UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7157

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN CARLOS SALTOS, a/k/a "THOMAS", JIMMY RAY ROJO, and WILSON RENFIGO MUNOZ,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
CR3 90 128 R

March 30, 1993

Before, JOHNSON, GARWOOD, and JONES, Circuit Judges.[1]

EDITH H. JONES, Circuit Judge:

Each of the three appellants was charged with and convicted of conspiracy to distribute, and various counts of possession with the intent to distribute cocaine. Their source of drugs was tied by the evidence very closely to Colombia's Medellin Cartel. Among the most pressing contentions before us is the

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[1]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

complaint of appellant Munoz that the district court refused to grant a continuance when his only exculpatory witness refused to testify without his attorney's being present. Further, Munoz and Rojo raised interesting questions whether the court incorrectly applied the guidelines, § 1B1.3, to determine the amount of cocaine, and hence the length of sentence, they were culpable for.

We affirm the district court's decisions on issues challenging appellants' convictions, but we vacate and remand Rojo's and Munoz' cases for resentencing.

FACTS AND PROCEDURAL HISTORY

John Paul Weber, formerly a Swiss pastry chef, was arrested in April of 1989 for distribution of cocaine. He cooperated with the government and has aided in the successful prosecution of numerous drug dealers associated, inter alia, with Jose "Alex" Ramos. Ramos, already sentenced to imprisonment for life, was a major drug kingpin whose Houston, Texas operation regularly distributed thousands of kilograms of cocaine he imported from Colombia. Weber, one of Ramos's customers, would obtain the cocaine from Ramos in Houston and sell it in Dallas and other cities. In this case, Weber's information led to the indictment of 23 alleged conspirators. Appellant Rojo was accused of being a multi-ounce cocaine distributor and customer of Weber in Dallas. Munoz and Saltos were alleged to have aided in the transfer of the drugs from Ramos to Weber.

After the jury was impanelled, but before opening arguments, Nelson and Leonora Caminero, codefendants with the

appellants, pled guilty. The following day, the district court explained to the jurors that the Camineros were absent because they had pled guilty. He further cautioned them not to impute the Camineros' guilt to the remaining defendants. No attorney objected, asked for further instructions, or moved for a new trial.

Munoz was the only defense witness. However, his attorney, Mr. Bush, had arranged for Alex Ramos to testify in Munoz's behalf. Bush expected Ramos to exculpate Munoz, apparently by testifying that Munoz was merely a hired hand in charge of Ramos's ranch near Houston and uninvolved in drug trafficking. But once on the witness stand, Ramos refused to testify because of his attorney's absence. After an extended colloquy, the trial went on.

The jury found the three appellants guilty, and they were sentenced to lengthy terms of imprisonment. In sentencing the defendants, the district judge followed the PSR and attributed to each defendant the entire amount of drugs involved in the Ramos conspiracy. Appellants raise numerous issues for review.

DISCUSSION

Saltos

The complaints of appellant Saltos are easily addressed. Saltos first contends he was improperly joined with co-defendants Munoz and Rojo, who, he alleges, were members of a separate and distinct conspiracy. He further complains of prejudice because a greater quantity of evidence was presented against his co-defendants than against himself. He is most upset about the admission of evidence that linked the unindicted conspirator

Gustavo Gaviria to Pablo Escobar, a notorious member of the Medellin drug cartel.

The general rule is that defendants who are indicted together should be tried together. Zafiro v. United States, ____ U.S. ____, 113 S. Ct. 933, 937 (1993). In Zafiro, the Supreme Court recently re-emphasized the broad discretion committed to district courts to examine motions for severance made by criminal defendants. Fed. R. Crim. Proc. 14. The Court held that when defendants have, as here, been properly joined for trial, a severance is warranted only to avert a "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." ____ U.S. ____, 113 S. Ct. 938. The Court listed some examples of potential prejudice, but it also stated that less drastic measures than separate trials, such as limiting instructions, might often cure a risk of prejudice. Id. The Court also sought specificity in the claims of prejudice.

