

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-1774  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT ONDRA MARSHAL,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 1:92-CR-013-C  
- - - - -

August 20, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:\*

Robert Ondra Marshal argues that the district court abused its discretion in denying his motion for continuance to give his attorney reasonable time to investigate a charge added in the superseding indictment. Trial judges have broad discretion in deciding whether to grant motions for continuance. United States v. Gentry, 839 F.2d 1065, 1073 (5th Cir. 1988). To prevail on appeal, Marshal must demonstrate an abuse of discretion resulting in serious prejudice. United States v. Kelly, 973 F.2d 1145,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

1148 (5th Cir. 1992). When claims of insufficient time for preparation are advanced, this Court examines the totality of the circumstances to determine if the continuance should have been granted. United States v. Webster, 734 F.2d 1048, 1056-57 (5th Cir.), cert. denied, 469 U.S. 1073 (1984). Marshal's counsel had ten days before trial to prepare for the charge added in the superseding indictment. This time period should have been sufficient for any preparation necessary to Marshal's defense for the charge. The district court did not abuse its discretion in denying the continuance.

Marshal also argues that the denial of a continuance rendered his counsel ineffective. As Marshal has not shown contradictory evidence counsel would have discovered had the continuance been granted, he has not shown the prejudice necessary to prove ineffective assistance of counsel. See Sawyer v. Butler, 848 F.2d 582, 588-89 (5th Cir. 1988), aff'd, 497 U.S. 227 (1990). Because Marshal may be able to develop a record of such prejudice, however, affirmance is without prejudice to Marshal's right to pursue an ineffective assistance of counsel claim in a 28 U.S.C. § 2255 motion. See United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988).

Marshal also argues that the term "base cocaine" as used in the sentencing guidelines is undefined and void for vagueness under the Fifth Amendment. Therefore, Marshal's offense level should have been calculated using the base offense level for cocaine, not "cocaine base."

The failure of the sentencing guidelines to define the differences between cocaine and cocaine base or "crack" does not render either the guidelines or the statute unconstitutionally vague. United States v. Thomas, 932 F.2d 1085, 1089-90 (5th Cir. 1991), cert. denied, 112 S.Ct. 887 (1992). Marshal invites us to reverse or limit the holding in Thomas, but Thomas is squarely on point and in this Circuit one panel cannot overrule another. In re Dyke, 943 F.2d 1435, 1442 (5th Cir. 1991).

Marshal's conviction and sentence are AFFIRMED.