No. 21-7283

United States Court of Appeals

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIE SLOCUM, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of West Virginia

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REPLY BRIEF OF APPELLANT

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ARGUMENT

The government's admissions warrant reversal in this case. The government concedes that "there was significant factual overlap between Count One and Count Two." Gov't Br. at 11. That factual overlap shows that the government alleged and offered evidence of only one agreement, and therefore one conspiracy, to distribute multiple drugs. Defense counsel was thus deficient for failing to challenge Counts One and Two as multiplicitous. And the government concedes that Mr. Slocum's $100 special assessment for the second conspiracy count constitutes prejudice. Reversal is therefore warranted, and this Court should remand for a new trial because the multiple conspiracy counts prejudiced Mr. Slocum at trial. The multiple counts may have tainted the jury's view of Mr. Slocum, pushing them to convict him on his remaining counts, including two firearms-related counts that were supported by evidence that was sparse at best.

I. MR. SLOCUM'S DEFENSE COUNSEL PERFORMED DEFICIENTLY BY FAILING TO RAISE A MULTIPLICITY CHALLENGE AT TRIAL

The government all but concedes that it violated Mr. Slocum's Double Jeopardy rights by trying him on a multiplicitous indictment. The government does not contest the applicability of *Braverman's* core

holding—that a single agreement to commit multiple crimes is only one conspiracy. *Braverman v. United States*, 317 U.S. 49, 53 (1942). Nor does it dispute that this Court's five-factored, totality-of-the-circumstances test is the appropriate method to determine if there was one or multiple agreements. *See* Gov't Br. at 10 (citing *United States. v. MacDougall,* 790 F.2d 1135, 1144 (4th Cir. 1986)). And the government's concession that there was "significant factual overlap" between the two counts demonstrates that only one agreement, and thus one conspiracy, existed. Gov't Br. at 11. Indeed, the government's evidence for both counts was virtually identical, proving that only "a single agreement" existed to distribute both drugs. *See United States v. Jarvis*, 7 F.3d 404, 412 (4th Cir. 1993).

The few arguments the government does assert contradict well-established precedent. First, it argues that in addition to the totality-of-the-circumstances test, *Blockburger's* "same-evidence" test should also apply to this case. But, as the government acknowledges, *Blockburger* does not apply to conspiracy cases such as this one. Even if it did, Counts One and Two would still be considered the same offense under that test. Second, ignoring well-established precedent and relying on irrelevant

evidence, the government argues that there are two separate offenses under the totality-of-the-circumstances test. Its meager attempts to distinguish Counts One and Two fail.

A. *Blockburger* Neither Applies nor Shows Two Conspiracies.

Despite acknowledging that the totality-of-the-circumstances test applies, the government argues that this Court should also apply the *Blockburger* test and find that Counts One and Two are not the same offense because each requires proof of additional elements the other does not—the type and quantity of drug. Gov't Br. at 8–9.[1] The government fails to explain why Mr. Slocum needs to satisfy *both* the *Blockburger* test and the totality-of-the-circumstances test. In fact, the government seems to undermine its own position by acknowledging that the totality-of-the-circumstances test was developed for conspiracy cases in which the

[1] Although the government suggests that the drug type and quantity are "facts," its reliance on *Blockburger* indicates that it views them as elements of the offense. Gov't Br. at 8–9. *Blockburger* requires courts to focus on "the elements of the statutory provisions in question, not the particular facts of the underlying case." *See United States v. Ayala*, 601 F.3d 256, 265 (4th Cir. 2010); *cf. Mathis v. United States*, 579 U.S. 500, 504 (2016) (distinguishing between elements and facts and emphasizing that facts are "extraneous to the crime's legal requirements").

Blockburger test does not work. Gov't Br. at 10 (noting that the *Blockburger* test is of limited value in cases involving multiple 21 U.S.C. § 846 charges).

