UNITED STATES of America,

Plaintiff-Appellant,

v.

JOEY FLINT,

Defendant-Appellee.

No. 88-999

United States Court of Appeals

Twelfth Circuit

Argued April 1, 1988

Decided April 10, 1988

OPINION AND ORDER

Granite, Judge.

SUMMARY OF THE FACTS

On January 10, 1988, the defendant, nineteen year-old Joey Flint, was arrested by agents of the Drug Enforcement Administration (hereinafter "DEA") for selling what is commonly referred to as "crack." A grand jury in Bedrock handed down an indictment.

Before trial, Flint moved, pursuant to Fed. R. Crim. P. 12(b)(1), to dismiss the charge for defects in the institution of the prosecution. On March 12, at a hearing on the motion before Judge Pebbles, counsel for Flint offered police records

and the defendant's testimony to demonstrate the events. The government presented testimony of DEA agents involved in the arrest to defend against the 12(b)(1) motion. The facts are not in dispute.

As part of an ongoing operation to rid Bedrock of drugs, the DEA made several arrests for narcotics trafficking in December of 1987. These arrests led to the confiscation of large quantities of crack.

Flint had no previous convictions or arrests on narcotics charges. DEA agent Arnold Slate, however, heard rumors that Flint had sold cocaine in the past. Slate resolved to use some of the DEA's previously confiscated crack to see whether the rumors were true.

On December 28, working under cover, Slate approached Flint and asked if he would be interested in selling some crack. Flint refused saying that, although he wanted to sell crack, he did not know Slate well enough to trust him. Initially, Slate offered Flint 10 percent of all the money received. The parties stipulated that this is the "street rate" for transactions of this type.

In an attempt to gain the defendant's confidence, on December 30, Slate solicited the help of Barney Rock, a longtime friend of Flint. Slate had heard through informers that Rock believed Flint had recently had an affair with Rock's wife, Betty. Slate's information apparently was correct, as Rock was anxious to help. Rock aided Slate by telling Flint that Slate was an acquaintance of his and could be trusted.

Soon after Rock spoke with Flint, however, he began having second thoughts about his decision to help send his old friend to jail. Rock told Slate of his intention to tell Flint the truth.

In response, Slate falsely advised Rock that a police informer, while following Flint, had seen Flint visit Rock's house the previous day while Rock was at work. Slate further told Rock, "if the son-of-a-bitch did that to me I'd kill him." Slate later testified that he lied to Rock "in order to keep the whole thing from going down the tubes after all the work that had been put in it."

Despite Rock's efforts, Flint still remained unsure of Slate. In an effort to "sweeten the pot," Slate promised Flint that as soon as the sale was complete, Flint could work in Slate's (non-existent) factory at "an easy job for very good pay." Further, Slate told Flint that if he would sell the crack, he would also be provided with "a woman and a hotel room for the night" when the sale was complete.

Finally, in a meeting with Slate on January 6, 1988, Flint agreed to sell the drugs, but only on the condition that Slate arrange for and pay the woman before the sale. Slate agreed and accompanied Flint to a local bar, the "Bedrock-A-GO-GO." There, Flint selected a prostitute and Slate paid her with government funds. It was not Slate's intent, however, that the prostitute be involved beyond accepting the money. Consequently, he instructed her that she was to meet Flint on January 11, which was the day <u>after</u> the planned arrest of Flint

if the deal was completed. Flint, however, returned to the bar alone on January 9 and convinced the prostitute to have intercourse with him at that time.

On January 10, Slate gave Flint the crack about 15 minutes before the sale was scheduled to take place. Flint rolled and began to smoke a marijuana cigarette and offered it to Slate. Not wishing to lose the defendant's confidence at this critical stage, Agent Slate shared the cigarette. The buyer, not a DEA agent, but an individual selected by Flint, arrived on time. Flint made the sale and Slate arrested him immediately. He was charged with sale of narcotics in violation of 21 U.S.C. § 841(a)(1).

The defendant moved for dismissal under Fed. R. Crim. P. 12(b)(1) and Judge Pebbles held the evidentiary hearing on the motion. Following the evidentiary hearing and pursuant to Fed. R. Crim. P. 12(e), Judge Pebbles deferred ruling on the 12(b)(1) motion until all evidence at trial had been presented. On July 1, Flint was brought to trial. Evidence presented at trial before the jury mirrored the facts presented at the evidentiary hearing as recounted above. At the close of all the evidence, the judge submitted the case to the jury without ruling on the pre-trial motion. The jury returned a verdict of guilty. Thereafter, the judge considered and granted Flint's 12(b)(1) motion thereby setting aside the jury's guilty verdict.

The issues considered by this court are: 1) whether the Double Jeopardy Clause of the Fifth Amendment bars the government's appeal; and 2) whether the conduct of the DEA constitutes a violation of due process.

MAJORITY OPINION

Judge Granite, joined by Judge Stone

The government seeks to appeal the decision of the district court judge granting Flint's pre-trial motion. The government relies upon 18 U.S.C. § 3731 which permits the government to appeal unless barred by the Double Jeopardy Clause of the Fifth Amendment. The first issue, therefore, is whether double jeopardy bars appeal.

