UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1768
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIE D. SMITH,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
(3:91 CR 047 R)

(July 8, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant Willie D. Smith was convicted of (1) being a felon in possession of a firearm, (2) possessing cocaine with the intent to distribute, and (3) possessing a firearm in a drug trafficking crime. Smith brings this direct appeal claiming that his conviction should be overturned because (1) the prosecutor made

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

illegal remarks during closing argument, (2) Smith's Sixth Amendment right to a speedy trial was violated, and (3) Smith's statutory right to a speedy trial was violated. Smith also challenges his sentence on appeal, claiming that he is entitled to credit for his acceptance of responsibility. Because all of Smith's claims lack merit, we affirm.

Facts and Proceedings Below

At 2:30 a.m. on January 13, 1991, a ticket agent at the Greyhound bus terminal in downtown Dallas noticed that Smith was boarding a bus with a pistol stuck in his waistband. The ticket agent informed the security officer at the terminal, an off-duty police officer, who immediately arrested Smith for illegally carrying a firearm.[1] While waiting for on-duty Dallas police officers to arrive to pick up Smith, the security officer detained him in the break room at the bus station. In the break room, the security officer searched Smith and discovered eight small bags of crack cocaine in Smith's right front pocket and three larger bags, containing respectively twenty, twenty, and twenty-one smaller bags of crack cocaine. The total net weight of the cocaine was 74.8 grams, about a year's supply for a moderate user.

Dallas police officers picked Smith up at the bus terminal, transferred him to the Lew Sterret jail, and kept him in custody there for six weeks.

On February 27, Smith was indicted by a federal grand jury on the three charges stated above. On March 1, 1991, Smith was

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[1] The gun was a Brazilian made Taurus .357 magnum transported to Dallas, Texas, through interstate commerce.

released from Lew Sterret by local authorities in spite of a federal detainer. Also on March 1, a federal arrest warrant was issued.

On March 13, 1991, Smith was arrested by Texas authorities on unrelated charges and kept in their custody through March 18, 1992.

The federal agents, however, were unaware that Smith had been rearrested by Texas authorities and were unable to locate Smith to prosecute him on the federal indictment. On April 7, 1992, fifteen months later, Smith was found by federal authorities at a state run halfway house in Houston, Texas, and was then finally arrested on the federal warrant.

During the period after his original release from state custody in March 1991 and prior to his arrest on the federal warrant in April 1992, federal agents made several attempts to locate Smith. On March 25, federal agents went to find Smith at the address Smith gave as his place of residence when he was arrested in January 1991. The agents spoke to people in the house who said that they were related to Smith, but that Smith had not lived there for over a year since separating from his wife and that they did not know where he was. The agents also looked for Smith at Judy's Lounge, a club where he had been employed as a singer prior to his January 1991 arrest, but no one at the lounge knew how to locate him.

The agents and the U.S. Attorney stated that they did not notice that a TCIC computer check on Smith run on January 22, 1991, before Smith was originally released by local authorities, reflected that Smith was then on parole and listed the names of his

two parole officers. Smith's parole officers knew that he was in the custody of Texas authorities after March 13, 1991. The federal agents and the U.S. Attorney admit that they made no efforts to contact Smith's parole officers to help locate him and that they knew that contacting a suspect's parole officer is a good method of attempting to locate the suspect.

The agents and the U.S. Attorney admit that they did not run an NCIC computer check after Smith was released by the local authorities on March 1, 1991. Such a check, after March 13, 1991, would likely have revealed that Smith was in the custody of Texas authorities and enabled them to have Smith transferred to their custody to commence prosecution of the case.[2]

Smith was tried on June 1 and 2, 1992. Smith did not testify at trial *and* Smith offered no evidence in his defense other than challenging the prosecution's witnesses on cross-examination. During trial, the prosecutor made the following remarks in his closing argument:

> "PROSECUTING ATTORNEY: The Judge charges, you have to base your verdict on the evidence not on speculation, or supposition, or what might have been. *They had an opportunity like everyone else to present testimony in this case.*
>
> DEFENSE ATTORNEY: Your Honor, that's improper closing argument. Whether or not we present evidence it's not our burden.