The government's inability to articulate a coherent theory for why both tests apply may be because this Court has reiterated multiple times that the *Blockburger* test does not apply to cases involving multiple violations of the same statute. *MacDougall,* 790 F.2d at 1144; *see also* Opening Br. at 21 n.3. That test is used to determine whether "the same act" violates "two distinct statutory provisions." *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see also Sanabria v. United States,* 437 U.S. 54, 70 n.24 (1978). But Counts One and Two alleged violations of the same statutory provisions, so the question in this case is whether each count charged the same act—that is, the same conspiracy—at all. Thus, *Blockburger* has no bearing on this case.

Even if *Blockburger* did apply, as the government claims, Counts One and Two would still be multiplicitous. To satisfy *Blockburger*, the government must show that each count "requires proof of a different element" that the other does not. *Blockburger*, 284 U.S. at 304. The government argues that it can satisfy *Blockburger* because each count

required proof of a different drug type and quantity. Gov't Br. at 8–9, 11. But that argument defies both the facts of this case and the law.

To start, the government's claim that drug type and quantity are elements of the offense conflicts with its prosecution of the case. If drug type and quantity are elements, then they "must [have been] submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 103 (2013). But there is no evidence they ever were. The general verdict form used in this case did not ask the jury to determine the specific type or quantity of drugs. *See United States v. Slocum*, Case No. 2:13-cr-00274, Dkt. 98 (S.D.W. Va. Nov. 7, 2014) (General Jury Verdict Form). And the judge never instructed the jury to determine the specific quantity of drugs attributable to Mr. Slocum, as opposed to the conspiracy as a whole, for each count. *See* JA894.

The jury should have been instructed, or required to use a special verdict form, to identify the type and quantity of controlled substances attributable to Mr. Slocum for each count. *See United States v. Perez-Ruiz*, 353 F.3d 1, 15–16 (1st Cir. 2003) (concluding that a jury's "naked act of returning a guilty verdict" was insufficient to show it had "actually found the appellant responsible for the . . . drug types and quantities"

described in the indictment). When a special verdict form is necessary, it is the government's obligation to provide one. *See United States v. Rhynes*, 196 F.3d 207, 238 (4th Cir. 1999), *vacated in part on other grounds* 218 F.3d 310 (4th Cir. 2000) (en banc). The government failed to do so here.

Because it is not clear from the record that the jury ever found the type or quantity of drugs attributed to Mr. Slocum beyond a reasonable doubt, his sentence would be limited to the one-year maximum sentence permitted by 21 U.S.C. § 841(b)(3). *See United States v. Barbosa*, 271 F.3d 438, 454–57 (3d Cir. 2001) (finding an *Apprendi* error where the jury did not make a finding "as to a particular controlled substance or the amount at issue" and the defendant's sentence was above the lowest sentence prescribed by the "catch-all" provisions in § 841(b)(3)). That provision provides the baseline penalty for drug trafficking crimes where no finding of drug type or quantity has been made. *Id.*

The government's *Blockburger* argument is also wrong as a matter of law. To satisfy *Blockburger*, each count must require proof of an additional element that the other does not, but even under the government's theory, only Count One required the government to prove

an additional element beyond the elements for Count Two. Mr. Slocum was charged with violating the exact same statutory offenses in both Counts One and Two—21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1). JA31–32. Drug type and quantity are not elements of a § 841(a)(1) offense, the offense underlying the conspiracy in this case. That provision makes it unlawful to distribute a "controlled substance," no matter the type or quantity. *See McFadden v. United States*, 576 U.S. 186, 191–92 (2015) (holding that § 841(a)(1) requires knowledge of "some unspecified substance listed on the federal drug schedules"). And the penalty provisions for § 841(a)(1) offenses contain several "'catch-all' provisions, all of which generally contain no reference to specific drug quantity or drug identity, except by schedule number." *See Barbosa*, 271 F.3d at 454 (citing 21 U.S.C. § 841(b)).

