

GOVERNMENT OF THE VIRGIN ISLANDS,	)	
	)	CRIM. NO. 394/1997
Plaintiff,	)	
	)	MURDER 2ND DEGREE
v.	)	14 V.I.C. § 922 (b);
	)	POSSESSION OF A
PATRICK KREPPS,	)	DANGEROUS WEAPON
	)	DURING A CRIME OF
Defendant.	)	VIOLENCE
	)	14 V.I.C. § 2251 a (2) (B).
	)	
	)	NOT FOR PUBLICATION

CABRET, P.J.

(June 14, 2001)

THIS MATTER is before the Court on Defendant's Motion for New Trial, pursuant to Federal Rule of Criminal Procedure 33, and the Government's opposition. As reasons for his motion, the Defendant, Patrick Krepps ("Krepps" or "Defendant") contends that his discovery of

witnesses in Florida, who could have provided what he terms "exculpatory" evidence, constitutes newly discovered evidence warranting a new trial. For the reasons which follow, the defendant's motion will be denied.

FACTS AND PROCEDURAL POSTURE

On October 14, 1997, the family of Kenneth Anderson ("Anderson") reported that he had not been seen since October 10, 1997. During the ensuing missing person investigation, police officers questioned employees of the Company Street Pub, which Anderson frequented. Police spoke to Carlos Keyes ("Keyes"), a cook at that establishment, as well as an unnamed waitress. Both witnesses reported seeing Anderson just days preceding their interview with police on October 16, 1997. Keyes reported seeing Anderson, who appeared unharmed, on or about October 13 during a Monday night football game. The other witness reported seeing Anderson sometime during the middle of October but was a bit uncertain about the date. Officer Marisol Colon ("Colon"), the interviewing officer, noted this interview in a police report which identified Keyes and recorded the information he provided. The report also noted that a waitress had been interviewed; however, that name was not included, although Colon testified at the hearing on this motion that she recalled that waitress to be the girlfriend of Carlos Keyes.

Subsequently, Keyes left the Virgin Islands in November or December, 1997 and relocated to Jacksonville, Florida. The waitress to whom the report refers, now identified as Keyes' fiancée, Nilka Gines ("Gines"), also relocated to Puerto Rico and then to Florida, where they both currently reside.

On October 23, 1997, Anderson's partially decomposed and mummified body was found in the brush in Western Suburb, Christiansted, near the defendant's home. The decomposed

GOV'T OF THE VIRGIN ISLANDS V. PATRICK KREPPS
CRIM. NO. 394/1997
MEMORANDUM ON MOTION FOR NEW TRIAL
PAGE 3

state of the body indicated Anderson had been dead for some time.¹ The body did not appear to have been moved or tampered with while there, and a medical examination revealed a hole through a bone in the upper torso, consistent with a stab wound.²

After discovering Anderson's body, police initiated an investigation, which led them to Krepps' nearby apartment. Krepps admitted to police that he had been with Anderson in the defendant's Western Suburb apartment on or about October 10, 1997 and had beaten Anderson to unconsciousness.³ He then detailed to police how he had removed the body from the apartment building and taken it to nearby brush, where he left it along with Anderson's clothing.⁴ Krepps also reported smelling a foul odor several days later and admitted that he believed Anderson's body to be the source of that odor.⁵ Additionally, police searched Krepps' apartment and found a large amount of blood in the defendant's room – saturating the defendant's mattress, spattered on the walls and floor of his bedroom, spotting the floor and a wicker sofa of a shared common living room adjoining his bedroom, and pooled under the sofa.⁶ Tests showed the substance found to be human blood, although no sample was available to determine whether it was Anderson's.⁷ However, tests determined that the blood was not that of the defendant.⁸

¹ Tr. Testimony of Dr. William Fogarty at Vol. I. pp. 131-134.

² *Id.* at 134, 138; Tr. Testimony of Dr. Clyde Snow at Vol. II. pp. 60-68.

³ Tr. Testimony of Detective Stephen Brown at Vol. I. pp. 67-68; Pl. Exh. 2 .

