

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Amy J. St. Eve	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 CR 691 - 4	DATE	2/19/2008
CASE TITLE	USA vs. Antoin Rezko		

DOCKET ENTRY TEXT

The government's Second Motion in Limine is granted in part, denied in part, and denied in part as moot.

■ [For further details see text below.]

Notices mailed by Judicial staff.

STATEMENT

The government has filed a Second Motion in Limine regarding the cross examination of Stuart Levine. For the reasons stated below, the government's motion is granted in part, denied in part, and denied in part as moot.

Motions in limine provide courts with "an important tool . . . to ensure the expeditious and evenhanded management of the trial proceedings." *Jonasson v. Lutheran Child & Family Services*, 115 F.3d 436, 440 (7th Cir. 1997). A motion in limine "performs a gatekeeping function and permits the trial judge to eliminate from further consideration evidentiary submissions that clearly ought not be presented to the jury because they clearly would be inadmissible for any purpose. The prudent use of the in limine motion sharpens the focus of later trial proceedings and permits the parties to focus their preparation on those matters that will be considered by the jury." *Id.* In some instances, however, "it is necessary to defer ruling until during trial, when the trial judge can better estimate its impact on the jury." *Id.*

On August 3, 2005, a grand jury returned a multi-count indictment against Stuart Levine, Joseph Cari, and Steven Loren. (R. 1-1.) On October 5, 2006, the government filed a Superseding Indictment (the "Indictment") against Defendant Levine and Antoin Rezko. (R. 96-1.) On October 27, 2006, Levine pled guilty to Counts One (mail fraud) and Twenty-Three (money laundering) of the Indictment. (R. 120-1.) As part of his plea agreement with the government, Levine agreed to provide full and truthful cooperation. In connection with this cooperation agreement, the government intends to call Levine as a witness at Defendant Rezko's trial, scheduled to commence on March 3, 2008. The government seeks to preclude Defendant from cross examining Levine and introducing substantive evidence in certain areas. The Court will address each area in turn.

I. Prior Drug Usage

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The government first moves in limine to prevent Defendant from cross examining Levine regarding any of his prior drug usage. Specifically, the government advised Defendant that Levine used marijuana, LSD, cocaine, and quaaludes in social situations from the early 1970s until the late 1980s. Defendant has agreed that he does not intend to introduce evidence of Levine's history of social drug use which purportedly ceased in the late 1980s, thus this aspect of the motion is moot.

The government also informed Defendant (and Defendant obtained independent evidence) that Levine "consistently used drugs" including marijuana, cocaine, crystal methamphetamine, and ketamine ("Special K") during the time period relevant to the Indictment. The government argues that Levine's drug usage is not relevant because he only used drugs during personal social activities, and the drugs did not impair his memory.

According to Defendant (and the government does not dispute this), the government did not question Levine about his prior drug usage during the first 49 debriefing sessions he had with the government. After these sessions and after his guilty plea, the government inquired into his drug usage.

Defendant has proffered sufficient evidence to the Court to establish the relevance of Levine's drug usage. Specifically, a May 8, 2004 intercepted call between Levine and one of his social acquaintances captures Levine asking "did you get the stuff?" and making plans to pick up "the stuff." Further, Levine's former secretary (from 1996 until August 2004) advised the government in August of 2005 that Levine had a "substance abuse problem, a bad cocaine habit, used cocaine daily, and used it in his office." (Response to Second Motion in Limine, page 3; Interview Memo, Bates # 3619.) His secretary also found cocaine in Levine's desk. She also heard Levine snort cocaine in his office, overhead conversations in which Levine spoke about getting cocaine, and observed his nose bleeding when she went into his office. Further, on numerous occasions, Levine asked his secretary to make cash withdrawals of \$9,000, and under \$10,000. His financial records support these cash withdrawals.

On August 21, 2007, Levine's secretary reiterated to defense counsel's investigator that Levine had a "serious drug problem," was often under the influence of drugs when he arrived at the office, and would frequently lock himself in his office for two or three hours to do drugs, among other things. When his secretary entered his office, she often found cocaine residue, drug paraphernalia, and bloody tissues.

Another woman who worked in Levine's office, recalled hearing snorting sounds coming from his office and observing white powder on Levine's desk. She also reported hearing the snorting noises more frequently in 2004 than in 2002.

In addition, several of Levine's social acquaintances have reported that Levine is a heavy user of crystal meth, ecstasy, Special K, cocaine and marijuana. One of them reported that Levine would take large amounts of drugs during their all-night partying sessions, and would take drugs up until the moment he departed, when Levine – at times – would tell his social acquaintances that he had to leave for an "important meeting." In addition, one interviewee stated that Levine's serious drug problem became "progressively worse" up through approximately October 2004.