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[2] Prior to trial, the government alleged that on April 2, 1991, an NCIC computer check was conducted by federal agents; however, no evidence to that effect was placed in the record during the district court's hearing on the issue of Smith's right to a speedy trial. Agents only testified that they entered the federal arrest warrant for Smith on the NCIC system on April 2, 1991.

THE COURT: I'll sustain the objection.

PROSECUTING ATTORNEY: Well let me say this, . . . They are under absolutely, I want to make sure on this, they're under absolutely no obligation whatsoever to call a single witness and I don't quarrel with that for a minute. That's the law. *But if there was a question about the -- let's say how much crack cocaine usage a person used on the street, they wanted to refute our testimony.*

DEFENSE COUNSEL: Objection, improper argument and

THE COURT: That is . . .

DEFENSE COUNSEL: . . . we are under no obligation.

THE COURT: That is sustained." (Emphasis added).

Shortly thereafter the court instructed the jury: "I sustained an objection to those last two arguments. I know you understand when I sustain an objection that means you are not to consider those arguments or talk about them during deliberations."

Smith was convicted of (1) being a felon in possession of a firearm, (2) possessing cocaine with the intent to distribute, and (3) possessing a firearm in a drug trafficking crime. Smith did not testify at trial. Smith now appeals his conviction and sentence, raising four points of error.

Discussion

I. Improper Prosecutorial Remarks

Smith contends that the prosecutor's remarks during closing argument improperly attempted to shift the burden of proof and violated Smith's Fifth Amendment rights because they referred to Smith's failure to testify.

A defendant must show that the contested remarks were improper and that they substantially affected the defendant's right to a

fair trial. *United States v. Rocha*, 916 F.2d 219, 235 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2057 (1991). A prosecutor may not attempt to misstate the burden of proof. *See United States v. Cantu*, 876 F.2d 1134, 1138 (5th Cir. 1989). Three factors are considered in evaluating whether improper prosecutorial remarks justify reversal: "the magnitude of the prejudicial effect of the remarks, the efficacy of any cautionary instruction, and the strength of the evidence of the defendant's guilt." *United States v. Diaz-Carreon*, 915 F.2d 951, 956 (5th Cir. 1990).

We need not decide whether the remarks were improper because even if they were, any error was harmless.[3] Smith made no showing on appeal that he was prejudiced by the remarks. The record suggests that the jury would not likely have given much weight to the remarks because they were brief, it was obvious there was no defense evidence, defense counsel objected twice immediately after the remarks were made, the court sustained both the objections, and the court gave the jury a cautionary instruction. The cautionary instruction alone sufficed here to remove any prejudice from the remarks. *See United States v. Randall*, 887 F.2d 1262, 1269 (5th Cir. 1989) (cautionary instruction cured prejudice). Also, a vast amount of evidence proved Smith's guilt. At the time of Smith's arrest, he had 74.8 grams of crack cocaine in his pockets, far more

[3] The prosecutor's remarks may have improperly attempted to shift the burden of proof to Smith by suggesting that Smith had a duty to refute the prosecution's evidence, which he did not. The jury could have found Smith innocent if the prosecution failed to offer sufficient evidence of guilt or if they disbelieved the prosecution's evidence without defense counsel offering any evidence or even cross-examining the prosecution's witnesses.

than the amount a mere drug user would likely possess on any given occasion for personal use. The cocaine was packaged in small bags that each contained one medium-sized crack rock. Smith's claim that his conviction should be overturned because the prosecutor engaged in improper burden shifting lacks merit because the remarks, even if improper, did not harm Smith.[4] *See Habertroh v. Montanye*, 493 F.2d 483, 485 (2d Cir. 1974) (similar remark harmless error).

Smith failed to raise his Fifth Amendment claim below so we review it only for plain error. *See Diaz-Carreon*, 915 F.2d at 957 & n.11. "The fifth amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify." *United States v. Borchardt*, 809 F.2d 1115, 1119 (5th Cir. 1987) (citing *Griffin v. California*, 85 S.Ct. 1229 (1965)). "A prosecutor may comment, however, on the failure of the defense, as opposed to the defendant, to counter or explain the evidence." *Id*. Such a comment only justifies reversal where the comment is "'of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *Id.* (quoting *United States v. Bright*, 630 F.2d 804, 825 (5th Cir. 1980)); *Montoya v. Collins*, 955 F.2d 279, 287 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 820 (1992); *United States v. Wade*, 931 F.2d 300, 305 (5th Cir.), *cert. denied*, 112 S.Ct. 247 (1991).