To be sure, after the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that the specific drug quantity is an element of an § 841(a)(1) offense where it allows for "the imposition of a sentence exceeding the maximum allowable" under a catch-all provision. *United States v. Promise*, 255 F.3d 150, 156 (4th Cir. 2001) (en banc) (citing 21 U.S.C. § 841(b)(1)). For example, the catch-all

provision for offenses involving Schedule I or II drugs sets a maximum of 20 years, 21 U.S.C. § 841(b)(1)(C), but if the offense involves one kilogram or more of heroin, a Schedule I substance, the penalty range is 10 years to life, 21 U.S.C. § 841(b)(1)(A)(i). To impose that enhanced penalty range, the jury must find that the offense involved one kilogram or more of heroin beyond a reasonable doubt. *Promise*, 255 F.3d at 156–57.

In this case, only Count One required proof of a specific threshold drug quantity for the conspiracy as a whole—one kilogram or more of heroin—that increases the maximum sentence allowable under the catch-all provision for offenses involving Schedule I and II substances. JA31. The oxycodone conspiracy alleged in Count Two, however, fell under that catch-all provision because it did not allege a specific quantity of drugs. *See* JA32; Gov't Br. at 11 (noting that Count Two is governed by the penalties under § 841(b)(1)(C), the catch-all provision for Schedule I and II drugs). Indeed, the trial judge instructed the jury on Count Two that they "need not establish a specific amount or quantity of the controlled substance involved," just that some quantity of the drug was involved. JA894. In short, the specific drug type and quantity were not elements of the offense for Count Two. Because only Count One required

proof of a different element, the *Blockburger* test is not satisfied and the indictment is multiplicitous.

In short, the government is trying to have its cake and eat it too by arguing that both *Blockburger* and the totality-of-the-circumstances test applies. But its arguments fail on both counts. Even if *Blockburger* applies (which it does not), and the type and quantity of the drugs alleged are elements of the offense, the government's argument fails on both the facts and the law. But if the totality-of-the-circumstances test applies (which it does), then there is no doubt that there was only one conspiracy given the significant factual overlap between the two counts.

B. The Totality of the Circumstances Shows that Mr. Slocum's Second Superseding Indictment was Multiplicitous.

Turning to the totality-of-the-circumstances test, the government admits that there was "significant factual overlap" between the two counts. Govt' Br. at 11. Grasping at straws, it nonetheless argues that there are two offenses under the totality-of-the-circumstances test. First, it again relies on the different statutory penalties for each conspiracy count under § 841(b)(1) to argue that they were not multiplicitous. Gov't Br. at 11–12. But the totality-of-the-circumstances test only requires

courts to consider the "statutory offenses charged in the indictment[]." *MacDougall*, 790 F.2d at 1144. Here, the second superseding indictment only charged violations of §§ 846 and 841(a)(1) for each count; it says nothing about the penalty provisions in § 841(b)(1). JA31–32.

Additionally, regardless of whether § 841(b)(1) would lead to different penalties for each count, the substantive conspiracy statute alleged in Counts One and Two—§ 846—is designed to punish those who *undertake conspiracies*, and there was only one alleged conspiracy in this case. Conspiracy offenses are defined by the "agreement which constitutes the conspiracy," not the objects of that agreement. *See Braverman*, 317 U.S. at 53. The government only alleged and offered evidence of a single agreement to distribute both drugs, so the conspiracy statute only authorized the government to punish Mr. Slocum once for that offense. *See* Opening Br. at 26–27 (collecting cases).

Next, the government argues that under the totality-of-the-circumstances test there was evidence of two separate conspiracies because, after scouring the record, it uncovered evidence of a few isolated drug transactions that only involved one drug. Gov't Br. at 12. The government identifies only two instances: one witness, Adrianna White,

testified about purchasing oxycodone from Mr. Slocum and his co-conspirators, and another witness and co-conspirator, Gabrielle Beeman, testified that she travelled a couple hours away from Charleston, West Virginia to engage in a transaction only involving oxycodone. Gov't Br. at 12. Neither of these isolated incidents suggests that more than one agreement existed.

