

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1338
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO B. LOPEZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(CR3-91-185-T)

(December 9, 1992)

Before POLITZ, Chief Judge, KING and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:*

Convicted by a jury of conspiring to possess cocaine with intent to distribute and of aiding and abetting in the substantive offense, Francisco B. Lopez appeals his convictions, claiming prosecutorial misconduct and insufficient evidence. He also

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeals his sentences, assigning error to the court's refusal to grant a two-point reduction in the guidelines offense calculation for acceptance of responsibility. Finding neither error nor abuse of discretion, we affirm.

Background

While conducting undercover drug investigations, Dallas police officer Frank Perez met Lopez and another person identified only as "Peanut." There were multiple discussions, over a period of several days, about Perez's interest in purchasing cocaine. Terms of sale and specifics of delivery were finally agreed upon. At one of the meetings Lopez was accompanied by a person identified as "Garfield." These meetings were carefully observed by several surveillance officers, including Officer David McCoy. On January 18, 1991 Lopez delivered to Perez 921.9 grams of 92% cocaine. There was some confusion as to the name of the person Perez had been negotiating with, but the in-court identification of Lopez was positive. He was identified as the negotiating and delivering party. Following sentencing, Lopez timely appealed.

Analysis

Lopez's claims of prosecutorial misconduct relate to a claimed violation of an *in limine* order prohibiting the prosecution from presenting any evidence of unadjudicated offenses without prior specific court approval. During the course of officer Perez's testimony, while discussing the confusion surrounding Lopez's true

name (the officer had been told Lopez's name was "Frank Ortiz" and Lopez had asked to be referred to only as "Boogie"), the officer was asked how he learned of Lopez's true identity. The following question and answer resulted:

Q: How did you -- when did you have an opportunity to develop and to substantiate the correct name of the defendant?

A: Well, one time I had been paged on my pager I didn't get a chance to call that number back. And I called it back late, somebody else answered the phone and told me that it was a pay phone at a store. And I asked, well I was just paged. And they said well, there was a Frank Lopez here paging somebody or using the phone a little earlier. I said fine. Some time later, few months after this transaction, I received a call from the Assistant United States Attorney in Louisiana and --

A defense objection to relevance was made and sustained. The prosecutor referred to the incident in his closing argument as part of his explanation why the officers did not know Lopez's correct name during the course of the negotiations. The court sustained a defense objection and instructed the jury to disregard the prosecutor's remarks about Lopez's legal difficulties in Louisiana, but denied a mistrial.

This allusion to prior bad acts was obviously viewed by the trial judge as an innocent nonresponsive answer by a prosecution witness which had little significance. The witness's answer went unfinished and there was no detailing of the cause, purpose, reason, or meaning of the telephone call from the Assistant United

States Attorney in Louisiana. We likewise view the matter,¹ and finding no abuse of discretion reject this assignment of error.²

Nor do we find any merit to Lopez's claim that the evidence is insufficient to establish that he was the person who met and dealt with Officer Lopez.³ The record reflects adequate evidence upon which the jury could have acted, including the positive in-court identification by both officers Perez and McCoy.⁴

Finally, Lopez's contention that the trial judge's refusal to grant a two-point reduction in the guidelines computation violated his fifth amendment privilege against self-incrimination is foreclosed by our decision in **United States v. Mourning**, 914 F.2d 699 (5th Cir. 1990).

The convictions and sentences are AFFIRMED.

¹ **United States v. Lokey**, 945 F.2d 825 (5th Cir. 1991).

² **United States v. Rocha**, 916 F.2d 219 (5th Cir.), cert. denied, 111 S.Ct. 2057 (1991).

³ This issue was not raised at the trial court level and we thus review only for a manifest miscarriage of justice. **United States v. Pierre**, 958 F.2d 1304 (5th Cir. 1992) (*en banc*).

⁴ **United States v. Fernandez-Roque**, 703 F.2d 808 (5th Cir. 1983).