In closing, the prosecutor said: "But if there was a question

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[4] We note that Smith's counsel below did not ask for a mistrial after the prosecutor's remarks. Nor did he ask for further or other curative instructions.

about theSQlet's say how much crack cocaine usage a person used on the street, they wanted to refute our testimony." Smith claims that this remark commented upon his failure to testify because only he could have testified that the cocaine seized from him was for personal use and not for purposes of distribution. This argument is false. Smith could have presented character witnesses, including "Gladys" (a woman with whom he told the police he was going to share the cocaine), to show that he was not a drug dealer, or an expert witness to testify that the amount of cocaine he possessed was not abnormally large for the average drug user and that the way it was packaged was also not abnormal for the average drug user. Thus, Smith failed under both the plain error standard and the lower abuse of discretion standard to show how these remarks reflect his refusal to testify as opposed to the failure of the defense to offer evidence. *Compare United States v. Collins*, 972 F.2d 1385, 1406-09 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1812 (1993) (remark "And he won't tell . . . ." comment on failure of defense when considered in context).

II. Sixth Amendment Speedy Trial Rights

Smith contends that the United States violated his Sixth Amendment right to a speedy trial by deliberately waiting fifteen months to arrest him.

The Sixth Amendment provides that the accused has a right to a speedy trial in all criminal prosecutions. Courts examine four factors in analyzing speedy trial claims: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant." *Nelson v.*

Hargett, 989 F.2d 847, 851 (5th Cir. 1993) (citing *Barker v. Wingo*, 92 S.Ct. 2182, 2192-93 (1972). These factors are applied in a flexible and practical manner. *Id.*

A. Length of delay

A defendant must show that the delay was of a sufficient duration to be presumptively prejudicial for the courts to consider a speedy trial claim. *Doggett v. United States*, 112 S.Ct. 2686, 2690-91 (1992). Once a presumptively prejudicial delay is shown, the length of the delay is balanced with the other factors to determine if a violation occurred. *Id.* (length of delay considered "as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim"). The Fifth Circuit requires a delay of at least one year between the earlier of arrest or indictment and the subsequent prosecution of the case to make the delay presumptively prejudicial and trigger the speedy trial analysis. *Nelson*, 989 F.2d at 851-52. *See Doggett*, 112 S.Ct. at 2691 n.1.

Because there was a fifteen month interval between Smith's indictment and his subsequent arrest and prosecution, he has shown that the delay was presumptively prejudicial, allowing further analysis of the other *Barker* factors. However, because the delay was only fifteen months, this factor does not weigh heavily in Smith's favor.

B. Reason for delay

Under *Barker*, "different weights should be assigned to different reasons [for the delay]," with deliberate efforts "to hamper the defense . . . weighted heavily against the government.

A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government . . . ." 92 S.Ct. at 2192. If the delay is because the defendant is imprisoned or in custody by another sovereign, "the proper focus is . . . whether, and to what extent, the state took steps to bring [the defendant] back . . . for trial." *Nelson*, 989 F.2d at 853.

There is no evidence that federal authorities intentionally failed to locate Smith or intentionally failed to contact his parole officers, and the district court found the government was not negligent. Even if the federal authorities acted negligently in failing to run a TCIC or NCIC computer check after indicting Smith and realizing that they could not locate him, this factor weighs only mildly in Smith's favor.

C. Assertion of right

A defendant should assert his right to a speedy trial when possible to protect that right. Smith claims that he was unaware of the federal indictment and warrant during the fifteen month interval. On May 21, 1992, Smith filed a motion to dismiss the indictment on speedy trial grounds. Smith asserted the right soon after he knew that he was being prosecuted, adequately protecting it. Nonetheless, this factor is neutral since Smith was unable to assert the right during the period in which he claims his right was infringed.

