

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2384
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ANTHONY CORNEL HAYNES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-91-162-2)

March 24, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Anthony Cornel Haynes appeals, contending that the court reversibly erred in denying his right to intelligently exercise his peremptory challenges, and in denying his motion to suppress evidence seized in a warrantless search of a suitcase. Finding Haynes's contentions wholly without merit, We **AFFIRM**.

I.

¹ Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

In September 1991, James Kistler, a senior customer service agent for Delta Airlines in Detroit, Michigan, received an unclaimed suitcase bearing the name Lisa Smith. After unsuccessfully attempting to locate its owner through the central tracking office, Kistler opened the bag to search for further identification. It was empty, except for a pillow, the original Samonsite brochure, and keys. Kistler picked up the pillow, which felt lumpy and heavy. Concerned that the pillow might contain an explosive device or contraband, Kistler had his supervisor, David Winter, inspect the suitcase. Winter testified that he unzipped the pillow and found several packages "opaque yellow in color"; that he could see through the packaging of all but one, which was wrapped in silver duct tape; and that, because he believed the packages contained narcotics, he called the Drug Enforcement Administration (DEA). John David Riddle, a DEA agent with 20 years of experience in narcotics investigation, testified that when he arrived at the scene, he observed an open suitcase, with a pillow open at one end, and a zip-lock baggie wrapped in cellophane protruding from the pillow; that he immediately recognized the substance as cocaine; and that, accordingly, he brought the suitcase to the DEA office and field tested the material in one of the bags.

Meanwhile, shortly after Kistler first opened the suitcase, and before Winter examined it, Kistler received a teletype message that Lisa Smith was in Houston, looking for her suitcase. Smith continued to call Delta Airlines throughout the day in search of it. Later that day, customer service agent Karen Rogers, pursuant

to instructions from the Houston Police Department, advised Smith that her bag had been located. Smith arrived at the airport with appellant Haynes, signed for the suitcase, and handed it to him. The two were arrested in the parking garage.

Haynes and Latanya Smith (a/k/a Lisa Smith) were charged in a two-count indictment with conspiracy and possession with intent to distribute crack cocaine, in violation of 21 U.S.C. §§ 841, 846, and 18 U.S.C. § 2. After a jury was chosen and the government presented a portion of its evidence, Smith changed her plea to guilty. When the trial resumed, the court instructed the jury that "Latanya Smith is no longer a party to this proceeding. At this time, you are to draw no inferences whatsoever from that fact". Just prior to Smith taking the stand at the end of the government's case, Haynes moved to prohibit her testimony on the grounds of attorney-client privilege, and moved for a mistrial, arguing that the defendants had shared their peremptory strikes. The court denied the motions. The jury found Haynes guilty of both offenses; the court sentenced him to concurrent terms of imprisonment of 360 months and five years supervised release on each count.

II.

A.

Haynes contends that the district court erred in permitting Smith to testify, or in failing to grant a mistrial. According to Haynes, Smith's plea and subsequent testimony compromised his right to an impartial jury, because he and Smith jointly exercised their peremptory strikes to select jurors sympathetic to Smith (ten women

on jury), and because her belated plea deprived him of the benefit of all ten strikes.

"In order to preserve a claim of error for appellate review, a party must timely object or move to strike the objectionable evidence, stating the specific ground of the objection". **United States v. Martinez**, 962 F.2d 1161, 1165-66 (5th Cir. 1992); see also Fed. R. Evid. 103(a)(1). Haynes objected to the admission of Smith's testimony solely on the basis of the attorney-client privilege, not because of their joint use of peremptory challenges; accordingly, we review for plain error. We similarly review the court's refusal to grant a mistrial, because Haynes failed to timely object.²

Fed. R. Crim. P. 24(b) provides that defendants are jointly entitled to ten challenges if the offense charged is punishable by imprisonment for more than one year. "Although peremptory challenges are a means to the end of achieving an impartial jury, 'peremptory challenges are not of constitutional dimension'." **United States v. Prati**, 861 F.2d 82, 87 (5th Cir. 1988) (quoting **Ross v. Oklahoma**, 487 U.S. 81, 88 (1988)). Haynes asserts that had he known of Smith's plea and subsequent testimony, he would have exercised his strikes differently; however, he fails to offer supporting facts. When the defendants exercised their peremptory challenges, their planned defenses were consistent. Moreover,

² Haynes knew of Smith's plea on the first day of trial; however, he did not move for a mistrial until over three days later, when the government had presented its entire case in chief (except for Smith's testimony).

Haynes fails to "show that `the jury as finally selected was other than representative and impartial'". See **United States v. Sandoval**, 847 F.2d 179, 184 (5th Cir. 1988). His assumption that the selected female jurors were prejudiced in favor of Smith because of their gender, and, therefore, unable to assess her credibility without bias, is completely unsupported, and, to say the least, totally without merit. Our failure to review this issue will not result in plain error.³

B.

Haynes contends that the district court reversibly erred by refusing to suppress the cocaine seized from the suitcase.⁴ The court characterized the search as private and therefore concluded that it did not implicate the Fourth Amendment. In reviewing a motion to suppress based on live testimony, we accept the court's factual findings absent clear error. **United States v. Pierce**, 893 F.2d 669, 673 (5th Cir. 1990) (citation omitted).

The Fourth Amendment proscribes only governmental action and is wholly inapplicable "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of

³ This court's decision in **Knox v. Collins**, 928 F.2d 657 (5th Cir. 1991) is distinguishable. In **Knox**, the court failed to give an agreed upon parole instruction. Defense counsel specified two jurors who would not have been chosen had the court given the instruction. Here, however, Haynes has not shown that his right to exercise his challenges was actually impaired, or that members of the jury were biased.

⁴ The government contended in district court that Haynes lacked standing to raise this issue, but the court ruled that it would decide that issue only if it found government intervention.

any governmental official". *United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984) (internal quotation and citation omitted). "Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information." *Id.* at 117. Accordingly, where a package has been opened by private individuals, the government may re-examine the materials so long as its search does not exceed the scope of the private search. *Id.* at 115.

Here, Winter, acting in a private capacity, unzipped the pillow and discovered zip-lock baggies that he believed contained illegal drugs. Without further invading the packaging, the government agents observed at least one baggie and realized immediately that it contained cocaine. Although the cocaine remained wrapped in plastic, "the package could no longer support any expectation of privacy; it was just like a balloon the distinctive character [of which] spoke volumes as to its contents -- particularly to the trained eye of the officer". *Id.* at 121 (internal quotation and citations omitted). Accordingly, the district court correctly ruled that there was no government intrusion implicating the Fourth Amendment.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.