

January 4, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40016
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BERNARD CUNNINGHAM,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:03-CR-844-ALL

Before JONES, BARKSDALE, and PRADO, Circuit Judges.

PER CURIAM:*

Following a jury trial, Bernard Cunningham was convicted of one charge of possession of more than one hundred kilograms of marijuana with intent to distribute. The district court sentenced him to serve eighty-four months in prison and a five-year term of supervised release.

Cunningham argues that plain error resulted from the admission of testimony concerning an offer to transport drugs. He argues that this testimony amounts to hearsay and does not fall

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

under the exception to the hearsay rule for coconspirator statements embodied in FED. R. EVID. 801(d)(2). The disputed testimony does not amount to hearsay, as it concerns a question or inquiry. See United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990). Cunningham has not shown plain error in connection with the admission of the disputed testimony.

Cunningham also contends that the statute of conviction, 21 U.S.C. § 841, is unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). This argument is, as he concedes, unavailing. See United States v. Slaughter, 238 F.3d 580 (5th Cir. 2000).

Cunningham has not shown reversible error in connection with his conviction and sentence. Accordingly, the judgment of the district court is **AFFIRMED**.