

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

UNITED STATES OF AMERICA : CRIMINAL NO.: 07-459 (RBK)

v. :

DRITA DUKA, et al. :

BRIEF IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO
F.R.CRIM.P. 29(C) AND FOR A NEW TRIAL PURSUANT TO F.R.CRIM.P. 33

I. PRELIMINARY STATEMENT

On January 15, 2008, a seven count superseding indictment was filed against the defendant, Dritan ("Tony") Duka. Mr. Duka was named in all of the counts but for count 4. Count 1 charged Mr. Duka with conspiracy to murder in violation of 18 U.S.C. § 1117, count 2 with attempt to murder in violation of 18 U.S.C. § 1114, count 3 with possession and attempted possession of firearms in furtherance of a crime of violence in violation of 18 U.S.C. 924(c)(1)(A) and (c)(1)(B)(ii), count 5 with possession of machine guns in violation of 18 U.S.C. 922(o), count 6 with possession of a firearm by an illegal alien in violation of 18 U.S.C. § 922(g)(5) and count 7 with possession of firearms by an illegal alien in violation of 18 U.S.C. § 922(g)(5). Mr. Duka entered not-guilty pleas on all counts.

Voir Dire began on September 29, 2008. After an eight week jury trial, on December 22, 2008, Tony Duka was convicted of all

counts but for count 2 charging attempted murder. At the conclusion of the government's case-in-chief, Tony Duka made an oral motion for dismissal pursuant to Rule 29(a). Mr. Duka respectfully renews this motion for judgment of acquittal or a new trial and submits this brief in support thereof.

II. LEGAL ARGUMENT

The defendant respectfully requests the Court enter a judgment of acquittal on all counts of the superseding indictment because the government failed to offer sufficient proof from which a reasonable jury could find him guilty.

A. Standard for granting a judgment of acquittal pursuant to Fed.R.Crim.P. 29

A defendant seeking a judgment of acquittal pursuant to Federal Rules of Criminal Procedure Rule 29 may prevail only if, after viewing the evidence in the light most favorable to the prosecution, the Court determines that no reasonable jury could find the essential elements of the offenses charged beyond a reasonable doubt. *See, e.g., Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Ozcelik*, __ F.3d ___, 2008 WL 2169398, * 3 (3d Cir. May 27, 2008); *United States v. Smith*, 294 F.3d 473, 478 (3d Cir. 2002); *United States v. Stevens*, 935 F.2d 1380, 1406 n. 28 (3d Cir. 1991). This high standard of review notwithstanding, it is also deeply embedded in our jurisprudence that juries may not convict based upon

speculation, suspicion, innuendo or surmise. See, e.g., *United States v. Espinosa-Seanez*, 862 F.2d 526, 537 (5th Cir. 1988) (citing *United States v. Jackson*, 700 F.2d 181, 185 (5th Cir.), cert. denied, 464 U.S. 842 (1983)); *United States v. Jones*, 808 F.2d 754, 755 (10th Cir. 1987); *United States v. DeLutis*, 722 F.2d 902, 907 (1st Cir. 1983) (citing *United States v. Palacios*, 556 F.2d 1359, 1365 (5th Cir. 1977)); *United States v. Melchior-Lopez*, 627 F.2d 886, 891 (9th Cir. 1980) (citing *United States v. Taylor*, 562 F.2d 1345, 1352 (2d Cir.), cert. denied, 432 U.S. 909 (1977)). See also *United States v. Heithaus*, 391 F.2d 810, 811 (3d Cir. 1968); *United States v. Lynch*, 366 F.2d 829, 831 (3d Cir. 1966).

These principles are grounded in the most fundamental premise of our system of criminal justice: that one cannot be convicted unless proven guilty beyond a reasonable doubt of each and every element of the offense charged. See generally, *Jackson v. Virginia*, 443 U.S. at 315-16. This standard of proof: 'plays a vital role in the American scheme of criminal procedure,' because it operates to give 'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and reduce the risk of factual error in a criminal proceeding. At the same time, by impressing upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance

that our society attaches to the criminal sanction and thus to liberty itself. 443 U.S. at 315 (internal citation omitted). Such motions, therefore, should be granted where necessary to "guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *United States v. Samuels*, 741 F.2d 570, 572 (3d Cir. 1984) (quoting *Estelle v. Williams*, 425 U.S. 501, 503 (1976)).