D. Prejudice

Smith alleges that he was prejudiced because the delay made

him unable to locate character witnesses who would testify that he was not a drug dealer. The district court did not clearly err in finding this claim not to be credible. When asked who the witnesses were, Smith said he did not know their names or where they could be found, only that they went to his church. When asked the name of his church, Smith said that he forgot it too. Smith has shown no prejudice from the delay. This factor weighs heavily against him.

In weighing the *Barker* factors, "'affirmative proof of particularized prejudice is not essential to every speedy trial claim,'" such as where the length and reason for the delay weigh heavily in favor of the defendant. *Nelson*, 989 F.2d at 853 (quoting *Doggett*, 112 S.Ct. at 2692). "After *Doggett*, the government's negligence may, in the extraordinary case, lift this burden of making a particularized showing [of prejudice] as well." *Id*. Here, the facts that the delay was relatively short and that Smith suffered no prejudice far outweigh the fact that the government may have been negligent in failing to locate Smith. *Compare Doggett*, 112 S.Ct. at 2692 (eight-and-a-half year delay with lesser showing of prejudice). There was no evidence that the government's conduct was designed to gain a tactical advantage or in bad faith. Smith failed to prove that his Sixth Amendment speedy trial right was violated.

III. Statutory Speedy Trial Right

Smith contends that he is entitled to a reversal of his conviction and a new trial since the United States violated his statutory speedy trial right under 18 U.S.C. § 3161(j)(1) when it

acted negligently or with conscious indifference in failing to have him transferred from the custody of Texas authorities to stand trial on the federal charges.[5]

We need not address whether the U.S. Attorney violated section 3161(j) of the Speedy Trial Act because the remedies of conviction reversal, new trial, or dismissal of the indictment are not available for violations of section 3161(j). 18 U.S.C. 3161(j) (1988); 18 U.S.C. 3162(b); *United States v. Anderton*, 752 F.2d 1005, 1008 (5th Cir. 1985) ("§ 3162 does *not* provide for dismissal in the event of violation of § 3161(j)(1)"); *United States v. Dawn*, 900 F.2d 1132 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 368 (1991) (the dismissal sanction is only available for violations of sections 3161(b) and 3161(c)(1) not 3161(j)); *United States v. Tanner*, 941 F.2d 574, 582-83 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1190 (1992). Under 18 U.S.C. § 3162(b)(4), the following remedies may be the only remedies available for violations of section 3161(j): (1) a fine of up to $250 on the attorney for the government; (2) prohibiting the attorney for the government from practicing before the district court for up to ninety days; and (3) filing a report with the appropriate disciplinary committee.

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[5] Section 3161(j) of the Speedy Trial Act provides that "[i]f the attorney for the government *knows* that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly SQ undertake to obtain the presence of the prisoner for trial." 18 U.S.C. 3161(j)(1)(A) (1988) (emphasis added). Smith did not raise below and does not raise on appeal any other challenges to the timeliness of his prosecution such as a violation of 18 U.S.C. § 3161(c)(1). Any such challenges are therefore waived. 18 U.S.C. § 3162(a)(2) (1988) ("Failure of the defendant to move for dismissal prior to trial . . . shall constitute a waiver of the right to dismissal under this section.").

Anderton, 752 F.2d at 1008 (suggesting no remedies may be available for section 3161(j) violations); *Dawn*, 900 F.2d at 1132 (suggesting 3162(b)(4) remedies available for 3161(j) violations); *Tanner*, 941 F.2d at 582-83 (3162(b)(4) remedies available for 3161(j) violations). The remedial provisions in 18 U.S.C. § 3162(b) "apply to all cases commenced by arrest or summons, and all informations or indictments filed , on or after July 1, 1980." 18 U.S.C. § 3163(c); *Compare United States v. Hendricks*, 661 F.2d 38, 40-41 (5th Cir. 1981) (crime and indictment in 1979). "Every court to address the issue has agreed that dismissal of the indictment is not an available remedy for violations of § 3161(j)." *Dawn*, 900 F.2d at 1135.[6] Since Smith does not seek any of the types of relief available below or on appeal under section 3161(j), there is no need for us to address the merits of his 3161(j) claim.[7]

