

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-1897
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES A. CAMPBELL,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas

CR4 92 011 1 Y

(June 11, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

James A. Campbell was convicted by a jury of two counts of distributing crack cocaine and two counts of possessing, with the intent to distribute, crack cocaine. Two of the counts of which

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Campbell was convicted occurred within one thousand feet of a school. Campbell was sentenced to 180 months of confinement as to each count.

At trial, Edward Salame, an undercover officer with the Fort Worth Police Department, testified that he purchased approximately three ounces of crack cocaine from Campbell on two separate occasions. Salame paid Campbell over two thousand dollars for the substance. Salame testified that during these transactions, he noticed that Campbell had more of what appeared to be crack in his possession and that Campbell's satchel was "bulging full" with the same type of substance packaged in different quantities. Salame also testified that both of the substances he purchased field-tested positive for the presence of cocaine and that he marked each with his initials.

Max Courtney, a forensic chemist, tested the samples and determined that they contained cocaine base. Campbell objected to the introduction of Courtney's testimony, arguing that the chain of custody for the samples was not properly established. Campbell argued that Courtney's assistant had indicated that the first sample, the Government's exhibit number two, was initialed "S.C." not "E.S." The district court overruled Campbell's objection.

Campbell's defense was misidentification. He offered testimony that the vehicle that he was allegedly driving during the transactions belonged to an individual named Carolyn Payne and that Payne did not identify Campbell from a photographic lineup. In rebuttal, the Government offered into evidence copies of two

traffic citations issued to a "James A. Campbell" while he was driving the vehicle in question. The Government also offered into evidence the order setting the conditions of release, signed by Campbell, to show that the signature on the release matched the signatures on the traffic citations. The district court overruled Campbell's objection to the introduction of the evidence.

OPINION

Campbell argues that the district court erred by admitting into evidence the exhibits which purported to be the substance that Officer Salame bought from Campbell. Campbell argues that there was a serious break in the chain of custody of the evidence and that the substance about which the chemist testified at trial was different from the substance taken from Campbell.

The Government argues that although Campbell stated specific objections to the introduction of the first sample, exhibit two, he did not specifically state his chain-of-custody objection regarding the introduction of the second sample, exhibit three. The Government argues that the district court's ruling regarding the introduction of exhibit three should be reviewed for plain error.

When exhibit three was offered, Campbell's attorney stated that he had the "same objections" to the evidence as he had with exhibit two. Given the context of the discussion and the degree of specificity with which Campbell explained his objection to the introduction of exhibit two, Campbell sufficiently preserved his objection for review. Accordingly, the district court's rulings regarding both objections should not be reviewed under the plain-

error standard; the abuse-of-discretion standard applies. See United States v. Shaw, 920 F.2d 1225, 1229 (5th Cir.), cert. denied, 111 S. Ct. 2038 (1991).

In overruling Campbell's objection, the district court noted that breaks in the chain of custody of evidence go to the credibility of the evidence and not to its admissibility. Campbell argues that: "The issue is not merely that a problem has arisen in the chain of custody of the government's exhibits. The issues goes to authentication, which directly implicates 'admissibility,' rather than merely a 'weight and credibility' question." Campbell asserts that a finding of authenticity is precluded because (1) Salame testified that he marked the bag with his initials, yet the forensic assistant testified that the initials on the exhibit were "S.C."; (2) the agent who gave exhibit two to the forensic chemist was not the same agent to whom Salame gave the substance; (3) the forensic chemist and forensic assistant gave differing dates on which the evidence was received; and (4) Salame testified that the field tests were positive, yet the "reagent/color test" on exhibit three was negative.

The Government asserts that, regardless of the initials appearing on the inner seal of the exhibit, the seal on the outer envelope of the exhibit bears Salame's initials ("E.S."). The Government also asserts that a negative "reagent/color" test does not conclusively establish the absence of cocaine and that the forensic chemists testified that the end-result of his tests established that exhibit three contained cocaine.