As an initial matter, the government completely ignores its own evidence that suggests the trip outside of Charleston involved both drugs. *See* Opening Br. at 28. Victoria Hagan, another witness who was on that trip with Ms. Beeman, *see* JA334–340, JA385, testified that the trip involved "Heroin and Oxies." JA385–387. This trip also seemingly occurred within the Southern District of West Virginia, the geographic region listed for both counts in the indictment, which further suggests that it was part of the same alleged conspiracy. *See* JA31–32, JA387.

Even if that trip, and the interactions with Ms. White, only involved oxycodone, that does little to prove two conspiracies existed. As this Court has observed, large drug conspiracies necessarily consist "of many separate overt acts of illegal narcotics trafficking," but the government cannot pluck one overt act of trafficking from the bunch and "prosecute[]

it as a separate conspiracy." *Jarvis*, 7 F.3d at 412. That is exactly what the government is attempting to do here: prosecute one or two individual overt acts of illegal drug trafficking that were part of the alleged conspiracy as a separate conspiracy.

The government's approach to prosecuting conspiracy offenses also defies logic. A group of co-conspirators who agree to sell two drugs do not necessarily agree to sell both drugs at *every* drug deal related to the conspiracy. And yet, their agreement to sell two drugs would still constitute only one conspiracy, so long as they maintained an overlap "of key actors, methods, and goals." *United States v. Cannady*, 924 F.3d 94, 100 (4th Cir. 2019) (upholding a single conspiracy conviction for a defendant involved in conspiracy that used "lower-level distributors" to sell both cocaine and heroin). The significant overlap of key actors, methods, and goals between the two conspiracies alleged in this case demonstrates that only a single conspiracy existed.

Finally, running out of options, the government tries to equate this case with simultaneous possession cases prosecuted under § 841(a)(1). Gov't Br. at 9, 11–12 (citing *United States v. Grandison*, 783 F.2d 1152 (4th Cir. 1986)). *Grandison* held that the government could prosecute a

defendant who simultaneously possessed two drugs with two separate crimes under § 841(a)(1). 783 F.2d at 1156. But a possession offense is different from a conspiracy offense. The possession offense under § 841(a)(1) seeks to punish the possession of each drug, while the conspiracy offense seeks to punish illegal agreements between two or more co-conspirators. Indeed, one of the simultaneous possession cases the government cites, *United States v. Lockett*, explicitly distinguished multiple-drug conspiracy cases, explaining that the analysis to determine "the scope of . . . alleged conspiracies . . . does not carry over to possession charges." 859 F.3d 425, 429 (7th Cir. 2017) (citing *United States v. Powell*, 894 F.2d 895 (7th Cir. 1990)). The possession holdings the government relies on are simply irrelevant.

Given the overwhelming factual overlap between the two counts and the well-established case law at the time, Mr. Slocum's counsel should have raised a multiplicity challenge at trial. As noted in Mr. Slocum's opening brief, there was long-standing and binding precedent, including *Braverman*—which the government inexplicably fails to cite—supporting a multiplicity claim that Mr. Slocum's lawyer should have discovered after minimal investigation. Opening Br. at 31–32. The few

cases the government does rely on to argue that counsel was not deficient, including *Blockburger* and *Grandison*, are simply irrelevant to this case. Gov't Br. at 13–14. And because it ignores binding Supreme Court precedent like *Braverman*, the government is forced to rely on three district court opinions, two of which are unpublished, that involved conspiracies with little, if any, factual similarities. Gov't Br. at 14 n.3. None of these cases excuse defense counsel for ignoring the binding case law "strongly suggesting" that a multiplicity challenge would have been meritorious. *United States v. Freeman*, 24 F.4th 320, 326 (4th Cir. 2022) (citation omitted). As a result, Mr. Slocum's defense counsel was deficient for failing to raise such a claim.

II. BECAUSE MR. SLOCUM SUFFERED PREJUDICE FROM COUNSEL'S DEFICIENT PERFORMANCE, HE IS ENTITLED TO A NEW TRIAL.

The government conceded, as it must, that the additional special assessment prejudiced Mr. Slocum. *See* Gov't Br. at 15 ("[T]he prejudice in this case would simply be the imposition of the additional special assessment"). That warrants reversal, and this Court should remand this case with instructions to grant a new trial because Mr. Slocum's entire trial was infected by the multiplicitous indictment.

