UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-8599
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AUTRY LEE JONES, a/k/a
ARCHIE, JR.,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(A-CR-90-00177-01)

(December 4, 1992)

Before POLITZ, Chief Judge, GARWOOD and SMITH, Circuit Judges.

POLITZ, Chief Judge:[*]

Autry Lee Jones appeals his convictions for conspiracy to possess and possession of cocaine base with intent to distribute, and the concurrent life sentences imposed. Although represented by counsel at trial, Jones proceeds on appeal *pro se* and *in forma*

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

pauperis. Finding no error, we affirm.

Background

On November 6, 1990, Officer Randall Milstead of the Austin, Texas Police Department, in the course of undercover drug work, attempted to purchase cocaine from Demetra Madison. Milstead met Madison at her room in the Rio Motel. Madison told Officer Milstead that she had come to Austin with a man she called "Archie" to distribute cocaine and to operate a crack house. She further stated that Archie, also a motel guest, supplied cocaine to purchasers at the motel.

When Milstead told Madison that he wished to purchase cocaine, Madison went to Archie's room to make the arrangements. During Madison's absence Milstead talked with several other men in her hotel room who spoke of the availability of large amounts of cocaine. The men identified as Archie's son a person who came to the room while Madison was absent. When Madison returned, she told Milstead that, because of recent drug arrests at the Rio Motel, Archie insisted on the transfer of the cocaine only at another location later that evening. When Milstead asked where he could purchase cocaine immediately, Madison took him to a place in Austin where, with Madison's assistance, Milstead purchased cocaine from two men. Surveilling police promptly arrested Madison and the two men.

Cooperating with police, Madison agreed to arrange for Milstead's purchase of cocaine that evening from Archie. Madison

made a telephone call in the presence of Milstead and Officer Paul Ford, permitting them to record the conversation. Madison subsequently identified a photograph of Jones's son as "Archie, Jr.," and stated that Archie drove a white two-door Chevrolet Cavalier.

Police watched Jones enter the hotel room Madison identified as Archie's room and saw a white two-door Cavalier first outside of Madison's motel room and then near Jones's room. Madison had advised that two persons recently arrested on cocaine trafficking charges at the Rio Motel worked for Jones. The officers obtained a warrant for the search of the Chevrolet automobile and arrest warrants for Jones and his son.

Later, at a bus station, police watched Jones exit the white Chevrolet and return carrying a gray shoulder bag. Officers in unmarked units followed Jones, thinking he would either go to the Rio Motel or the crack house. When Jones went in a different direction, the pursuing officers elected to arrest him. Realizing that he was being followed, Jones threw the gray shoulder bag out of the car, and led the police on a high speed chase through the streets of Austin. Police picked up the jettisoned container in which they found cocaine and marihuana, and they arrested Jones. Investigating officers found additional evidence of drug trafficking activity in Jones's room at the Rio Motel. The grand jury indicted Jones for conspiracy to possess and possession of cocaine base with intent to distribute and a trial jury found him guilty of all charges. This appeal followed.

Analysis

A. Issues Raised for the First Time in This Court

Jones raises many issues for the first time in this court.[1] Because Jones failed properly to bring these claims before the trial court, we review the actions he complains of only for plain error.[2]

One of the claims Jones raises for the first time is

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[1] He claims that police improperly arrested him without a warrant; that the prosecution failed adequately to authenticate the cocaine used as evidence against him at trial; and that Madison, after trial, recanted her statements to Officer Milstead. He also challenges the search and arrest warrants issued by the state court on the ground that Officer Ford, in the affidavits on which the magistrate relied in issuing those warrants, made affirmative misrepresentations as to his possession of a sworn statement from his informant. Jones also claims for the first time in this court that the district court improperly: admitted into evidence for their truth, statements by Demetra Madison to police prior to her arrest and in a tape recorded telephone conversation with Jones; refused to subpoena Ella Winley and Anthony Boldin; refused to subpoena the laboratory notes of the APD chemist analyzing the substances confiscated; ordered the U.S. Probation Office, rather than the Administrative Office of the United States Courts, to oversee payment of his fine; permitted the jury to consider as evidence a prior conviction in which his habitual offender sentence was predicated on earlier convictions invalid on sixth amendment and state law grounds; assessed a two-point increase in offense level for obstruction of justice; and assigned him three criminal history points at sentencing on the basis of a prior conviction invalid because the court in that case never advised of his right to appeal.