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 71-72, 80.

⁷ Tr. Testimony of Deborah Hobson at Vol. II. pp. 15- 21.

GOV'T OF THE VIRGIN ISLANDS V. PATRICK KREPPS
CRIM. NO. 394/1997
MEMORANDUM ON MOTION FOR NEW TRIAL
PAGE 4

Police also interviewed another occupant of the building, Jose Herrera ("Herrera"), who testified at trial that he was awakened sometime between 1:30 a.m. to 2:00 a.m. on October 10, 1997 by screams coming from defendant's room.⁹ Though he did not recognize the voice of that person, he did recognize another voice as that of the defendant exclaiming or shouting expletives.¹⁰ Herrera testified he then heard a door open and heard as the defendant pulled another person from his room and leaned that person on a piece of furniture outside of Herrera's door.¹¹ The following day, Herrera said he saw the defendant in the common bathroom, washing what appeared to be blood-stained clothing. Herrera also noticed blood in close proximity to his bedroom door, as well as the defendant's door, under the furniture and on a refrigerator motor.¹²

Krepps was arrested on October 30, 1997 and charged in Anderson's death. During discovery, the Government on January 14, 1998 provided Krepps a copy of the police report containing the names and statements of the witnesses who claimed they had seen Anderson several days after the defendant's admitted encounter with him.

At trial, the defense did not attempt to procure the live testimony of these witnesses, but instead attempted to introduce into evidence the police report containing the statements of the witnesses regarding the purported sighting of Anderson in a downtown bar several days after the

⁸ *Id.*

⁹ Tr. Testimony of Jose Herrera at Vol. I, pp. 33 -34.

¹⁰ *Id.* at 35.

¹¹ *Id.*

¹² *Id.* at 37-40.

GOV'T OF THE VIRGIN ISLANDS V. PATRICK KREPPS
CRIM. NO. 394/1997
MEMORANDUM ON MOTION FOR NEW TRIAL
PAGE 5

defendant, by his own admission, beat him and left him in the brush. The Court precluded that testimony as inadmissible hearsay under Fed. R. Evid. 803 (8).¹³ Following a jury trial, Krepps was convicted on December 17, 1998 of second degree murder, in connection with Anderson's death.¹⁴ Krepps was sentenced to 35 years imprisonment, by judgment entered March 23, 1999. The defense filed this motion for new trial, after "inadvertently" discovering the whereabouts of both Keyes and Gines in 1999. These witnesses were deposed in Florida and a transcript submitted to the Court along with this motion for new trial. The Court held a hearing on the motion on May 7, 2001.

DISCUSSION

Krepps contends that the location of two witnesses who were unavailable at trial and the testimony they propose to offer constitute newly discovered evidence warranting a new trial.

A trial court may grant a new trial within two years¹⁵ of final judgment if required "in the interest of justice," based on newly discovered evidence, or to correct a verdict that was against the weight of the evidence. Terr. Ct. R. 135; Fed. R. Crim. P. 33. Before the Court may grant a new trial based on new evidence, the defendant must establish the following:

1. The evidence must be in fact, newly discovered, i.e., discovered since the trial;
2. Facts must be alleged from which the court may infer diligence on the part of the movant;
3. The evidence relied on must not be merely cumulative or impeaching;
4. It must be material to the issues involved; and

¹³ See Court's Order dated December 15, 1998.

¹⁴ An appeal is now pending in the District Court, Appellate Division.

¹⁵ The defendant filed this motion on October 17, 2000, well within the statutory period.

5. It must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal

United States v. DiSalvo, 34 F.3d 1204, 1215 (3d Cir. 1994)(quoting *United States v. Ianelli*, 528 F. 2d 1290, 1292 (3d Cir. 1976)); see also *Government of the Virgin Islands v. Lima*, 775 F.2d 1245 (3d Cir. 1985). The defendant must satisfy all five prongs to justify a new trial. Moreover, in determining that a new trial is in the interest of justice, the court may weigh the evidence and the credibility of witnesses. See *United States v. Charles*, 35 V.I. 306, 309 (D.V.I. 1996). Applying the facts of this case to the five-part test set forth in *DiSalvo* and its progeny, the Court finds that the defendant has not met his burden for establishing that a new trial is warranted.