Measured by the stern but fair Zafiro test, the district court's refusal to sever Saltos was hardly an abuse of discretion. Saltos is hard put to identify any specific prejudice caused by his joint trial with Rojo and Munoz other than testimony referring to Pablo Escobar.[1] Yet that prejudice is not related to joinder of co-defendants so much as to the nature of the conspiracy, for

[1] In general terms, Saltos avers that Munoz and Rojo were members of a different conspiracy. He references no testimony to support his theory, but it was a defense which his attorney argued and on which the jury was instructed. No prejudice arose from a joint trial in this respect.

Colombian cocaine was the direct supply source for Alex Ramos, who sold in deals arranged by Saltos. Thus, even if Saltos had been tried separately, very similar evidence would have been admitted. In any event, the trial court's limiting instruction reminded the jury to judge each co-defendant individually. This instruction, not objected to by Saltos, was sufficient to alleviate any risk of prejudice from joinder. See Zafiro, 113 S. Ct. at 938, 939.

Saltos also contends that the uncorroborated testimony of Paul Weber, which formed the case against him, was insufficient to sustain his convictions for conspiracy and aiding and abetting the possession of cocaine with intent to distribute on January 17, 1989. On review of a sufficiency of the evidence claim, this court considers all the evidence in the light most favorable to the government, drawing all reasonable inferences and credibility choices to support the jury verdict. U.S. v. Hinojosa, 958 F.2d 624, 628 (5th Cir. 1992). The evidence here was sufficient.

Paul Weber testified of his personal, firsthand knowledge of Saltos's involvement in the drug ring. Weber testified that he often placed orders for cocaine from the Ramos organization through Saltos, and he described the conspirators' modus operandi. Weber testified that on January 17, 1989, he gave Saltos, whom he knew as "Tomas," a substantial amount of money for cocaine, and within the hour, Saltos delivered to Weber ten kilograms of cocaine from Ramos. Although this testimony was uncorroborated, this court recently determined that there is no requirement that testimony of a co-conspirator who is fulfilling the terms of a plea agreement be

corroborated by independent evidence. U.S. v. Hernandez, 962 F.2d 1152, 1157 (5th Cir. 1992). The jury is responsible for evaluating credibility. In Hernandez, as in this case, the jurors were informed that the witnesses were accomplices, and they were further informed of the plea agreement. Thus, when viewed in the light most favorable to the government, a rational juror could find Weber's testimony credible and could have determined that Saltos committed the crime charged.

Munoz

Appellant Munoz urges that the court erred by not granting a continuance until Alex Ramos's attorney was able to be present for Ramos's hoped-for exculpatory testimony. Alternatively, he challenges his own attorney's competence for not securing a continuance. The appeal of Munoz's sentence will be dealt with at the end of this opinion.[2]

Munoz complains that the trial court violated his right to compulsory process because Ramos refused to testify without Ramos's attorney being present. According to Munoz, Ramos' attorney had informed both the government and his attorney that Ramos would willingly testify on behalf of Munoz. On the day that Ramos was subpoenaed to testify, however, he refused. After being sworn, Ramos attempted to plead the Fifth Amendment, stating that he did not want to implicate himself on unrelated charges outstanding in New Jersey and Houston. The trial court informed

[2] Munoz's brief adopted the arguments of appellant Rojo and will be so treated in the section addressing Rojo's appeal.

Ramos that since he had pled guilty to the charges involved in this case, he had waived his Fifth Amendment privilege with respect to those incidents underlying the guilty plea. The court promised him that he would not be questioned on matters involved in the other prosecutions. Ramos still refused to testify unless his lawyer was present.