The court does not assess credibility of witnesses or weigh the evidence, but it must find "the verdict is supported by substantial evidence." *United States v. McKee*, 506 F.3d 225, 232 (3d Cir. 2007). In considering this motion, the court is not limited to examining the proofs adduced during the government's case-in-chief. Although the defendant moved for a judgment of acquittal at the close of the government's case, the court did not reserve decision. See Fed.R.Crim.P. 29(b)(when court reserves ruling, it may only consider the evidence presented as of the conclusion of the government's case). When, as here, a defendant renews his motion at the close of all the evidence or within seven days of the verdict, the court should consider all evidence presented. See *United States v. Heron*, 525 F. Supp. 2d 729, 734-35 and n. 4 (E.D. Pa. 2007). This Court, therefore, should consider all of the evidence presented in the case in deciding whether the government has established guilt beyond a reasonable doubt.

B. Government's burden of proof

In order to sustain a conviction on count one, conspiracy to murder, the government was required prove to introduce proof beyond a reasonable doubt that two or more persons agreed to commit murder, that Tony Duka was a party to or member of that agreement, that Tony Duka joined the agreement or conspiracy knowing of its objective(s) to commit an offense(s) against the United States and intending to join together with at least one other alleged conspirator to achieve those objectives; that is, that Dritan Duka and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal(s) or objective(s), to commit an offense(s) against the United States; and finally, that at some time during the existence of the agreement or conspiracy, at least one of its members performed an overt act in order to further the objectives of the agreement. Third Circuit Model Jury Instructions 6.18.371A.

In the instant case, insufficient evidence was presented by the Government to prove that Tony Duka was a party to or a member of an agreement to murder members of the uniformed services. It stands to reason that since Mr. Duka was not a member of a conspiracy to murder, that insufficient evidence was presented by the Government to demonstrate that Tony Duka purchased weapons in furtherance of a crime of violence. As the

Court is aware, this was a fifteen month, exhaustively, lengthy investigation that included surveillance, hundreds of body wires and phone taps and the use two confidential informants. During this time, Mohamad Shnewer and Mahmoud Omar first discussed Fort Dix on August 1, 2006. Mr. Shnewer subsequently told Mr. Omar on various occasions that Dritan Duka and others were involved or would join the conspiracy when informed of its formation.

Despite Mr. Shnewer's allegations and the comprehensive government investigation, not a single phone call or body wire recording exists or was presented to the jury that Dritan Duka knew of or joined in the Shnewer-Omar conspiracy. More specifically, no evidence was presented that Tony Duka discussed Fort Dix or any other military or governmental target with any of his co-defendants or government informants. Further, no evidence was presented that Tony Duka was aware of or participated in any surveillance of any military or governmental target. No evidence was presented that Tony Duka knew of or discussed a map of Fort Dix.

Evidence was also elicited from a second cooperator, Besnik Bakalli. Again, no recordings exist or were played for the jury that Bakalli and Tony Duka ever discussed specifically attacking a military base or government facility. It was only after significant goading over a period of time that Mr. Duka told Bakalli on March 10, 2007, that he was willing to do something

in the United States. During this same conversation, however, Tony Duka talked about getting people together and formulating a plan. It stands to reason, however, that if Tony already knew of a plan or was part of an agreement, he would have informed Bakalli of the same. That fact that Tony talks about needing to get people and come up with an idea demonstrates that he was unaware and was not a member of the Shnewer-Omar conspiracy.

Furthermore, the government failed to prove beyond a reasonable doubt that Tony Duka's purchase of firearms from Mahmoud Omar on May 7, 2007 was done so with the intent to engage in any crime of violence. From the beginning of the investigation, body wire evidence reveals that Tony Duka was interested in purchasing rifles so that he and his friends would not have to stand in line and wait their turn in the Poconos at legal firing ranges. Moreover, when presented with the opportunity to buy guns, Tony Duka only requested two weapons. It was only after the government offered him 7 guns at bargain-basement prices that he relented and bought all of the firearms on the government created list. The entire firearm transaction was arranged by the government's informant suggesting that the crime couldn't have happened without government intervention.

In sum, the government failed to prove beyond a reasonable doubt that Dritan Duka knew of or was a member of any conspiracy to kill military personnel. The government further failed to

prove that Dritan Duka purchased rifles with the intent to harm anyone. Instead, it appears that the jury was motivated by the hours of jihadist videos played by the government depicting the deaths of numerous U.S. military soldiers. It also appears that the jury was further motivated by the defendants' anti-American and anti-Jewish political and military rhetoric. Thus, the defendants were convicted based solely upon emotion, their political beliefs and their unpopular opinions.

Wherefore, the defendant, Dritan Duka, respectfully requests that this Court enter a Judgment of Acquittal or for a New Trial.

Respectfully submitted,

/s/ Michael N. Huff

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