Newly-Discovered Evidence

To warrant a new trial based on newly-discovered evidence, such evidence must have been discovered since the trial. Krepps argues that, though he was made aware of the existence and identity of the witnesses through the police report, he was unable to interview them to delve into the substance of their knowledge of the events and, ultimately, procure their trial testimony because of their relocation to the mainland. Thus, the threshold issue is whether the unavailability of previously identified witnesses constitutes newly discovered evidence, upon which a new trial could be had.

The defense relies on a holding in the First Circuit for the proposition that the unavailability of the defense witnesses is a proper basis for a new trial. See *United States v. Montilla-Rivera*, 115 F.3d 1060, 1066 (1st Cir. 1997). However, the Court finds that holding unpersuasive for several reasons. First, the test for a new trial in the First Circuit specifically

GOV'T OF THE VIRGIN ISLANDS V. PATRICK KREPPS
CRIM. NO. 394/1997
MEMORANDUM ON MOTION FOR NEW TRIAL
PAGE 7

contemplates unavailable evidence in its first prong. *See id. at 1065-66* (Defendant must establish that the evidence was "unknown or unavailable at the time of trial."). This is inapposite to the holdings of other circuits, which have rejected similar arguments. *See, e.g. United States v. Quintainilla*, 193 F. 3d 1139, 1147 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1442 (1999) (holding that evidence is not newly discovered where the defendant knew of the substance of interviews before trial); *United States v. Ramos*, 179 F.3d 1333, 1336 (11th Cir. 1999); *United States v. Blount*, 982 F. Supp. 327, 330-31 (E.D. Pa. 1997) (citations omitted). Indeed, the *Montilla-Rivera* Court acknowledged that its construction of the newly-discovered evidence prong differs from that of other circuits. *See Montilla-Rivera*, 115 F.3d at 1066.

The Third Circuit test also does not appear to contemplate unavailable evidence, as *DiSalvo* and its progeny specifically note that "evidence must be in fact, newly discovered, *i.e., discovered since the trial.*" *DiSalvo*, 34 F.3d at 1215 (emphasis added); *see also Blount*, 982 F. Supp. at 330-31 (construing the Third Circuit test as rejecting a finding that unavailable evidence is newly discovered); *see also United States v. Robles*, 814 F. Supp. 1233, 1238-39 (E.D. Pa. 1993) (holding that facts known to the defendant at the time of trial is not newly discovered evidence), *aff'd without opinion*, 8 F.3d 814 (3d Cir. 1993).

In this instance, the proposed testimony cannot be said to be newly-discovered evidence. Keyes was interviewed by police on October 16, 1997 and identified in a police report which was provided to the defendant almost a full year prior to trial. Moreover, the defendant knew the full substance of this witness' statement and what he would likely say if called to testify at trial, through the police report which was offered to the court and rejected as inadmissible hearsay. Significantly, the testimony offered by the witness at the hearing on this motion

mirrors that provided in the police report tendered to the defense in January, 1998. Thus, the defendant knew not only the identity, but all of the facts of the witness' testimony prior to trial. While Gines was identified only as a waitress and not by name in the police report, the information she provided to police was likewise recorded.

Due Diligence

Even if the Court could find that such evidence is newly discovered, the defendant has not shown that it could not have been previously discovered despite due diligence.

Bromley Martin ("Martin"), an investigator with the Territorial Public Defender's Office, testified at the hearing on the motion that he was assigned, sometime in December, 1997 or January, 1998, to locate Keyes and other witnesses for the defense. During his investigation, Martin said he learned that Keyes had left the island in November, 1997, leaving no forwarding address, and could not be found. At trial, the defense never notified the Court of its difficulty in securing these witnesses, nor sought to invoke the Court's subpoena power¹⁶ or seek a continuance. This, the government argues, coupled with the one-year window of time which the defense had to investigate the case and locate witnesses prior to trial, militate against a finding of due diligence. *See United States v. DeLuca*, 137 F.3d 24, 40 (1st Cir. 1998); *United States v. Ortiz*, 23 F.3d 21, 27 (1st Cir. 1994). The Court agrees.