An inquiry on the whereabouts of Ramos's counsel revealed that Munoz' attorney had been unable to reach him recently and that he had gone into the hospital for an operation. The court chided Munoz' counsel for not having brought these matters to his attention until the fourth day of trial and for having forgotten the illness of Ramos's attorney. During the discussions of Ramos's refusal to testify, the court invited a motion for continuance, stating: "You can object to continuing and preserve your error, but we're going to continue with the trial." The district judge informed Ramos that he would hold a contempt proceeding when Ramos's attorney became available, and he refused to stop the trial.

The government first asserts that Munoz did not make a proper request for continuance. It is true that Munoz's attorney neither stated, "I request a continuance," nor acknowledged the court's comment that he could preserve his error. Ordinarily, a careful attorney would have done one or the other in response to the court's express reference to a continuance. Nevertheless, from the entire context of the dialogue between the court and the attorneys, such a request can be inferred. After the judge's

above-quoted remarks, Munoz's attorney explained the reasons that he would like a continuance. He protested that Ramos offered his client's only corroborative defense evidence. On facts somewhat similar to these, the Eleventh Circuit has held that a request for continuance could be inferred. Dickerson v. State, 667 F.2d 1364, 1369-70 (11th Cir. 1982).

Assuming that a motion for continuance was made and denied, we review the court's action under an abuse of discretion standard. Hicks v. Wainwright, 633 F.2d 1146, 1148 (5th Cir. 1981). When a motion for continuance for the purposes of securing defense witnesses is denied, we have considered the following factors probative: the diligence of counsel's efforts to interview the witnesses and procure their presence; the probability of securing their testimony within a reasonable time; the specificity with which the defense is able to describe their expected knowledge or testimony; the degree to which that testimony is expected to be favorable for the accused; and the unique or cumulative nature of the testimony. Id. at 1149 (quoting U.S. v. Uptaine, 531 F.2d 1281, 1287 (5th Cir. 1976)).

Munoz does not fulfill the critical requirement that the witness is expected to give substantial testimony favorable to the accused. At trial, the only showing that Ramos was going to give exculpatory evidence in favor of Munoz came from Munoz's attorney based on a conversation with Ramos's attorney. The affidavit filed with this court on appeal was not executed by Ramos but by his attorney. There was no real tender or proof of Ramos's expected

testimony. U.S. v. Poston, 902 F.2d 90, 97-98 (D.C. Cir. 1990) (Thomas, J.) (on similar facts, the court notes that the potential statements of the party invoking the Fifth Amendment were "mere assertions regarding the utility of a prospective testimony [which] do not provide a sufficient basis to compel a continuance."). The cases relied on by Munoz do not support his position. In Shirley v. State of North Carolina, 528 F.2d 819 (4th Cir. 1975), the prospective witness had already filed sworn testimony that he had seen another person, not the defendant, in possession of the drugs which formed the basis of the case. Id. at 822. Further, in Hicks, the psychiatrist whose testimony was made unavailable by the court's refusal to grant a continuance motion had previously filed affidavits stating that he was prepared to testify that the petitioner was psychotic on the date of the alleged offense. 633 F.2d at 1149.

In the instant case, we have no evidence, of the type available in Shirley and Hicks, that Ramos would have testified to exculpate Munoz. All we have is the self-serving statements of Munoz's attorney and the attorney for Ramos. There is no affidavit from the alleged exculpating witness nor is there sworn testimony in any court. If anything, Ramos's staunch refusal to testify for fear of incriminating himself, despite the court's rebuke and threat of a contempt proceeding, casts serious doubt over the likelihood of his later offering exculpatory testimony. As a matter of law, the evidence before this court cannot form the basis

of an abuse of discretion by the district court in denying the continuance.

