

NOT RECOMMENDED FOR PUBLICATION

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Case No. 21-1177

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jan 21, 2022

DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LUIS AYALA-VIEYRA,

Defendant - Appellant.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN

BEFORE: BOGGS, GIBBONS, and NALBANDIAN, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. Luis Ayala-Vieyra was convicted by a jury for conspiracy to distribute and possess with intent to distribute cocaine and distribution of cocaine. On appeal, he argues the district court erred in denying his motions to suppress wiretaps, allowing jurors to be masked during voir dire, permitting phone transcripts to be read to the jury, failing to exclude expert testimony, applying a gun enhancement at his sentencing, and failing to credit him for acceptance of responsibility. We disagree and affirm the district court.

I.

We begin with a discussion of the relevant wiretap applications, before turning to Ayala-Vieyra's motions to suppress, trial, and sentencing.

A.

In 2018 and 2019, the Drug Enforcement Administration (“DEA”) investigated Gaston Silva for cocaine trafficking in Grand Rapids, Michigan. This investigation included applications for numerous wiretaps, eventually leading to a wiretap of Ayala-Vieyra’s phone.

In April 2019, the government applied for interception of Gaston Silva’s, Tony Silva’s, and Teodulo Zepeda’s phones, after physical and electronic surveillance indicated they were involved in distributing narcotics. The affiant described why traditional investigative techniques would not allow the government to fully complete its investigation. For example, individuals had thwarted physical surveillance, execution of search warrants too early would lead to detection of the investigation and result in destruction of evidence, and video surveillance was of limited use against a mobile drug organization. The interception of Gaston Silva’s phone also helped investigators identify Luis Ayala-Vieyra and his brother, Inocencio Ayala-Vieyra, as drug suppliers. The district court authorized the wiretaps.

In May 2019, the government sought continued interception of Tony Silva’s and Zepeda’s phones and new interception of Inocencio Ayala-Vieyra’s phone. For reasons similar to those explained in the April application, the affiant detailed why the wiretaps were necessary to fully investigate the numerous drug organizations. The district court authorized the wiretaps.

In July 2019, the government sought to continue interception of Inocencio Ayala-Vieyra’s phone and to initiate interception of Luis Ayala-Vieyra’s phone. Investigators identified Luis Ayala-Vieyra as a supplier for Inocencio, but were unable to identify the source of his supply. Again, the affiant described why the wiretaps were necessary. For example, a confidential informant provided some information, but was unable to provide information on the Ayala-

Vieyras' current narcotics activity. Surveillance and trash pulls were unsuccessful. The district court authorized the wiretaps.

B.

Luis Ayala-Vieyra was indicted for conspiracy to distribute and to possess with intent to distribute cocaine, as well as distribution of cocaine. He moved to suppress the wiretap evidence, arguing the applications for the wiretaps failed to establish probable cause and necessity. The district court denied the motions.

Ayala-Vieyra also moved for an order requiring the preparation of transcripts of ex parte hearings before the issuing judge on the wiretap applications. The district court denied the motions after the government affirmed it had not presented any additional evidence in those ex parte hearings.

C.

Ayala-Vieyra proceeded to trial on September 21, 2020. Because his trial took place during the COVID-19 pandemic, the district court took safety precautions including allowing jurors to wear face masks. Ayala-Vieyra objected, with his counsel arguing he did not know whether he could “adequately assess credibility of anyone wearing a mask.” DE 210, Trial Tr., Page ID 1232. The district court overruled the objection, noting that the masks did not create a Sixth Amendment issue as the jurors were not witnesses and recognizing that jurors could be uncomfortable with unmasked fellow jurors given the health concerns presented by the pandemic.

During trial, the government proposed calling two people from its office to read to the jury transcripts that the parties agreed to admit. Ayala-Vieyra objected, arguing he thought “the best way is to have the jury read them.” *Id.* at 1312. The district court overruled the objection,

explaining that it found no prejudice and would allow the government to decide how to present its evidence.

The government also called DEA Special Agent Thomas Burns. Before trial, Ayala-Vieyra moved to exclude Burns's expert testimony under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), arguing that drug experts do not offer a reliable methodology nor provide testimony beyond the common knowledge of the average juror. The district court heard argument on the motion during the pretrial conference. The defense argued that Burns's general testimony that drug dealers talk in code was within the common knowledge of the jury. The government responded that Burns's testimony on how drug dealers use an "entire ad-hoc language" to avoid police would be helpful, as not all jurors were familiar with the practice. DE 129, Pretrial Tr., Page ID 696. The district court denied Ayala-Vieyra's motion, explaining:

I appreciate the fact that the language used in these phone calls may be common to practitioners both on the prosecution and defense side and members of the judiciary, but to say that your average juror in the Western District of Michigan will understand code—use or code words and lingo in drug—in the drug trade, I think is a real stretch.

Id. at 697. After a three-day trial, the jury convicted Ayala-Vieyra on all counts.

D.

In Ayala-Vieyra's Presentence Investigation Report ("PSR"), the probation office calculated an offense level of 32 and a criminal history category of I. The recommended Guidelines range was 121 to 151 months of imprisonment. Ayala-Vieyra raised numerous objections.

Ayala-Vieyra objected to receiving a two-level enhancement for possession of a firearm in connection with drug trafficking activities. He argued the gun found in his residence belonged and was registered to his wife and there was no evidence he stored drugs in proximity to the gun.

The district court overruled his objection, finding that Ayala-Vieyra stored drugs in his home and that the gun could be jointly possessed with his wife.

Ayala-Vieyra also objected to the absence of a reduction in his offense level calculation for acceptance of responsibility. The district court overruled the objection, explaining that Ayala-Vieyra went to trial and contested each element of the offense. Finding the drug weight calculation should be four levels lower than the PSR recommendation, the district court calculated a Guidelines range of 78 to 97 months in prison and sentenced Ayala-Vieyra to 78 months' imprisonment.

II.

We discuss Ayala-Vieyra's arguments in chronological order, beginning with his pretrial motions to suppress the wiretap evidence.

A.

When reviewing the district court's decision to suppress a wiretap under 18 U.S.C. § 2518, we review findings of fact for clear error and questions of law de novo. *United States v. Rice*, 478 F.3d 704, 709 (6th Cir. 2007). "Generally, a district court's finding that the requirements of § 2518(1)(c) [the necessity provision] have been met are afforded 'considerable discretion.'" *United States v. Stewart*, 306 F.3d 295, 304 (6th Cir. 2002) (quoting *United States v. Landmesser*, 553 F.2d 17, 20 (6th Cir. 1977)).

Ayala-Vieyra argues the district court should have granted his motions to suppress the wiretap evidence because the government failed to establish probable cause or necessity in the wiretap applications. He also contends the district court should have provided him with transcripts of ex parte wiretap hearings.

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