20 F.3d 538, 548 (2d Cir.1994)). The defendant must demonstrate that "no rational trier of fact could [find] the essential elements of the crime charged beyond a reasonable doubt." United States v. McDermott, 245 F.3d 133, 137 (2d Cir. 2001) (internal quotation marks omitted). "This standard derives from Jackson v. Virginia, 443 U.S. 307, 99

S.Ct. 2781, 61 L.Ed.2d 560 (1979), in which the Supreme Court instructed that ‘the relevant question is whether ... *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” Glenn, 312 F.3d at 63 (emphasis in original).

In making this determination, “all reasonable inferences are to be resolved in favor of the prosecution and the trial court is required to view the evidence in the light most favorable to the Government with respect to each element of the offense.” United States v. Thorn, 317 F.3d 107, 132 (2d Cir. 2003) (quoting United States v. Artuso, 618 F.2d 192, 195 (2d Cir.1980)). Moreover, in reviewing the sufficiency of the evidence the Court must “defer to the jury’s assessment of witness credibility and the jury’s resolution of conflicting testimony.” United States v. Bala, 236 F.3d 87, 93-94 (2d Cir.2000). Additionally, each piece of evidence, direct and circumstantial, must be viewed “not in isolation but in conjunction.” See United States v. Strauss, 999 F.2d 692, 696 (2d Cir.1993). Finally, while the defendant’s conviction cannot rest on speculation or conjecture, it may be based solely on reasonable inferences drawn from circumstantial evidence. See United States v. Pinckney, 85 F.3d 4, 7 (2d Cir.1996).

### **III. Discussion**

#### **A. Entrapment Defense**

At trial, in support of his entrapment defense, Duncan testified as to the following: Miguel Soto (“Soto”) (whom Duncan claimed he did not previously know) approached him at the Rainbow Variety store in Hartford on February 16, 2002 regarding promoting concerts Soto wished to sponsor on Duncan’s radio station, Blaze 990AM. Duncan then gave Soto his business card and handwrote his phone number on it. Soto subsequently called Duncan and the two agreed to meet at Rufus Barbeque

and Jerk restaurant (“the Rufus restaurant”) in East Hartford on February 18, 2002. At this meeting, according to Duncan, Soto asked Duncan about promoting the concerts.

On February 26, 2002, according to Duncan, he and Soto met at Soto’s home. At this meeting, Soto raised a new topic: he asked Duncan to travel to New York for him and pick up a package containing drugs. According to Duncan, he refused and left. Duncan claims that he later saw Soto at the Rainbow Variety store in early March and that Soto again asked Duncan to go to New York for him. Again, according to Duncan, he refused. Duncan next saw Soto at the Rufus restaurant on March 13, 2003 and claims that Soto again pressed him to pick up the drugs in New York. According to Duncan, Soto then offered him between \$15,000 and \$20,000 to make the trip. Duncan finally agreed and Soto instructed him how to complete the mission. Duncan claims that he then traveled to Harlem, picked up a package of cocaine, and delivered it to Soto on March 24, 2002.

The Government’s evidence at trial, including testimony by Soto and government agents, recounted the events quite differently. Soto, who has a considerable prior record for narcotics trafficking, testified that Duncan approached him at the Rainbow Variety store in early February 2002. Soto stated that he had just finished purchasing heroin packaging and processing materials at the store when Duncan came up to him, told Soto that he was not a police officer, and stated that he “wanted to do business,” which Soto interpreted as selling drugs. According to Soto, Duncan then gave Soto his business card. Shortly after this conversation and a series of telephone calls, Soto met Duncan at the Rufus restaurant and Duncan proposed selling Soto a kilogram of cocaine. Prior to the delivery of the cocaine by Duncan, however, Soto was arrested for possession of heroin on February 22, 2002 by

Detective James Graham of the Tri-Town Narcotics Unit.<sup>1</sup>

Soto and Detective Graham testified that Detective Graham asked Soto about cooperating with the government, specifically an FBI Task Force investigating drug dealing in Hartford. Soto agreed to cooperate and told the government he could consummate two drug transactions that he was in the process of completing, one being the purchase of cocaine from Duncan.<sup>2</sup> Soto claims that he then spoke with Duncan on several occasions and that on March 26, 2002, without first alerting Soto as to the delivery, Duncan showed up at Soto's home with the cocaine. On the same day, Soto contacted the FBI Task Force, told them of the delivery, and gave them the cocaine. Also on March 26, after weighing the cocaine, the FBI Task Force informed Soto that it weighed approximately 500 grams. Soto then called Duncan and told him that the quantity delivered was less than the promised kilogram. The next day, March 27, 2002, Duncan delivered a second quantity of cocaine to Soto's wife at their home.<sup>3</sup> Soto, at the Government's direction, then arranged a series of meetings with Duncan which were intended to corroborate the two prior drug deliveries by Duncan. Those meetings were surveilled and recorded through a wireless transmitter secreted on Soto's body. Tape recordings of meetings on March 28, 2002 at the Rufus restaurant and April 9, 2002 at Soto's home were played to the jury.

