

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3080

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GREGORY FONTENBERRY and JEROME FONTENBERRY,
Defendants-Appellants.

**Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 91 00098 "A")**

(December 21, 1992)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and EMILIO GARZA, Circuit
Judges.

PER CURIAM:*

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The appellant, Gregory Fontenberry, appeals his conviction on grounds of insufficient evidence. His brother, Jerome Fontenberry, challenges his sentencing as an organizer/leader of the conspiracy. Upon review, we find these arguments meritless and we therefore AFFIRM.

FACTS

On March 7 and 8, 1991, Special Agent Tommy Johnson, acting undercover, arranged to purchase seven (7) ounces of cocaine for \$7,700 from Alfred Simmons after meeting Simmons and a cooperating individual (CI), at a CITGO station in Harahan, Louisiana. Johnson followed Simmons to the Ghost Town Lounge at the corner of Edinburgh and Eagle Streets in New Orleans. Gregory Fontenberry was on the corner pay phone and acknowledged Simmons. Simmons told Johnson that Gregory was the brother of the cocaine source, Jerome Fontenberry. Gregory gave the phone to Simmons who told the person on the line that his buyer was present and ready for the cocaine deal. Simmons told Johnson that he was on the phone with Jerome and that he would arrive shortly. He also stated that Gregory, who usually held the dope, told them to wait in the house next to the Ghost Town Lounge.

Jerome arrived a short while later in a Mercedes. He stated that he did not have the drugs but that his "boy" would arrive shortly and that they should wait inside the house for him. Arthur Mitchell ("Bigelow") arrived at the house a short while later and spoke briefly to Jerome. Jerome reached into Bigelow's car and

took a package which he placed under his jacket. Jerome then went inside and produced nine (9) ounces of cocaine, stating that seven (7) were for Johnson and two (2) were for Simmons. Jerome gave the cocaine to Johnson and requested payment. Johnson stated the money was in his car and they both left the house. Jerome, Simmons and Dempsey, the owner of the house, were arrested. Mitchell was chased but remained a fugitive until after the Gregory/Dempsey trial.

Gregory remained at the street corner pacing back and forth. The undercover tape indicated that Jerome had his brother page Bigelow when he was on the phone. Gregory was arrested while informing their mother of Jerome's arrest.

Gregory was convicted and sentenced to 27 months while Jerome plead guilty and was sentenced to 63 months.

ANALYSIS

The standard of review for sufficiency of evidence is whether any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed. 560 (1979); United States v. Anderson, 933 F.2d 1261, 1274 (5th Cir. 1991). We must view all the evidence with all reasonable inferences drawn in the light most favorable to the jury verdict. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); United States v. Pigrum, 922 F.2d 249, 253 (5th Cir.), cert. denied, 111 S.Ct. 2064 (1991).

To convict of a drug conspiracy in violation of 21 U.S.C. §846, the government must prove (1) that an agreement exists between two or more persons to violate the narcotics laws, (2) that the defendant knew of the conspiracy and intended to join it and, (3) that the defendant participated in the conspiracy. United States v. Juarez-Fierro, 935 F.2d 672, 677 (5th Cir.), cert. denied, 112 S.Ct. 402 (1991). An element may be inferred from circumstantial evidence and a conspiracy proven by "a concert of action," United States v. Espinoza-Seanez, 862 F.2d 526, 537 (5th Cir. 1988).

There was enough evidence to convict Gregory Fontenberry. Gregory Fontenberry was the person that put the drug purchasers in touch with his brother. He gave the phone to Simmons and then stood by while Simmons confirmed with Jerome Fontenberry the time of the drug transaction. Special agent Johnson testified that Simmons stated that Gregory usually holds the dope for his brother and that Gregory told him that they should wait next door for his brother. This was also corroborated by the tape recording. There was also evidence in the tapes that Jerome had Gregory beep Bigelow (the drug supplier) for him. Gregory stayed at the corner pacing back and forth during the deal, seemingly acting as a lookout. When he was arrested at the corner he had a beeper, which is suspicious for an unemployed person. All this evidence supports that there was a conspiracy that Gregory knew about and voluntarily participated in. There is sufficient evidence for a reasonable juror to find that Gregory participated in the drug conspiracy.

Jerome Fontenberry challenges his sentencing by the court as an organizer or leader of the conspiracy. This court upholds a sentence "so long as it results from a correct application of the guidelines to factual findings which are not clearly erroneous." United States v. Sarasti, 869 F.2d 805, 806 (5th Cir. 1989). "A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole." United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991). The determination of a defendant's role in a crime for sentencing purposes is one of a sophisticated factual finding by the judge that enjoys the protection of the clearly erroneous standard. United States v. Mejia-Orosco, 867 F.2d 216, 221 (5th Cir.), cert. denied, 492 U.S. 924 (1989).

The Sentencing Guidelines provides for an upward four-level adjustment if the judge finds that the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. U.S.S.G. §3B1.1(a).¹ There were at least five participants involved in this drug conspiracy, Gregory and Jerome Fontenberry, Simmons, Dempsey and Bigelow.

There is substantial evidence to support that Jerome

¹ §3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

Fontenberry was indeed the organizer and leader of this conspiracy. He was the one contacted to establish the time of the drug transaction. He had told his brother to contact Bigelow and have everyone meet at Dempsey's house. He also personally took delivery of the cocaine from Bigelow and brought it into the house. He split up the cocaine between Agent Johnson and Simmons and requested payment. Dempsey stated at that the time of his arrest that Jerome Fontenberry had conducted several other drug transactions at his home. Dempsey testified that Jerome had delivered a scale to Dempsey's house several days prior, apparently to be used to weigh the cocaine.

Jerome Fontenberry was clearly the organizer and leader of this transaction, from setting up the time, negotiating the price, delivering the cocaine and requesting payment. The court's determination that a defendant is a leader will be upheld when the evidence supports this finding. United States v. Kinder, 946 F.2d 362,369 (5th Cir.), cert. denied, 112 S.Ct. 1677 (1992).

CONCLUSION

There is sufficient evidence that Gregory Fontenberry participated in, and that Jerome Fontenberry was the leader of this drug conspiracy. The lower court is therefore

AFFIRMED.