The government argues that this prior drug usage evidence is not probative of Levine's truthfulness under Federal Rule of Evidence 608(b). Federal Rule of Evidence 608(b) provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness ... may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of

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truthfulness or untruthfulness, be inquired into on cross-examination of the witness ... concerning the witness' character for truthfulness or untruthfulness....” Fed.R.Evid. 608(b); *see United States v. Holt*, 486 F.3d 997, 1001 (7th Cir. 2007). The Seventh Circuit has made clear, however, that “[e]vidence of a witness’ prior drug use may be admitted insofar as it relates to his possible inability to recollect and relate.” *United States v. Gallardo*, 497 F.3d 727, 733 (7th Cir. 2007) (quoting *United States v. Mojica*, 185 F.3d at 788 (7th Cir. 1999) (citing *United States v. Robinson*, 956 F.2d 1388, 1397 (7th Cir. 1992))). Because there is “considerable danger that evidence that a witness has used illegal drugs may so prejudice the jury that it will excessively discount the witness’ testimony,” *id.* (citations and quotations omitted), “cross examination on the issue of drug use may be refused ‘where memory or mental capacity is not legitimately at issue and the evidence is offered solely as a general character attack.’” *Id.* (quoting *Mojica*, 185 F.3d at 788); *see also United States v. Berry*, 60 F.3d 288, 294 (7th Cir. 1995).

The Indictment in this case charges a scheme from at least the Spring of 2003 through July 2004. Defendant has presented evidence that Levine was using a significant amount of drugs during the time period in question in this case. Although Levine informed the government that his drug usage did not impair his memory of the events in question and that he “can remember things distinctly,” Defendant has a good faith basis to explore this area on cross examination. Indeed, Defendant has proffered evidence that during the events in question in the Indictment, Levine had a serious drug problem and extensively used a wide variety of powerful drugs, including crystal meth. Defendant has further proffered evidence that Levine’s drug usage became progressively worse between 2002 and 2004. In sum, Defendant Rezko has presented sufficient information to raise a legitimate issue regarding whether Levine’s memory of the events in question was affected by his drug usage. It is appropriate for the jury to hear the evidence and determine what weight to give to Levine’s testimony.

The fact that Defendant used some of these drugs while engaged in personal social activities, however, is irrelevant and Defendant Rezko may not inquire into this area or produce independent evidence of it. Defendant is nonetheless free to cross examine Levine about whether he failed to disclose his drug usage – including the extent of it – to the government; whether the government failed to confront him with evidence of his drug usage; the extent of his drug usage, including excessive use throughout the evenings before attending meetings regarding the events in question; whether his drug usage was part of his plea agreement; and whether Levine anticipates the government will prosecute him for his drug activities.

The government’s motion to preclude questioning about Levine’s drug usage is therefore denied. After Levine testifies, Defendant Rezko must inform the Court of who, if anyone, he intends to call to testify about Levine’s drug usage. The Court will take up further issues regarding these witnesses at that time.

Defendant adds that he has retained a medical professional as an expert who will opine about the effect of Levine’s drug use on his memory, attention span, and his ability to perceive and understand events accurately. The Court will address expert issues at a later point. *See generally Gallardo*, 497 F.3d at 733 for the general standard on this issue.

II. Evidence Regarding the Structuring of Cash Transactions

The government acknowledges that Levine will admit that he structured cash transactions to avoid making cash withdrawals of over \$10,000 in order to avoid cash reporting requirements. Rezko is free to cross examine Defendant about the structuring of these transactions, whether he disclosed this information to the government, and Levine’s use of the money to purchase narcotics. The alleged purchase of narcotics

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with this money is also relevant because it goes to the amount of drugs Levine purchased during the time in question, further supporting Defendant's argument that the drugs may have had an impact on Levine's memory. Rezko may not, however, introduce extrinsic evidence of the structuring without permission from the Court.

III. Evidence Regarding Levine's Personal Social Activities

The government has also asked the Court to preclude Defendant from cross examining Levine regarding Levine's personal social life. The government argues that any evidence of Levine's relationships should be precluded because it is not probative of truthfulness under Rule 608(b). The Court agrees.

First, Levine's personal social activities are irrelevant to the matters at issue in this case and his truthfulness. Second, the government has represented that it did not offer or promise to keep Levine's activities secret in exchange for his cooperation. Third, Defendant's argument that Levine was motivated to cooperate, in part, because he wanted to keep these activities secret is unavailing. Even if this assumption were true, impeachment by motive is relevant where the government offers the witness a benefit in exchange for his testimony or the witness has a motive to testify in a certain way. A witness's personal feelings about a defendant, for example, might provide a motive for a witness to testify a certain way about that defendant. Levine's social activities provide neither.

Finally, and significantly, any potential relevance to cross examining Levine about this topic area is substantially outweighed by its extreme prejudicial impact. Federal Rule of Evidence 403 provides that a district court may exclude otherwise admissible evidence if its probative value is substantially outweighed by its unfair prejudicial impact. Fed.R.Evid. 403. *See United States v. Smith*, 502 F.3d 680, 686-87 (7th Cir. 2007); *United States v. Chavis*, 429 F.3d 662, 670 (7th Cir.2005). *See also United States v. Dennis*, 497 F.3d 765, 769 (7th Cir. 2007) (Rule 403 was never intended to exclude relevant evidence simply because it is detrimental to one party's case; rather, the relevant inquiry is whether any unfair prejudice from the evidence substantially outweighs its probative value.") (internal quotation and citations omitted). Given the unfair prejudice from this potential testimony, and the limited relevance – at best – of any such testimony, the government's motion is granted. Defendant Rezko has substantial other areas on which he can extensively cross examine Levine, challenge his credibility, test his bias, and probe into any motivations he may have to testify.

CONCLUSION

For these reasons, the government's Second Motion in Limine is granted in part, denied in part, and denied in part as moot.