Government testing confirmed that the cocaine mixture delivered on March 26, 2002 was eighty-four percent pure and weighed 530.9 grams, and the cocaine mixture delivered on March 27,

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<sup>1</sup>The Tri-Town Narcotics Unit is an investigative group composed of police officers from a number of Connecticut municipalities.

<sup>2</sup>The other drug transaction involved Soto's successful controlled purchase of thirty grams of heroin from a man known as "Cuba."

<sup>3</sup>Although not married, Clara Hernandez testified that she is Soto's common law wife.

2002 was sixty-six percent pure and weighed 286.9 grams. At trial, the defendant stipulated to these purity and weight figures.<sup>4</sup>

The defense of entrapment was first recognized by the United States Supreme Court in Sorrells v. United States, 287 U.S. 435 (1932). It has two related elements: “government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct.” Mathews v. United States, 485 U.S. 58, 63 (1988).

In order to raise a valid entrapment defense, the defendant must first present “credible evidence” of inducement by a government agent. Then, the burden shifts to the Government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. See Jacobson v. United States, 503 U.S. 540, 549 (1992); United States v. Salerno, 66 F.3d 544, 547 (2d Cir.1995), cert. denied, 516 U.S. 1063 (1996); United States v. Dunn, 779 F.2d 157, 160 (2d Cir.1985); United States v. Henry, 417 F.2d 267, 269 (2d Cir. 1969), cert. denied, 397 U.S. 953 (1970). This burden of proof allocation was first set forth by Circuit Judge Learned Hand in United States v. Sherman, 200 F.2d 880 (2d Cir. 1952).

“[T]he defendant's burden of introducing an issue of fact regarding the 'inducement' by a Government agent or informer is relatively slight. On the other hand, the Government's burden to show

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<sup>4</sup>However, at trial, Duncan raised an evidentiary challenge to the admission of the cocaine, claiming that an inadequate chain of custody existed between his alleged deliveries to Soto and the FBI Task Force’s acquisition of the cocaine from Soto. The Court denied the request to exclude the cocaine and allowed it into evidence. Duncan’s first Rule 29(a) motion raised the issue of the authentication of the cocaine again and argued that Government had not sustained its burden of proof as to the amount of cocaine sold. As noted above, that motion was denied. This issue is again raised in the instant motion. See discussion infra.

justification for the inducement, through the defendant's propensity to commit the crime when the opportunity is thus made available, is more difficult.” United States v. Henry, 41 F.2d 267, 269 (2d Cir. 1969), cert. denied, 397 U.S. 953 (1970).

The Second Circuit has defined “inducement” as “‘soliciting, proposing, initiating, broaching or suggesting the commission of the offence charged,’” Henry, 417 F.2d at 269 (quoting Sherman, 200 F.2d at 882), and “predisposed” as “‘ready and willing without persuasion' to commit the crime charged and 'awaiting any propitious opportunity’” to do so. United States v. Harvey, 991 F.2d 981, 992 (2d Cir.1993) (quoting United States v. Williams, 705 F.2d 603, 613 (2d Cir.), cert. denied, 464 U.S. 1007 (1983)).

Predisposition may be shown by evidence of:

(1) an existing course of criminal conduct similar to the crime for which [the defendant] is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement.

United States v. Valencia, 645 F.2d 1158, 1167 (2d Cir.1980) (quoting United States v. Viviano, 437 F.2d 295, 299 (2d Cir.), cert. denied, 402 U.S. 983 (1971), amended, 669 F.2d 37 (2d Cir.1981)).

For example, a defendant’s “ready response to the inducement demonstrated by his ability to obtain the two kilograms of crack cocaine on credit from his supplier” has been found to be sufficient evidence of predisposition. United States v. Damblu, 134 F.3d 490, 495 (2d Cir. 1998) (citing United States v. Valencia, 645 F.2d 1158, 1167 (2d Cir.1980) (“The fact that [defendant] was able to get a substantial amount of cocaine on credit ... would support an inference that [defendant] had dealt in cocaine on prior occasions.”)).

As noted above, Duncan argues that he is entitled to acquittal because the trial was devoid of proof beyond a reasonable doubt that he was predisposed to distribute cocaine to Soto. However, the jury was free to accept Soto's testimony that he and Duncan engaged in negotiations about the sale of a kilogram of cocaine prior to Soto becoming an "agent" of the government and that Duncan initiated the proposed drug deal prior to that time. The jury was also free to accept the Government's evidence of corroboration of Soto's story. That evidence included toll records showing telephone discussions between Soto and Duncan prior to Soto's arrest on February 22, 2002 (the earliest time he became a government agent), and Soto's successful cooperation against the other individual with whom Soto claimed he was in the midst of consummating a drug deal prior to his arrest, which bolstered Soto's claim that he had two drug deals in the works prior to his arrest. Also relevant to the question of whether Soto induced Duncan to sell the cocaine prior to Soto becoming a government cooperator on February 22 were the two tape-recorded discussions between Duncan and Soto after February 22, from which the jury could conclude that Duncan had a strong interest in the distribution of narcotics with Soto, including the transactions which resulted in the counts of the indictment, as well as future drug transactions. Thus, the jury was free to reject Duncan's claim of inducement and reject his entrapment defense on that basis.

