

UNITED STATES OF AMERICA -against- ELVIS O. BANTON, Defendant.

04-CR-574 (JBW)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2004 U.S. Dist. LEXIS 20401

October 12, 2004, Decided

COUNSEL: [*1] For Elvis O'Banton (1) aka L(1) aka L(1) aka Links (1) aka Links (1), Defendant: Jeffrey Chapman, New York, NY; Sam Seymour, New York, NY.

For USA, Plaintiff: Toni Michelle Mele, United States Attorney's Office, Brooklyn, NY.

JUDGES: Jack B. Weinstein, Senior District Judge.

OPINIONBY: Jack B. Weinstein

OPINION: MEMORANDUM AND ORDER

MEMORANDUM

JACK B. WEINSTEIN, Senior District Judge:

The defendant was charged with the following narcotics crimes in a superseding indictment: conspiracy to import a controlled substance, conspiracy to possess a controlled substance with intent to distribute, unlawful importation of a controlled substance, and attempt to possess with intent to distribute a controlled substance. The jury found the defendant guilty on all counts.

In a second phase, the jury was charged with determining whether the facts supporting enhancements relied upon by the government were proved beyond a reasonable doubt. See **Blakely v. Washington**, -- U.S. --, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *United States v. Landgarten*, 325 F. Supp. 2d 234, 2004 WL 1576516 (E.D.N.Y. July 15, 2004); *United States v. Khan*, 325 F. Supp. 2d 218, 2004 WL 1616460 [*2] (E.D.N.Y. July 20, 2004).

The charge was as follows:

You have rendered a general verdict. You must now determine: 1) the amount of cocaine involved and 2) whether the defendant was an "organizer," "leader," "manager" or "supervisor."

To be an organizer, leader, manager or supervisor of criminal activity, the criminal activity must have involved one or more other participants.

Factors you should consider in determining whether the defendant was an

organizer, leader, manager or supervisor include the exercise of decision making authority, the nature and participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. More than one person can fall within these four categories. A person who merely suggests committing the offense, without more, does not qualify as an organizer, leader, manager or supervisor.

A higher quantity of cocaine makes the offense more serious. A finding that the defendant is an "organizer," "leader," "manager" [***3**] or "supervisor" makes the offense more serious. There may be a group crime where none of the participants falls within any of these categories.

These decisions will enter into the court's sentencing considerations.

Your decision must be unanimous. The government has the burden of proof beyond a reasonable doubt as to each decision.

You can use any evidence from the main trial in making your findings.

As you know from the evidence, even without enhancement defendant faces a very serious sentence.

Decide without sympathy or favor.

The amended charge sheet is:

AMENDED PENALTY CHARGE SHEET

ELVIS O. BANTON

CHOOSE ONE

CHOOSE ONE

Less than
500
grams of
cocaine

Less than
2000
grams of
cocaine
but at least 500
grams of
cocaine

At least 2000
grams of cocaine

"Organizer,"
"Leader,"
"Manager," or
"Supervisor"
"No role
enhancement"

Count

1

Count

2.

Count

3

Count

4

The jury determined that with respect to each count, the amount of cocaine was more than 500 grams but less than 2000 grams, [*4] and that the defendant was an "organizer," "leader," "manager," or "supervisor," and thus eligible for a role enhancement under the guidelines.

Defendant's objection to this two stage trial is overruled.

SO ORDERED.

Jack B. Weinstein

Senior District Judge

Dated: October 12, 2004

Brooklyn, NY