[2] We defined plain error as "error which, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of judicial proceedings." **United States v. Breque**, 964 F.2d 381, 388 (5th Cir. 1992), cert. filed, 61 U.S.L.W. 3356 (U.S. Oct. 26, 1992) (No. 92-738) (quoting **United States v. Lopez**, 923 F.2d 47, 50 (5th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 2032, 114 L. Ed. 2d 117 (1991)).

ineffective assistance of counsel. We generally do not entertain such claims on direct appeal because of an insufficient record.[3] So it is here. Jones asserts that one of his attorneys lied about his presence at a meeting for inspection of prosecution evidence, and repeatedly alleges that his attorneys conspired with the government against him. In the record before us we cannot assess the merit of these claims and therefore decline to reach them.

B. Violation of Fed. R. Evid. 404(b)

Jones contends that the trial court improperly permitted the prosecution to introduce the records of his 1981 Texas conviction for possession of a controlled substance. Because the Texas court sentenced Jones under that state's habitual offender statute, that state record reflected earlier convictions for armed robbery and burglary. The prosecution argued that the conviction record tended to establish identity, knowledge, common scheme, opportunity and the fact that Jones was on life probation at the time of the alleged acts. We have long held that the determination of admissibility of other crimes evidence requires a two-part analysis, considering first whether the past crime evidence tends to establish anything other than bad character, and then whether the undue prejudicial effect of the evidence substantially outweighs its probative value.[4] The highly prejudicial nature of

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[3] **United States v. Higdon**, 832 F.2d 312 (5th Cir. 1987).

[4] **United States v. Beechum**, 582 F.2d 898 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979).

this type of evidence requires the exercise of great care. Nevertheless, where error under Fed. R. Evid. 404(b), when considered in relation to the entire proceedings, had no apparent substantial influence on the jury's verdict, we may consider that error harmless.[5]

We doubt the relevance of the past criminal conduct and suspect that its prejudicial effect substantially outweighs its probative value. But viewed against the overwhelming evidence of guilt we must perforce conclude that any error committed in allowing its admission properly may be characterized as harmless.

C. Application of Sentencing Guidelines

1. Imposition of Fine

Jones claims that the district court erred in fining him $25,000 under U.S.S.G. § 5E1.2 for each of his convictions. He argues that the trial court incorrectly found him able to pay a fine as required by U.S.S.G. § 5E1.2(a). In considering a sentence, we accept trial court findings of fact unless clearly erroneous, but review *de novo* the application of the guidelines.[6] The presentence report supports the trial court's implicit finding

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[5] **See, e.g., United States v. Williams**, 957 F.2d 1238, 1244 (5th Cir. 1992) (citation omitted).

[6] 18 U.S.C. § 3742(e); **United States v. Shell**, 972 F.2d 548 (5th Cir. 1992).

that future earning potential may permit Jones to pay fines;[7] we thus will not disturb that finding. As future ability to pay will support imposition of fines under U.S.S.G. § 5E1.2,[8] the trial court did not err by imposing fines.

2. Assessment of Four-Point Increase for Leadership Role

Relying on **United States v. Barbontin**,[9] Jones argues that the trial court erroneously assessed a four-point increase in offense level for a leadership role in criminal activity under U.S.S.G. § 3B1.1(a) because it had no evidence expressly identifying five participants in any of the criminal transactions leading to his convictions. The upward offense level adjustment permitted by U.S.S.G. § 3B1.1(a) applies where the defendant took a leadership role in "the transaction leading to the conviction."[10] In

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[7] At sentencing, district courts may consider reliable evidence, regardless of its admissibility at trial. **See** 18 U.S.C. § 3661; U.S.S.G. § 6A1.3(a) (district court may consider information without regard to admissibility at trial as long as information bears sufficient indicia of reliability). We have held that presentence reports usually fall within the category of evidence which the district court may consider. **United States v. Alfaro**, 919 F.2d 962, 966 (5th Cir. 1990).

