

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 19-3476, 19-3481, 19-3484, 19-3537, 20-1113 & 20-1266

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GILBERTO VIZCARRA-MILLAN, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:17-cr-00222-JMS-TAB — **Jane Magnus-Stinson**, *Judge*.

ARGUED MAY 12, 2021 — DECIDED SEPTEMBER 30, 2021

Before FLAUM, HAMILTON, and BRENNAN, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Richard Grundy III and his network of drug suppliers, couriers, distributors, and dealers trafficked hundreds of pounds of methamphetamine in Indianapolis. Grundy and over two dozen co-conspirators were indicted. Most ultimately pled guilty. After a three-week trial, Grundy and four other defendants were convicted of all the charges against them. In these consolidated appeals, the five

trial defendants and one defendant who pled guilty challenge their convictions. There are no sentencing issues.

Grundy argues that the district court violated his Sixth Amendment right to counsel by improperly obstructing him from representing himself. Gilberto Vizcarra-Millan argues that the district court should have disqualified his chosen counsel due to a conflict of interest. Derek Atwater, James Beasley, and Undrae Moseby all challenge the denials of their untimely motions to suppress evidence. Atwater, Beasley, and Ezell Neville all contend that the evidence was insufficient to support some of their convictions.

We affirm the convictions of Grundy, Vizcarra-Millan, Moseby, Atwater, and Neville. We also affirm the conviction of Beasley on one count but reverse his convictions on two others. The evidence at trial necessarily left a reasonable doubt as to whether he committed those crimes. Beasley's case is remanded to the district court for resentencing on the one remaining count.

I. Factual and Procedural Background

We provide the basic outline of Grundy's network and the procedural history of this case here, with more specific details as needed for each defendant's appeal. Because the co-conspirators' appeals do not hinge on the substance of the conspiracy, we omit many of the details of the inner workings of Grundy's crew as presented during the trial.

A. Grundy and his Crew

Grundy has been of interest to law enforcement for years. He has been arrested or indicted for, among other things, murder and conspiracy to commit murder, though he was never convicted of so serious a charge. As recently as 2015 or

2016, he had been indicted on four counts of conspiracy to commit murder, but he ultimately pled guilty to a lower-level state charge for marijuana distribution.

After his plea in the state case, Grundy pooled seed money to restart his drug-trafficking network. Gilberto Vizcarra-Millan, who lived in Arizona, provided the drugs to Grundy. A network of couriers, including defendant Undrae Moseby, brought the drugs to Indiana.

Once the drugs arrived in Indianapolis, Grundy distributed them himself or via a network of wholesalers, including David Carroll. These wholesalers then sold to retail dealers, including Derek Atwater and James Beasley. Ezell Neville was another associate of Grundy's. The parties dispute the exact nature of his relationship with Grundy, but he also sold Grundy's methamphetamine. All told, Grundy and his crew brought at least 280 pounds of highly pure methamphetamine, as well as other drugs, to the streets of Indianapolis.

In May 2017, federal law enforcement obtained wiretaps for the cell phones of crew members. FBI agents also coordinated controlled drug buys from Grundy's dealers. Things started to fall apart for the Grundy gang in August 2017. Law enforcement seized over \$84,000 in cash that was headed to Vizcarra-Millan to purchase more drugs. Next, in September 2017, agents intercepted a phone call between Carroll and Beasley discussing an upcoming methamphetamine deal. Soon after Beasley purchased the methamphetamine, local police stopped the car in which he was a passenger for a routine traffic violation. The officers smelled raw marijuana and recovered drug paraphernalia while searching the car. A search of Beasley's person uncovered methamphetamine. The driver of the car, Susan Koch, told the officers that Beasley

stored more methamphetamine in her home and gave her consent for a search that recovered more methamphetamine.

On November 17, federal agents executed several search warrants against members of the conspiracy. As relevant here, they uncovered methamphetamine and drug-trafficking paraphernalia at Atwater's house. They also raided what they believed to be the "clubhouse" of Grundy's gang. Several members of the conspiracy were present, and the police collected several cell phones, including two used by Moseby that contained incriminating evidence of his connection to the Grundy crew.

B. *Pretrial and Mistrial*

In two separate cases, over two dozen members of Grundy's gang were charged with federal offenses, including conspiracy to distribute drugs and money laundering. Most defendants ultimately pled guilty. David Carroll, one of Grundy's key wholesalers, agreed to testify for the prosecution. Carroll's attorney, John Tennyson, however, had also been retained by Vizcarra-Millan, who was charged in the second, formally distinct but related case. The government pointed out the potential conflict of interest—if Carroll were to testify at trial (which he had agreed to do), he might incriminate Vizcarra-Millan. If he did, Tennyson's duties to his respective clients would conflict. See Indiana Rule of Prof'l Conduct 1.7.

Two district judges held hearings to discuss the conflict with Vizcarra-Millan and whether he wanted to waive it. At the first hearing with Judge Barker, the potential conflict appeared both minor and unlikely to become actual, and Vizcarra-Millan said he would waive any conflict of interest.

When both of the *Grundy* cases were later consolidated before Judge Magnus-Stinson, she also held a hearing that ended with Vizcarra-Millan again waiving his right to unconflicted counsel.

But then, five weeks before trial, attorney Tennyson filed a motion to withdraw the waiver because his client had rejected the government's plea offer and said he intended to go to trial. Contrary to what he had told both judges months earlier, Tennyson now claimed his conflict of interest prohibited him from adequately representing Vizcarra-Millan at all. Judge Magnus-Stinson denied Tennyson's motion without holding a hearing. Vizcarra-Millan later pled guilty without a deal from the government.

In the meantime, the district court had set a deadline in February 2019 for filing motions to suppress evidence. Months later, just days before trial, defendants Beasley and Moseby submitted motions to suppress, styled as evidentiary motions in limine. The district court denied both motions.

Trial got under way on July 8, 2019, in Indianapolis. The court took the unusual step of empaneling an anonymous jury after the government came forward with evidence of attempted witness tampering and intimidation. The court provided juror information to defense counsel but forbade the defendants themselves from learning the jurors' names or detailed personal information from which they could be identified. The first trial did not last long. By day three, the district court learned that, despite the precautions, some defendants had gotten their hands on this confidential information. Moseby had written down the names of several jurors. Grundy had obtained partially redacted juror questionnaires.

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