The Double Jeopardy Clause bars an appeal when further procedure would expose the accused to multiple prosecutions. The government contends that review by this court would not require a retrial or reevaluation of the facts and thus would not expose the accused to multiple prosecutions. Rather, this court would merely review the legal analysis of the district court judge.

The government further argued that United States v. Wilson, 420 U.S. 332 (1974), 18 U.S.C. § 3731 permits an appeal by the government in those circumstances in which the appeal does not require an evaluation of the facts. In Wilson, after the jury returned a verdict of guilty, the defendant made a motion for acquittal under Fed. R. Crim. P. 29(c). The trial court

reconsidered a 12(b)(1) pretrial motion and dismissed the indictment on due process grounds. In Wilson the Supreme Court stressed that an appellate court reversal of the dismissal would not require a new trial since the appellate court could simply reinstate the jury's verdict.

We agree with the government and hold that the reasoning in Wilson controls. The Double Jeopardy Clause of the Fifth Amendment does not bar an appeal by the government when the jury returns a verdict of guilty which is itself overturned by the trial judge's ruling. However, we disagree with the ruling of the district court judge on the 12(b)(1) pretrial motion, and therefore, the jury's verdict of guilty will be reinstated.

Counsel for the defense has not raised the entrapment defense because the defendant has admitted his predisposition to sell drugs of this kind. Consequently, the next issue raised on appeal is whether the government's conduct is so outrageous as to constitute a violation of due process

We find the conduct of the DEA under these circumstances personally distasteful. However, Constitutional principles are not measured by personal tastes. Sellers of narcotics are very difficult to apprehend, and we would be remiss if we did not take that into account as one factor in the calculus. The sale of an illegal drug is a "fleeting and elusive crime to detect.... In such a situation the practicalities of combating drug distribution may require more extreme methods of investigation...." United States v. Twigg, 588 F.2d 373, 378 (1978).

In United States v. Russell, 411 U.S. 423 (1973), the Supreme Court explicitly left available the due process defense of outrageous law enforcement conduct. However, as Justice Powell pointed out in his concurring opinion in Hampton v. United States, 425 U.S. 484, 495 n.7 (1976), this defense rarely will be successful. Under the present circumstances, and given the difficulty of combating this crime, we find no violation of the Due Process Clause. This conduct is simply not so outrageous as to violate principles of fundamental fairness.

For the foregoing reasons, we remand to the District Court Judge for further disposition not inconsistent with this opinion.

DISSENT

Chief Judge Boulder

I disagree with the holding of the majority on the issue of whether the district court's grant of defendant's 12(b)(1) motion is subject to appeal. According to the rationale of the majority, double jeopardy would bar an appeal under 18 U.S.C. § 3731 when a subsequent proceeding requires adjudicating the guilt or innocence of the accused.

I agree with Justice Rehnquist's opinion in United States v. Scott, 437 U.S. 82 (1978), that the scope of the Double Jeopardy Clause extends protection against multiple

prosecutions for the same offense when the defendant has been acquitted. This is consistent with the rationale established in Burks v. United States, 437 U.S. 1 (1978), that once there has been a factual determination of guilt or innocence, there cannot be a retrial.

The district court judge based his dismissal upon the evidence presented at the hearing and at the trial. These facts, although relating to the issue of overinvolvement, went to the heart of the government's charges against the defendant. It is my opinion that the judge in granting Flint's motion, make a factual determination of innocence. There fore, the trial judge's grant of defendant's pretrial motion following both an evidentiary hearing and presentation of all evidence is an acquittal. An acquittal, regardless of its label bars reprosecution by the government.

Additionally, the rationale of the majority fails in its reliance upon United States v. Wilson. The majority attaches an inordinate amount of significance to the fact that in Wilson the defendant formally made a motion for acquittal. Simply because Flint did not formally file a Fed. R. Crim. P. 29(c) motion for acquittal following a jury verdict is of no consequence.

A grant of the pretrial 12(b)(1) motion for dismissal based on defects in the prosecution is as formal a request as is required by the Double Jeopardy Clause. It is not relevant that Flint did not make a formal motion for acquittal following the jury verdict. According to the Supreme Court in United

States v. Fong Foo, 369 U.S. 141 (1962), if the effect of the judge's action is an acquittal, then double jeopardy bars appeal by the government.

By the requirements of the Fifth Amendment and the reasoning in Burks and Fong Foo, double jeopardy bars appeal by the government.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-999

JOEY FLINT, Petitioner,

v.

UNITED STATES of America, Respondent,

GRANT OF CERTIORARI

TO THE

UNITED STATES SUPREME COURT

The Petitioner, the United States of America, appeals from the United States Court of Appeals for the Twelfth Circuit.

The Supreme Court of the United States hereby certifies the following questions on appeal:

I. Whether a pretrial motion granted following a jury verdict of guilty constitutes an acquittal and therefore bars appeal by the government under the Double Jeopardy Clause of the Fifth Amendment.

II. Whether the conduct of the Drug Enforcement Administration was so outrageous as to constitute a violation of the Due Process Clause of the Fifth Amendment.