[8] See **United States v. O'Banion**, 943 F.2d 1422, 1432 n.11 (5th Cir. 1991) (citations omitted). We note that the trial court in this case imposed the minimum fine on Jones for each of his convictions. **See** U.S.S.G. § 5E1.2(c)(3) (setting minimum $25,000 fine where offense level exceeds 37).

[9] 907 F.2d 1494 (5th Cir. 1990).

[10] **United States v. Mir**, 919 F.2d 940, 944 (5th Cir. 1990).

Barbontin, we found that the trial court had failed to identify the five transactional participants required by § 3B1.1(a); we provided no precise definition of the term "transaction" in this context. Clarifying official commentary added to the Guidelines after **Barbontin** denotes the scope of the criminal transaction for the purposes of § 3B1.1,[11] indicating that it may go beyond the narrow confines of the crime charged to include "the contours of the underlying scheme."[12]

In determining the propriety of an upward adjustment under U.S.S.G. § 3B1.1, we are directed to consider "relevant conduct" as defined in U.S.S.G. § 1B1.3.[13] When considering convictions for conspiracy to possess and possession of cocaine base with intent to distribute, § 1B1.3(a)(2) directs our attention to all such acts or omissions "that were part of the same course of conduct or common scheme or plan as the offense of conviction."[14] Evidence adduced

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[11] See **United States v. Rodriguez**, 925 F.2d 107 (5th Cir. 1991) (guidelines provide framework for determining scope of transaction); **Mir**, 919 F.2d at 945.

[12] **Mir**, 919 F.2d at 945.

[13] See U.S.S.G. Ch. 3, Pt. B, intro. commentary ("The determination of the defendant's role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct) . . . and not solely on the basis of elements and acts cited in the count of conviction.").

[14] U.S.S.G. § 1B1.3(a)(2). The guidelines covering convictions for conspiracy to possess and possession of cocaine base with intent to distribute fall within the ambit of U.S.S.G. § 3D1.2(d), and hence fall within the broad definition of "relevant conduct" provided by § 1B1.3(a)(2). See U.S.S.G. § 3D1.2(d) (including § 2D1.1); U.S.S.G. § 3D1.2(d) comment 6 (guidelines

at trial together with the presentence report supports the conclusion that Jones employed five people in a drug trafficking operation. The record reflects that the scheme underlying both the possession and conspiracy convictions includes the operation which Jones supervised.[15] We conclude that the trial court properly assessed the four-point upward adjustment.

3. Assessment of Criminal History Points

Jones argues that the district court improperly added three criminal history points for a 1969 armed robbery conviction, contending that it was too old to count. This argument misperceives the Sentencing Guidelines which unambiguously require scoring of any sentence of imprisonment imposed within or extending into the fifteen years preceding commission of the offense of conviction.[16] The State of Louisiana released Jones from confinement for the 1969 conviction in 1979 -- well within the 15-year period. This argument is frivolous.

Jones also claims that the district court improperly assessed three criminal history points for the Texas conviction because the

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covering conspiracy to commit offenses covered by enumerated guidelines also included in subsection).

[15] See **Mir**, 919 F.2d at 946 (defendant convicted of cocaine possession with intent to distribute properly subjected to four-point increase of § 3B1.1 for leadership role in related drug trafficking ring, although unassisted in specific offense conduct for which convicted).

[16] U.S.S.G. § 4A1.2(e)(1).

habitual offender sentence imposed therein was predicated upon an earlier conviction in which he was denied counsel at a parole revocation hearing. The assignment of three criminal history points for the Texas conviction changed Jones's criminal history range from III to IV, but had no effect on his guideline sentencing range of 360 months to life.[17] Assuming *per arguendo* that a lack of counsel at a parole revocation hearing is relevant, if we find that assignment of three criminal history points to the Texas conviction "did not affect the district court's selection of the sentence imposed," we may find any error harmless and need not remand for resentencing.[18]

The sentencing court considered, as it was entitled to do, Jones's prior criminal record and the seriousness of the offense in imposing sentence. If there was error in adding the criminal history points, which we doubt, such patently was harmless.[19]

4. Weight of the Cocaine Base

Jones urges that the trial court erred by refusing to permit

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[17] See U.S.S.G. Ch. 5, Pt. A, Sentencing Table (providing sentencing range of 360 months to life for offense of level 42 in criminal history ranges III and IV).