The government does not explicitly address Mr. Slocum's request for a new trial. Instead, it argues that he was not prejudiced at trial because the trial evidence would have been the same even without the extra conspiracy charge. Gov't Br. at 15. But that misunderstands the point. It was the separation of the single conspiracy into multiplicitous counts in the second superseding indictment, not the evidence introduced at trial, that primed the jury to view Mr. Slocum as more likely to be guilty. *See United States v. Langford*, 946 F.2d 798, 802 (11th Cir. 1991) ("[A] multiplicitous indictment may improperly prejudice a jury by suggesting that a defendant has committed several crimes—not one."); *see also* Opening Br. at 36 (collecting cases). The more charges Mr. Slocum faced the more likely it is that the jury could have convicted him "under the rationale that with so much smoke there must be fire." *United States v. Foutz*, 540 F.2d 733, 739 (4th Cir. 1976).

Empirical evidence confirms that when a defendant faces multiple counts that defendant is more likely to be convicted. Edith Greene & Elizabeth F. Loftus, *When Crimes are Joined at Trial*, 9 LAW & HUM. BEHAVIOR 193, 197–98 (1985) (finding from lab experiments that "a defendant is more likely to be convicted by mock jurors of any one charge

when that offense is combined with another at trial"); Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349, 401 (2006) (conducting a study of over 20,000 federal cases and concluding that joining multiple charges "increase[es] the chances of conviction of the most serious charge by more than 10%"). Multiple charges in the indictment may also create a "halo effect," leading jurors to infer "that if the defendant is being charged with several offenses, he or she must possess some sort of criminal disposition." Greene & Loftus, *When Crimes are Joined at Trial*, at 194 (internal quotation marks omitted). The existence of an additional charge in Mr. Slocum's case may have biased the jury against him.

The risk of prejudice is amplified in this case because the government's evidence on the two gun charges—Counts Three and Four—was weak at best. The government never produced the firearms in question; instead, each conviction was based on the testimony of a single witness. JA855–JA856. Given the sparse evidence supporting these two convictions, it's fair to wonder whether the multiple conspiracy

counts may have led the jury to believe that Mr. Slocum was inherently criminal and likely to possess guns.

This Court has granted new trials in cases where the presence of an additional count may have influenced the jury's decision on other charges supported by flimsy evidence. For example, in *United States v. Hawkins*, the district court improperly joined a separate gun charge with two charges related to a carjacking. 776 F.3d 200, 209 (4th Cir. 2015). This Court concluded that the misjoinder had prejudiced the defendant because the evidence against him on the two carjacking-related offenses was "not overwhelming" and based on the testimony of a "lone witness." *Id.* at 212. Because the defendant "might well have been acquitted" on the two carjacking offenses if all three offenses had not been joined at trial, this Court held that the misjoinder actually prejudiced the defendant and ordered a new trial. *Id.* Like the defendant in *Hawkins*, Mr. Slocum "might well have been acquitted" of the gun charges had the additional drug conspiracy charge not been included in the indictment. *Id.*

A new trial is also particularly warranted here because "neither the court's instructions nor the verdict form" required the jury to find the

quantity of drugs attributable to Mr. Slocum for each conspiracy count. *See United States v. Denton*, 944 F.3d 170, 181 (4th Cir. 2019). The government's brief suggests that the quantity of drugs is an element of the offense, which means the jury was required to find that element beyond a reasonable doubt. But there is no evidence that the jury did so. A new trial is needed to rectify this mistake and avoid the prejudice Mr. Slocum faced as a result of the additional conspiracy count.

CONCLUSION

For the foregoing reasons, we ask this Court to remand with instructions to grant Mr. Slocum a new trial.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3617 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, Salvatore Mancina, certify that on September 13, 2023, a copy of Appellant's Reply Brief was served via the Court's ECF system on counsel for Appellee.

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