When confronted with evidence of questionable origin, the court should admit the evidence if a prima facia showing of authenticity is made. See United States v. Palella, 846 F.2d 977, 981 (5th Cir.), cert. denied, 488 U.S. 863 (1988). The record demonstrates that the Government made a prima facie showing of authenticity. Salame testified that he recognized the two exhibits as those which he submitted for testing after purchasing them from Campbell. He also testified that the field tests which he performed on the samples indicated the presence of cocaine base. Each of the exhibits was received for further testing in a sealed condition. The matters raised by Campbell regarding the initials on the seals and the dates on which the exhibits were received relate to the weight, rather than the admissibility, of the evidence. See United States v. Logan, 949 F.2d 1370, 1378 (5th Cir. 1991), cert. denied, 112 S. Ct. 1982 (1992). The admission of the evidence was not an abuse of discretion.

Campbell also argues that the district court erred by failing to dismiss the two counts of possession of cocaine because no physical evidence exists to establish the charges. The evidentiary foundation for the possession counts is based on Salame's testimony that when he purchased the crack from Campbell, he observed what appeared to be more cocaine in Campbell's possession. Campbell argues that because none of the cocaine was seized or introduced at trial, there is insufficient evidence to support his conviction.

Campbell moved for a judgment of acquittal at the close of the Government's evidence; however, he failed to renew his motion for

acquittal at the close of his evidence. Thus, the sufficiency of the evidence is reviewed only to determine whether the affirmance of the conviction would result in a manifest miscarriage of justice. See United States v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988). Such a miscarriage exists only if the record is devoid of evidence pointing to guilt or if evidence of a "key element" is "so tenuous that a conviction would be shocking." Id.

Campbell argues that scrutiny under a more lenient standard of review is appropriate because he raised the same issue in a pretrial motion to dismiss. United States v. Watson, 966 F.2d 161, 162 n.1 (5th Cir. 1992); United States v. Lopez, 923 F.2d 47, 50 (5th Cir.), cert. denied, 111 S. Ct. 2032 (1991); United States v. Brown, 555 F.2d 407, 420 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978). Watson, 966 F.2d at 162, is inapposite because the defendant made a timely motion or objection to the specific issue at hand. In Lopez, 923 F.2d at 50, this Court applied the plain-error standard, but noted that closer scrutiny may have been appropriate when the failure to preserve the precise grounds for error is mitigated by an objection on related grounds. In Brown, this Court held that "even if [the defendant's pre-trial motions] were not sufficient to present the constitutional issue to the district court and thus to preserve it for appeal, we are convinced that we can notice it under the plain error doctrine." 555 F.2d at 420. Further research reveals no authority supporting Campbell's assertion; therefore, we use the plain error standard of review.

Circumstantial evidence, supported by lay testimony, may establish the identity of a controlled substance. United States v. Brown, 887 F.2d 537, 542 (5th Cir. 1989). Circumstantial evidence supporting the identity of a substance includes (1) evidence that substantial sums of money are paid for the substance, (2) evidence establishing a particular method of packaging, and (3) the testimony of persons experienced in identifying the substance.

Salame testified that he paid over a thousand dollars for three ounces of a substance which Campbell removed from a large satchel containing many similar packages of a similar substance. Salame testified that when he inquired about the purchase of cocaine, Campbell told him that he was in the process of "cooking up a kilo." During the second purchase, Campbell showed Salame additional cocaine and stated that it was "really good stuff." At the time of the purchases, Salame had been involved in approximately 50 narcotics transactions. Thus, he was experienced in identifying cocaine. The record does not show a manifest miscarriage of justice; therefore, Campbell's conviction for the possession counts is affirmed.

Campbell argues that the district court erred by overruling his motion to disclose the identity of a confidential informant in the case. The informant allegedly introduced Campbell to Officer Salame.

The Government may avoid the disclosure of a confidential informant under some circumstances. Roviaro v. United States, 353 U.S. 53, 62, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957). In applying

Roviaro, this Court has developed a three-part balancing test, under which the trial court must consider (1) the level of the informant's involvement in the alleged criminal activity, (2) the helpfulness of the disclosure to the asserted defense, and (3) the Government's interest in non-disclosure. See United States v. Mendoza-Burciaga, 981 F.2d 192, 195 (5th Cir. 1992). A district court's denial of a motion to disclose the identity of an informant is reviewed under an abuse-of-discretion standard. United States v. Orozco, 982 F.2d 152, 156 (5th Cir.), petition for cert. filed, ___U.S.L.W. ___ (U.S. April 21, 1993)(No. 85-355).