[18] See **United States v. Johnson**, 961 F.2d 1188, 1189 n.1 (5th Cir. 1992) (citing **United States v. Williams**, 112 S. Ct. 1112 (1992)).

[19] See 18 U.S.C. § 3661 (sentencing court may consider any information concerning background, character and conduct of convicted person in imposing sentence).

him to weigh the confiscated cocaine at sentencing. He did not request an opportunity to weigh the contraband at trial, did not cross examine the police chemist at trial about weight, and never claimed that the presentence report contained an incorrect weight. Rather, he suggests that the weight noted in the presentence report differs from the weight attested to at trial. He errs. Both trial testimony and the presentence report reflect that police arrested Jones in possession of 676.24 grams of cocaine base. This argument also is meritless.

D. Discovery of Madison Statement

Jones argues that the government's failure to disclose to him a written statement made to Austin officers by Demetra Madison violated the Jencks Act[20] and Fed.R.Crim.P. 16, and that this violation requires reversal of his conviction. We disagree. Under our precedents, the government does not "possess" statements in the exclusive custody of state or local authorities for Jencks Act purposes,[21] or for the purposes of Fed.R.Crim.P. 16.[22] Although the Austin police report referred to a written statement by Madison, and the parties discussed the applicability of the Jencks Act to such a statement at trial, the government's assertion at sentencing

[20] 18 U.S.C. § 3500.

[21] See **United States v. Escobar**, 674 F.2d 469 (5th Cir. 1982).

[22] See **Thor v. United States**, 574 F.2d 215 (5th Cir. 1978).

that it never possessed such a statement by Demetra Madison and did not know whether one actually existed goes unrefuted. We need not decide whether such statements fall within the ambit of either the Jencks Act or Rule 16.

2. Motion for Subpoena

Jones further claims that the trial court erroneously denied his motion, presumably under Fed. R. Crim. P. 17(b), to subpoena Demetra Madison to the hearing on pretrial motions. Under Fed. R. Crim. P. 17(b), the court may, on the motion of an indigent defendant, subpoena at government expense witnesses necessary to an adequate defense. The district court may refuse to subpoena a witness who would present only cumulative or irrelevant testimony.[23] Trial courts enjoy broad discretion under Rule 17(b).[24]

In this case, the trial court found that Jones had not made the showing established by **Franks v. Delaware**[25] to warrant an evidentiary hearing on his challenge to the search warrant affidavits. The trial court found that Demetra Madison's testimony could have no relevance at the suppression hearing and denied the motion. The motion for subpoena set forth no information as to the

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[23] See **United States v. Bowman**, 636 F.2d 1003 (5th Cir. 1981).

[24] See, e.g., **United States v. Samples**, 897 F.2d 193 (5th Cir. 1990).

[25] **438 U.S. 154 (1978).**

relevancy of Madison's testimony; we cannot conclude that the trial court abused its discretion in its ruling.

E. Probable Cause to Issue Search Warrants

Jones claims that the affidavit by Officer Ford did not provide the probable cause needed to support search and arrest warrants because it indicated neither the reliability of his informant nor independent police corroboration of the information she supplied. In **Illinois v. Gates**,[26] the Supreme Court held that, in answering the probable cause question, magistrates should look to the totality of the circumstances, making "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."[27] Although knowledge and veracity of informants providing hearsay information remain important factors under the **Gates** test, a strong showing as to one of the indicia of reliability may compensate for weakness as to another. Independent corroboration by police, even as to innocent facts, may provide a basis for crediting the otherwise insufficient hearsay statements of an informant.[28] In our review, we seek only to ensure that the issuing

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[26] 462 U.S. 213 (1983).