Martin presented no facts at the hearing on this motion that would convince this Court that the defense took any affirmative steps to contact the witnesses after learning they had moved. Indeed, the defendant's pleadings note that both Keyes and Gines were found only through sheer inadvertence, suggesting there was little effort, if any, to procure the witnesses'

¹⁶ The defense attorney argued this would have been futile, since the location of the witnesses was unknown. However, defense counsel could have requested a continuance.

GOV'T OF THE VIRGIN ISLANDS V. PATRICK KREPPS
CRIM. NO. 394/1997
MEMORANDUM ON MOTION FOR NEW TRIAL
PAGE 9

testimony after learning they had relocated.¹⁷ Martin noted that both Keyes and Gines were ultimately located in November, 1999 – almost one year after Krepps' conviction -- only after the defendant's mother notified defense counsel of the couple's whereabouts.

Moreover, the defense noted at the hearing that it had met with or communicated with Keyes on more than one occasion before he moved from St. Croix, in connection with its attempts to secure a third-party custodian for Krepps after his arrest. Both witnesses also testified they were very good friends of the defendant – and had been for several years prior to his arrest. Thus, this Court is unconvinced that the defense, which had access to witnesses who were very close friends of the defendant, could not learn prior to trial that these witnesses had what the defense now deems to be exculpatory evidence.

Evidence Must Be Material and Not Cumulative or Impeaching

The witnesses' proposed testimony also cannot satisfy the materiality requirement to support a new trial in this case. It is clear from the testimony adduced at the hearing on this motion that Keyes can testify only to his purported sighting of Anderson in a bar on or about October 13 or 14, 1997. Gines had even less to offer. Gines candidly testified that she was uncertain about specific dates and recalled only that she had seen Anderson sometime during the middle of October.¹⁸ Both witnesses said they specifically recalled last seeing Anderson on a

¹⁷ See Def. Mem. In Support of Mot. for New Trial at 1. The defendant additionally points to this Court's in limine ruling excluding the police report as a primary factor stymying his ability to secure the witnesses' testimony. This argument has no merit, as the court's ruling went to the admissibility of a police report and not discovery issues.

¹⁸ Gines' deposition testimony showed even greater uncertainty, placing the sighting *sometime* in October. Gines Dep. at 8-9.

Monday night because of the excitement of the football games being shown at the Company Street Pub.¹⁹

Krepps suggests that this testimony is material to a determination of his guilt or innocence because it supports the contention that, while he may have severely beaten Anderson on October 10, 1997 and left him in the bushes, he could not have killed him. The Court disagrees. This is unlike a case in which the time of death is known to some degree of certainty and testimony regarding specific sightings of the victim or the defendant at or after the time of death could, indeed, prove exculpatory. However, on these facts, where Anderson was missing for weeks before his body was discovered and where the condition of the body suggests that he had been dead for some time, the purported sighting of the victim within a span of two to three weeks before the body was found cannot be said to be exculpatory. Further, the proposed testimony goes to the possible whereabouts of the victim and provides no alibi for the defendant at the estimated time of death, which, if believed, could suggest innocence. At best, the witnesses' testimony, if believed, would suggest only that they saw Anderson sometime before the defendant's encounter with him, if at all.

Furthermore, weighing the credibility of the witnesses, as it can on a motion for new trial, the Court concludes that Keyes' testimony is not credible. First, Keyes testified that, although he was a cook assigned to the back portion of the restaurant, he specifically recalls seeing Anderson enter and leave the restaurant on Monday, October 13. He recalls the date because it was a football night. He additionally testified -- and the testimony of Gines corroborated -- that the pub was crowded on the night he said he saw Anderson there. However,

¹⁹ Gines also testified, however, that Anderson often visited the Company Street Pub on Friday nights, weekends and, sometimes, during the week.