Munoz's claim of ineffective assistance of counsel is based solely upon the premise that, if this court upholds the denial of the continuance because counsel failed to exercise due diligence to assure that Ramos would testify at trial, such omission was of constitutional magnitude. We have not discussed the issue whether Munoz's attorney Mr. Bush used due diligence, because it was unnecessary to do so. But even if we consider Bush's alleged lack of diligence in obtaining Ramos's testimony as a ground of ineffective assistance, the claim is meritless. It does not pass the "deficiency" prong of the test for constitutionally ineffective counsel. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Bush arranged for a timely appearance of Ramos. He had interviewed Ramos and spoken with his attorney before trial. Bush had no advance warning either that Ramos would invoke his privilege against self-incrimination or that Ramos would demand the presence of his attorney before testifying. It is thus not surprising that Bush failed to assure the presence of Ramos's attorney. With these facts in mind, it is impossible to find that Bush failed to fulfill the first prong of the Strickland test.

Rojo

Rojo first argues that the prosecutor's closing arguments were so unfair that a new trial was warranted. The court may not reverse a case because of improper jury argument unless the remarks substantially affected the defendant's right to a fair

trial. United States v. Murrah, 888 F.2d 24, 27 (5th Cir. 1989). The court is to consider the arguments in the context of the entire trial. United States v. Pierre, 958 F.2d 1304, 1312 (5th Cir. 1992). Defendants objected to only one of the alleged prejudicial statements. This court reviews the statements to which the defendant's attorney did not object for plain error. The defendant must prove and the court must find that the argument caused a miscarriage of justice--that the jury would not have convicted him if it had heard a proper argument. Id.

We have carefully reviewed the prosecutor's closing argument, along with cautionary jury instructions and the strength of the evidence against appellants and, as to the prosecutorial statements that were not objected to, we find no plain error. Rojo's reliance on Murrah is misplaced, for the heart of that reversal was the prosecutor's statements challenging the integrity and ethical standards of the defense counsel, made against the backdrop of a circumstantial evidence case, 888 F.2d at 26. Here the evidence is primarily of a direct testimonial nature, and no aspersions were cast on the defense attorney.

Rojo timely objected to one improper statement by the prosecutor made in response to an improper statement by Rojo's counsel urging the jury to find that Giraldo, a witness not called to testify by the government, would have been favorable to Rojo. The government attorney, in rebuttal, denied this inference and suggested it was the "duty" of the defense to subpoena Giraldo if he would have helped their case. When defense counsel objected,

the court instructed the jury that either side may subpoena witnesses. The prosecutor should not have implied that the defendant had any such duty. Nevertheless, the court's instruction sufficiently cured the error.

Rojo also complains that he was prejudiced because the jury was informed that codefendants Nelson and Leonora Caminero pled guilty after the trial had begun. Again, in the absence of a timely objection, we may only review for plain error. It is not even wrong, much less a plain error for the jury to find out that codefendants have pled guilty. U.S. v. Horton, 646 F.2d 181, 186-87 (5th Cir. 1981); U.S. v. DeLucca, 630 F.2d 294, 299 (5th Cir. 1980); U.S. v. Beasley, 519 F.2d 233, 240, 246 (5th Cir. 1975) (footnote citations omitted), vacated on other grounds 425 U.S. 956, 96 S. Ct. 1736, 48 L.Ed.2d 201 (1976). The court also gave a limiting instruction admonishing the jury that guilty pleas were not to be regarded as evidence against the remaining defendants. This instruction ameliorated any possible error. DeLucca, 630 F.2d at 298; U.S. v. Sockwell, 699 F.2d 213, 216 (5th Cir. 1983); Beasley, 519 F.2d at 239.

SENTENCING

Munoz and Rojo persist in their objections to the amount of cocaine for which the court held them culpable under the Sentencing Guidelines. These objections were made first in written responses to the presentence reports (PSR's) and then renewed at the sentencing hearing. Each defendant argued that he was not

involved with the amount of cocaine attributed to him by the probation officer's report.

When reviewing applications of the Sentencing Guidelines, this court makes legal determinations de novo, while findings of fact are subject to the "clearly erroneous" standard of review. United States v. Mourning, 914 F.2d 699, 704 (5th Cir. 1990). Under this standard, the court exercises plenary review over the legal standard used in determining the calculation of a defendant's sentencing level based on amounts of drugs distributed by persons other than the defendant. United States v. Collado, 975 F.2d 985, 989 (3d Cir. 1992).