Moreover, even assuming the jury accepted Duncan's claim of inducement by Soto after February 22, 2002, the jury was free to credit the Government's evidence of Duncan's predisposition to sell the cocaine to Soto. The jury could have found that Duncan readily supplied Soto with over half a kilogram of cocaine upon Soto's request and apparently obtained the cocaine on credit from his supplier. The decisions provide that such evidence is sufficient for a finding that a defendant is "ready

and willing” to become involved in narcotics transactions. See Damblu, 134 F.3d at 495; Valencia, 645 F.2d at 1167.

In addition, the jury could have relied on Duncan’s statements in the recorded conversations of March 28, 2002 and April 9, 2002 in concluding that he was predisposed to sell drugs. In those conversations, Duncan instructed Soto to be cautious when discussing drug dealing on the telephone, expressed concern about the security of their conversations, promised Soto that he would introduce him to his suppliers and wished to continue his drug dealing relationship with Soto in the future. The March 28, 2002 recorded conversation also reveals Duncan “frisking” Soto for a wireless transmitter.

Duncan also boasted on tape that the drugs came “straight from a Columbian source” and tried to confirm with Soto that it was high quality cocaine Duncan had delivered to him. Additionally, when Soto told Duncan the quantity of cocaine was less than one kilogram, Duncan indicated that he would go back to his source to rectify the shortfall. From these statements, the jury could infer not only that it was Duncan’s supplier who provided the cocaine, rather than Soto’s supposed New York source, but also that Duncan was predisposed to sell the cocaine to Soto.

In light of the foregoing, resolving all reasonable inferences in favor of the government and viewing the evidence in the light most favorable to the government, a reasonable trier of fact could have found beyond a reasonable doubt either that Duncan was not induced to commit the offense in Count One or that Duncan was predisposed to commit that offense.

**B. Amount**

Duncan also argues that the Government failed to prove beyond a reasonable doubt that the amount of narcotics he distributed on March 26, 2002 was 500 grams or more of a mixture and

substance containing a detectable amount of cocaine. Duncan testified at trial that he delivered one package to Soto's home which he believed to contain cocaine. He further testified that he was unaware of the quantity of cocaine contained in the package. Soto, however, testified that two deliveries of cocaine were made—one on March 26, 2002 and one on March 27, 2002. At trial, the government introduced the two packages which Soto testified Duncan delivered on those dates. As noted above, a government witness testified as to laboratory results indicating that the first package contained 530.9 grams of a substance containing cocaine of eighty-four percent purity (the March 26, 2002 delivery), and that the second package contained 286.9 grams of a substance containing cocaine of sixty-six percent purity (the March 27, 2002 delivery). Also as noted above, the parties stipulated as to the weight and purity of the two packages.

The jury was free to credit Soto's testimony that Duncan delivered a package containing over 500 grams of a mixture and substance containing a detectable amount of cocaine on March 26, 2002. Moreover, the jury could have found that the recorded conversations between Duncan and Soto corroborated Soto's testimony in that regard.

As noted above, the Government decided to surveil and monitor conversations between Soto and Duncan following the cocaine deliveries in order to obtain corroboration that the deliveries had occurred as Soto recounted—that Duncan made two unexpected visits to his home on March 26, 2002 and March 27, 2002. The conversations included Duncan agreeing to statements by Soto that the two deliveries took place, that the total amount of cocaine delivered by Duncan weighed approximately 830 grams, and that the first package was over 500 grams. The conversations could also be understood by the jury to indicate Duncan's acquiescence to receiving only eighty-three percent of the agreed upon

price, presumably because he had believed he delivered eighty-three percent of one kilogram, or 830 grams.

Moreover, the Court also concludes that there was sufficient evidence as to the chain of custody of the March 26 package containing 530.9 grams. That is, the Court concludes that “the government satisfactorily accounted for the whereabouts of the evidence at all relevant times,” United States v. Robertson, 48 Fed.Appx. 823, 2002 WL 31401624 (2nd Cir. Oct. 23, 2002), and that the evidence is “sufficient to support a finding that the matter in question is what its proponent claims.” United States v. Pluta, 176 F.3d 43, 49 (2d Cir.1999).

Accordingly, a rational trier of fact could have found beyond a reasonable doubt that the amount of a mixture and substance containing cocaine distributed by Duncan on March 26, 2002 exceeded 500 grams.

#### **IV. Conclusion**

For the foregoing reasons, Duncan’s motion for judgment of acquittal [Doc. #53] is DENIED.

SO ORDERED this \_\_\_\_ day of June 2003, at Hartford, Connecticut.

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**CHRISTOPHER F. DRONEY**  
**UNITED STATES DISTRICT JUDGE**