Keyes also testified that seeing Anderson was significant on that day and struck him as odd, because he had heard media reports that Anderson had been reported missing. Despite this, Keyes said he did not contact police after seeing the victim in the bar. The Court discounts Keyes' credibility for several reasons.

Importantly, Anderson was not reported missing until October 14, 1997 -- after the time Keyes reported seeing him. Secondly, as the government noted at the hearing, there were no other reports of this purported sighting of Anderson -- a well-known media personality -- besides the report from Keyes, the defendant's close friend and former roommate. Moreover, Keyes testified that when he saw Anderson on October 13 or 14, he appeared nicely groomed, well-dressed and not at all disheveled or injured in any way. In light of the defendant's admission that he had beaten Anderson on October 10, sufficiently to cause unconsciousness, and in light of the other physical evidence introduced at trial, it is difficult for the Court to believe that Anderson would have shown absolutely no signs of the severe beating he suffered just three days earlier. Rather, the Court finds more credible Gines' testimony that there was nothing unusual the last time Anderson was seen in the pub -- sometime in mid-October -- because he was a regular patron and had not been reported missing at that time. Additionally, Gines testified that, at the time of this sighting, Anderson appeared neat and unharmed.

Probability of Acquittal

To warrant a new trial, the nature of the new evidence must be such that it is likely to produce an acquittal. Therefore, the test is not whether the information would have merely aided the defense, but whether there is a "reasonable probability" that it would have led to a different result. *Government of the Virgin Islands v. Davis*, 35 V.I. 72, 86 (Terr. Ct. 1997)

(citing *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *U.S. v. Price*, 13 F.3d 711, 721 (3rd Cir. 1994)). The mere possibility that an undisclosed item of information might have helped the defense, or might have affected the outcome of the trial is insufficient. *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 109-10, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)).

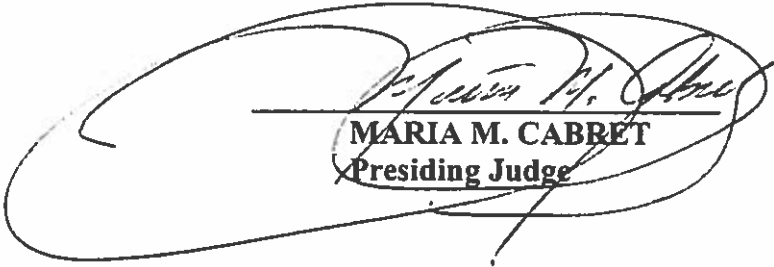
Given the great weight of evidence against the defendant, the testimony which these witnesses will offer cannot be said to be such that it would present the probability of an acquittal. The jury had before it the defendant's statement, in which he detailed how he met Anderson and invited him to the Western Suburb apartment, where he later beat Anderson until the victim lost consciousness, and then discarded his body in the nearby bushes. The defendant's details of the beating and his later efforts to remove the body from his apartment were supported by other physical evidence subsequently recovered from his apartment and by the testimony of Herrera. Remarkably, Anderson's disappearance on October 10, 1997 coincided with the date Krepps admitted to beating and leaving him in the bushes in Western Suburb. Anderson's nude body and clothing were discovered on October 23, 1997, in the same area where the defendant admittedly discarded them. Additionally, the physical evidence recovered from the defendant's apartment tends to support the infliction of serious injuries on Anderson.

The government properly noted the absurdity of events which the Court -- and, ultimately, a jury -- would have to believe in order to find in favor of Krepps: that the defendant severely beat Anderson and left his nude body in the brush behind the defendant's apartment, with his clothing heaped beside him; that Anderson later regained consciousness and visited the Company Street Pub three days later, with nary a scratch or bruise, where he was

spotted by Keyes; and that after this single sighting, some other person murdered Anderson, disrobed him and returned him to the exact location behind the defendant's residence, with his clothing also heaped beside him. The Court is simply not persuaded.

CONCLUSION

In light of the foregoing, the defendant has failed to meet his burden to show that a new trial is warranted. Accordingly, the defendant's motion will be denied. An appropriate order will issue.



MARIA M. CABRET
Presiding Judge