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[6] The statute suggests the U.S. Attorney must have *actual knowledge* that a person is serving time in a penal institution for its protections to apply. In *United States v. Hendricks*, 661 F.2d 38, 40-41 (5th Cir. 1981), we suggested, based on section 3161(j)'s text and legislative history, that an actual knowledge standard applied, but that situations might arise in which the government's attorney could be held constructively aware that the accused was imprisoned in another penal institution. Such a situation might be where "the evidence showed that the prosecution intentionally failed to check the computer and that the information was actually present to be discovered, or if the information was known to another federal agency." *Id.* at 41-42 & 41 n.3 ("[I]f, for example, it were proven that the fact of incarceration was entered into the computer and that the attorney for the government deliberately chose not to check the NCIC system," the government's attorney could be held constructively aware.). *Hendricks* suggests that mere negligence by a government attorney does not justify relief under the Act.

We agree with the district court that actual knowledge was not shown and that at most the U.S. Attorney acted negligently, and therefore section 3161(j)(1) was not violated.

[7] We note that none of the parties below noticed that the desired remedy was unavailable under the Act.

IV. Acceptance of Responsibility

Smith argues that the district court should have reduced his offense level two points for acceptance of responsibility.

"If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct," he is entitled to a two level decrease in his offense level. U.S.S.G. § 3E1.1(a) (1991). The term "criminal conduct" refers to all relevant conduct surrounding the charged offense.[8] *See United States v. Windham*, No. 92-8479, slip op. 4323 (5th Cir. May 7, 1993) (though defendant admitted possession, failure to take responsibility for relevant conduct barred acceptance of responsibility credit). "This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of

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[8] Smith claims that the district court erroneously based this sentencing decision on his relevant conduct and not just the facts supporting the charged offenses. Section 3E1.1 was amended, effective on November 1, 1992, to provide that a defendant need only accept responsibility for his offense as opposed to all of his criminal conduct. We held in *United States v. Windham*, No. 92-8479, slip op. 4323 (5th Cir. May 7, 1993), that this amendment did not apply retroactively to sentences issued before the amendment took effect. Smith was sentenced on August 31, 1992. Smith's claim lacks merit inasmuch as the district court would have been correct in denying a decrease for acceptance of responsibility for relevant conduct at the time Smith was sentenced, and because the facts Smith contested at trial related to the elements of the charged offenses and did not reach facts relating to uncharged conduct.

responsibility for his criminal conduct even though he exercises his constitutional right to a trial." U.S.S.G. § 3E1.1 Comment 2. *See United States v. Broussard*, 987 F.2d 215, 224 (5th Cir. 1993) (rare circumstances where government rejected defendant's offer to plead guilty in return for right to appeal denial of motion to suppress justified two level decrease).

Here, Smith has not proven his entitlement to an offense level decrease for acceptance of responsibility. He pleaded not guilty and prior to trial did not stipulate to the fact that he possessed cocaine or a gun so that the prosecution was put to its burden of proof on those issues at trial. Although defense counsel basically admitted during trial that Smith had possessed the crack cocaine, defense counsel contested the fact that Smith intended to distribute the cocaine, and the fact that Smith possessed a gun to facilitate drug trafficking. *United States v. Pofahl*, 990 F.2d 1456 (5th Cir. 1993) (although defendant admitted involvement in drug trafficking, his plea of not guilty and his defense at trial barred acceptance of responsibility reduction). That Smith may have admitted his guilt to the probation officer after trial is irrelevant since this admission took place after the government was put to its burden of proof. Even if Smith had accepted responsibility for one or two of the charged offenses and contested guilt on the remaining charges, he still may not have been entitled to the offense level decrease. *See United States v. Kleinebreil*, 966 F.2d 945 (5th Cir. 1992) (accepting responsibility for charged offense but not relevant conduct precluded reduction under 3E1.1; defendant must accept responsibility for all relevant criminal

conduct). Smith failed to prove that he accepted responsibility for his conduct. He is not entitled to a two level offense level decrease for this reason.

Conclusion

Smith has failed to show that he is entitled to have his conviction reversed or his sentence reduced. Accordingly, his conviction and sentence are

AFFIRMED.