[27] **Id.** at 238.

[28] See, e.g., **id.** at 244-46 & n.13; **United States v. Jackson**, 818 F.2d 345 (5th Cir. 1987).

magistrate had a substantial basis for the probable cause conclusion.[29] We independently review, however, district court conclusions as to affidavit sufficiency.[30]

In this case, Officer Ford's affidavits relied in large part on statements made to him by Demetra Madison immediately following her arrest. As Jones correctly contends, the incentive of a recently arrested person to make false statements so as to curry favor with authorities seriously impairs the reliability of such informants. The two affidavits in this case, however, reflect independent police work corroborating Madison's statements to Officer Ford on several points,[31] thus tending to support her reliability. Further, both affidavits strongly demonstrate the basis for Madison's knowledge. Her statements provide many details

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[29] See **Gates**, 462 U.S. at 238-39; **Jackson**, 818 F.2d at 348.

[30] See, e.g., **Jackson**, 818 F.2d at 348.

[31] In both affidavits, Officer Ford reported Madison's statements that: (1) police had arrested two people at the Rio Motel, named "Ella" and "Big Man" who distributed cocaine for "Archie"; (2) that she and "Archie" had come to Austin together in a white 2-door Chevrolet Cavalier; and (3) that she and Archie had rented rooms 111 and 211 of the Rio Motel, respectively. Police records, presented in both affidavits, documented the arrests on cocaine charges of Anthony Boldin (who identified himself to undercover officers as "Big Man") and Ella Winley the previous week at the Rio Motel. Further, the first affidavit reported that police had observed a white Chevrolet Cavalier in front of Madison's room; the second affidavit reported observation of the same car in front of room 211. In the second affidavit only, Officer Ford reported Madison's statement that Archie had arranged to distribute cocaine out of a house on Chicon Street, and that Ella Winley had established utility service there. Police investigation, reported in the second affidavit, revealed that Ella Winley had, in fact, established utility service at 1181 Chicon.

about Jones's drug operation. She made many of her statements to Officer Ford on the basis of personal knowledge.[32] Her status as a participant in Jones's drug operation lends credence to her claimed knowledge. The instant affidavits sufficiently support issuance of the warrants.

F. Sufficiency of Evidence to Support Conspiracy Conviction

Jones argues that the government presented no evidence proving that he entered into the agreement required in support of a conspiracy conviction. As we have repeatedly noted, however, the government need not, in a drug conspiracy case, prove by direct evidence that the defendant entered into a criminal agreement. Rather, the jury may infer existence of the requisite agreement from concert of action among the defendant and others.[33] In the instant case, the government presented evidence that Jones and Demetra Madison brought a large amount of cocaine from Houston to Austin, intending to establish a crack house distribution operation. The evidence further establishes that Madison attempted to arrange cocaine sales on Milstead's behalf. This evidence amply demonstrates the concert of action necessary to infer the existence of a criminal agreement. Jones's challenge to sufficiency of the

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[32] See **United States v. Phillips**, 727 F.2d 392, 399 (5th Cir. 1984) (fact that informant's statements recounted in warrant affidavit were detailed statements and based on personal knowledge strongly demonstrates informant's basis for knowledge).

[33] See, e.g., **United States v. Gonzalez-Rodriguez**, 966 F.2d 918 (5th Cir. 1992) (citation omitted).

evidence is without merit.

We find no merit in any of the several other assignments of error raised by Jones.[34]

The convictions and sentences are AFFIRMED.

[34] Jones's extensive litany of assignments of error challenges the referral of his case for federal prosecution as violative of the due process and equal protection clauses; that the trial court erroneously refused to subpoena Austin police radio transmission recordings from the time of his arrest as evidence that he was arrested without a warrant; ambiguity in the definition of cocaine base in 21 U.S.C. § 841; that the district court lacked jurisdiction over this prosecution; that the government made misleading statements to the tribunal amounting to prosecutorial misconduct; that the prosecution failed to produce in advance of trial the recording of the telephone conversation between himself and Demetra Madison; and that the trial court erroneously ruled unwritten, unsigned hearsay statements admissible.