In the present case, the informant's involvement in the criminal activity was minimal. He was not present at either of the transactions and his only function was to introduce Salame to Campbell. Campbell argues that because his defense was centered entirely around the issue of identity, the informant's testimony is essential to contradict Salame's identification of him. However, Campbell does not make a sufficient showing that the informant's testimony would contradict Salame's identification of him. Mere conjecture or supposition about the possible relevancy of the informant's testimony is not sufficient to warrant disclosure of the identity of an informant. Orozco, 982 F.2d at 155. Further, Campbell was also identified by Mitchell Felder, Salame's partner. Thus, the disclosure of the identity of the informant would not be very helpful to Campbell's misidentification defense.

The Government's interest in nondisclosure relates to both the safety of the informant and the informant's future usefulness to

authorities. See Orozco, 982 F.2d at 155-56. All three factors weigh in favor of non-disclosure; therefore, the district court did not abuse its discretion in withholding the identify of the informant.

Campbell also states that the district court should have held an in camera hearing to determine the need for disclosure. Although an in camera interview may be helpful in determining the informant's status and in balancing the parties' interests, this Court does not require a district court to hold an in camera interview whenever a defendant requests disclosure of an informant's identity. United States v. Cooper, 949 F.2d 737, 750 (5th Cir. 1991), cert. denied, 112 S. Ct. 2945 (1992). In United States v. Diaz, 655 F.2d 580, 588 (5th Cir. 1982), this Court held that the district court was not required to hold an in camera interview when the informant acted only as an "introducer" of the undercover agents to the defendant and when the testimony sought by the informant would not have been significantly helpful to the defendant's case. Similarly, the district court was not required to hold an in camera hearing in the present case.

Finally, Campbell argues that the district court erred in permitting the Government to introduce rebuttal evidence of two traffic citations issued to a "James A. Campbell" driving the vehicle that Salame identified. The Government introduced the citations after Campbell presented testimony that the owner of the vehicle did not identify Campbell from a photographic lineup. The Government also offered into evidence, for purposes of comparison,

the conditions of release which James A. Campbell, Sr., had testified contained the signature of his son. Campbell objected to the evidence, arguing that it was not relevant. The district court overruled the objection, concluding that the evidence was proper rebuttal to Campbell's assertion that he was misidentified.

Evidentiary rulings are reviewed for abuse of discretion. United States v. Liu, 960 F.2d 449, 452 (5th Cir.), cert. denied, 113 S. Ct. 418 (1992). Even if abuse is found, the error is reviewed under the harmless error doctrine. Id. The error is harmless if it would not have had a substantial impact on the jury's verdict and the evidence of guilt is overwhelming. United States v. Williams, 957 F.2d 1238, 1244 (5th Cir. 1992).

Campbell argues that the citations were not relevant because the Government did not present testimony of a handwriting expert to establish that the two signatures were from the same hand. He argues that the jury is without the expertise to determine the identity of one's handwriting. In United States v. Cashio, 420 F.2d 1132, 1135 (5th Cir.), cert. denied, 397 U.S. 1007 (1970), this Court held that the jury was entitled to make a comparison of the defendant's genuine signature, which was already admitted evidence, with the defendant's purported signature on other documents offered into evidence. The district court did not abuse its discretion in determining that the citations were relevant.

Campbell also argues for the first on appeal that the district court admitted the citations without first determining

that they were authentic.¹ The citations may have been admissible as self-authenticating public records under seal. See Fed. R. Evid. 902. There was no plain error in admitting the citations. See United States v. Martinez, 962 F.2d 1161, 1166 n.10 (5th Cir. 1992).

Finally, any error in admitting the citations was harmless. The Government presented the testimony of two hand-to-hand crack sales. Two undercover officers unequivocally identified Campbell. In defense, Campbell offered only the unexplained inability² of the owner of the vehicle to identify Campbell from a photographic lineup. The district court's ruling on the admission of the citations should not be disturbed.

We AFFIRM the judgment of the district court.

¹ At trial, Campbell objected to the introduction of the citations on the basis of relevancy. He argues that the issue of admissibility in general is a legal issue that should be subject to de novo review despite the lack of objection as to authenticity.

² In his opening statement, Campbell's attorney stated that Carolyn Payne would testify as a witness. Payne did not testify.