UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-6176
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAUL RODRIGUEZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR H-91-0007-01)

(December 29, 1992)

Before POLITZ, Chief Judge, DUHÉ and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:[*]

Raul Ortega Rodriguez was convicted of conspiracy and aiding and abetting the possession with intent to distribute more than 100 grams of marihuana. On appeal Rodriguez claims that the court committed plain error by failing *sua sponte* to caution the jury with regard to the testimony of cooperating accomplices. We

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

affirm.

Background

During the winter of 1989-90 Barbara McCollough, working as an undercover agent of the Drug Enforcement Administration, engaged Roger Walter Floyd and Harold Henrich Meyer in protracted negotiations for the delivery of large quantities of marihuana. Discussions during the meetings with Floyd and Meyer disclosed an ongoing marihuana importation operation between Houston and Mexico, via San Antonio and Laredo. Ultimately the parties agreed to terms and met at a Houston restaurant to complete the sale. Meyer proceeded from the restaurant to a warehouse, followed by a DEA agent. When Meyer emerged from the warehouse he was accompanied by Rodriguez and his truck carried 320 pounds of marihuana concealed under a tarpaulin. Meyer and Rodriguez then traveled separately to an adjacent parking lot where Meyer was to meet McCollough.

When McCollough arrived Rodriguez was talking to Meyer next to Meyer's truck. Rodriguez then walked to his car and waited with a woman later identified as Noe Ignacio Villanueva-Barboza. As McCollough approached Meyer's truck she noticed a strong odor of marihuana. Meyer and Rodriguez were arrested after McCollough found the marihuana underneath the tarpaulin. When arrested, Villanueva-Barboza possessed a marihuana cigarette. Meyer and Floyd were indicted with Rodriguez on the conspiracy and substantive counts.

DEA agents testified that shortly before the sale they saw Meyer and Rodriguez with several hispanics outside two rooms in a

Houston motel. Motel records confirmed that phone calls were placed from these rooms to Rodriguez and an unknown person in Laredo. A search of the Rodriguez car disclosed a long distance telephone bill reflecting a call to the same number in Laredo.

Floyd and Meyer testified against Rodriguez. Floyd informed the jury that he had agreed to testify for the prosecution and was promised the dismissal of one of the pending counts and a favorable sentencing recommendation. Floyd's testimony was consistent with that of the DEA agents. Floyd claimed to have met Rodriguez at the motel and that Rodriguez agreed to provide up to 300 pounds of marihuana for Floyd and Meyer to sell.

Meyer confirmed Floyd's version of the transaction, adding that while inside the warehouse Rodriguez assisted him with the loading of the marihuana. On cross-examination, Rodriguez' counsel attempted to impeach Meyer's testimony by focusing on his interest in seeing Rodriguez convicted. According to Rodriguez, Meyer was desirous of a reduction under section 5K1.1 of the guidelines for cooperation with the authorities.

The court failed to provide a specific accomplice credibility instruction to the jury. Although Rodriguez neither objected to the omission nor requested such an instruction, he now assigns the omission as error. We must determine whether the omission constituted plain error in light of the entire record.

Analysis

While relevant and indeed highly probative of guilt or

innocence, the testimony of an accomplice is inherently suspect because "an accomplice may have a special interest in testifying, thus casting doubt upon his veracity."[1] Accordingly, the receipt of such evidence is customarily accompanied by a cautionary instruction from the judge. The failure to give such an instruction, however, may or may not lead to reversal on appeal. The effect of a failure to provide an accomplice credibility instruction depends on the circumstances. Crucial to the determination is whether the defendant timely and specifically apprised the district court of its omission.[2] If so, the failure to give the instruction supports reversal of a conviction unless the error proves harmless when viewed in light of the entire record, i.e., where the other evidence of guilt is overwhelming.[3]

When there has been no objection or an insufficient objection, however, the record must demonstrate that the failure to give the instruction caused plain error, that is, error which if left uncorrected would result in a "manifest miscarriage of justice."[4] We resist the temptation to list the litany of cases in which we highlighted facts deemed significant in weighing the failure to

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[1] **Cool v. United States**, 409 U.S. 100, 103 (1972).

[2] Fed.R.Crim.P. 30.

[3] See, e.g., **United States v. Bernal**, 814 F.2d 175 (5th Cir. 1987).

[4] **United States v. Ruiz**, 860 F.2d 615, 617 (5th Cir. 1988).

give an accomplice credibility instruction. Our decision in **Jones**[5] adequately illustrates the principle that controls today's decision. There, as here, the defendant was convicted largely on the force of testimony of his accomplice. And, as here, the government independently knew of discussions between the men but was unaware of the content of those discussions. In weighing and ultimately rejecting Jones' claim of plain error we pointed out that there can be no fixed or rigid formula for determining whether such error exists.

While we have been more likely to find plain error in the presence of the following: a close balance between evidence of guilt or innocence;[6] the absence of corroboration of the accomplice's testimony;[7] and circumstances undermining the accomplice's credibility with respect to the facts related,[8] we also have made clear that such findings are not themselves equivalent to a conclusion that manifest injustice resulted from the failure to instruct the jury.[9] We do not find any of the

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[5] **United States v. Jones**, 673 F.2d 115 (5th Cir.), cert. denied, 459 U.S. 863 (1982).

[6] **United States v. Clark**, 480 F.2d 1249, 1254 (5th Cir.), cert. denied, 414 U.S. 978 (1973).

[7] **Tillery v. United States**, 411 F.2d 644 (5th Cir. 1969).

[8] **United States v. Arky**, 938 F.2d 579 (5th Cir. 1991).

[9] **Jones**, supra.

aforementioned factors occasioning a finding of plain error in the instant case. Nor do we find any other basis for such a finding on the record before us.

Meyer and Floyd were consistent in depicting their understanding of Rodriguez' involvement in the sale. Their version also coincided with the testimony of the surveilling DEA agents. During cross-examination of both Meyer and Floyd, defense counsel vigorously pointed out their potential bias, thus informing the jury why their testimony should be considered suspect. Counsel for both Rodriguez and the other codefendant pointedly argued the issue in closing argument. We do not suggest that counsel's questions and arguments carry the same force as a cautionary instruction from the presiding judge; but when viewed in light of the entire record, such allay the fear that the jury blindly returned a guilty verdict based on unscrutinized accomplice testimony. Finally, the district court did instruct the jury generally to consider the interests of each witness in weighing the credibility of their testimony. Although we invariably prefer the specific accomplice charge, when viewed as a whole, the record before us demonstrates that no manifest injustice resulted from the trial court's failure to give it in this instance.

AFFIRMED.