The PSR's in this case and the judge's comments at sentencing indicate the magnitude of the conspiracy Jose Ramos headed. Each of the PSR's states in almost identical language that "the amount of drugs involved in this offense far exceeds the top of the drug quantity table in this section".[3] The judge, overruling counsel's objections to this statement, stated that such a finding was consistent with the evidence at trial. The court and the PSR's both apparently considered as "relevant conduct" for sentencing coconspirators Munoz and Rojo the hundreds of kilos of cocaine that Ramos was importing from Colombia. U.S.S.G. § 1B1.3. This conclusion implied that the entirety of the amounts of drugs

[3] As Defendant Munoz points out in his reply brief, this statement is in obvious conflict with the recommended sentencing level of 36 (where 42 was the maximum). We speculate that the probation officer used a superseded version of the guidelines under which 36 was the maximum offense level.

in the conspiracy was reasonably attributable to any member convicted of conspiracy.

This is an incorrect statement of law. According to the Sentencing Guidelines pertaining to conspiracy, each conspirator is to be sentenced on the basis of (a) the defendant's own conduct and (b) the conduct of co-conspirators "in furtherance" of the joint activity "that was reasonably foreseeable by the defendant." See Section 1B1.3, Commentary, Application Note 1 (cross referenced by section 2D1.4). The sentencing court must determine the quantity of controlled substance that the defendant knew or should have reasonably foreseen was involved in the conspiracy. United States v. Puma, 937 F.2d 151, 159-60 (5th Cir. 1991). The reasonable foreseeability requirement of section 1B1.3 requires a finding separate from a finding that the defendant was a conspirator. Id. at 160; U.S. v. Warters, 885 F.2d 1266, 1273 (5th Cir. 1989). It is important to note that the entire amount of drugs involved in a conspiracy is not automatically attributable to any defendant. Puma, 937 F.2d at 160. See W. Wilkins & J. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L.Rev. 495, 510 (1990). The examples and Application Note 1 of the Commentary to § 1B1.3 helpfully illustrate various situations under which "the reasonable foreseeability" standard of relevant conduct either allows or precludes the attribution of criminal activity of other co-conspirators to a particular defendant.

Although the defendants did not specifically object to the court's failure to make findings concerning the amount of

cocaine which the defendants should have reasonably foreseen, they did complain that they were not involved in the full range of the Ramos conspiracy. There is support for this contention in the facts recited in the PSR, which attribute only one specific, quantified transaction each to Rojo and Munoz. At trial, their ongoing activities were fleshed out somewhat but still appear to have been less extensive than, say, Ramos's participation in the conspiracy. The "foreseeability" of coconspirators' conduct or the scope of the conspiracy known to the appellants is an open question. Lamentably, the PSR's did not discuss the issue of foreseeable amounts of drugs attributable to Munoz and Rojo individually, and this omission may well have led the court astray.

This case is thus similar to United States v. Mitchell, 964 F.2d 454 (5th Cir. 1992), in which the court reversed a sentence because there was no indication in the PSR that Mitchell was aware of the other members of the extensive cocaine conspiracy or the extent of their purchases. Id. at 460. Ironically, Mitchell arose from John Paul Weber's revelations against other drug traffickers.

Because the underlying legal standard used by the judge in assessing the sentences was incorrect, we must remand for resentencing both Munoz and Rojo. At resentencing, the district court should make a finding of foreseeability in accordance with section 1B1.3.

CONCLUSION

Having rejected the appellants' attacks on their convictions but agreed that Munoz' and Rojo's cases require resentencing, these cases are **AFFIRMED** in Part, and **VACATED** and **REMANDED** for **RESENTENCING** of Munoz and Rojo.