UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-3726
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

THOMAS RAY KENNEDY III,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 91 473)

(November 4, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Appellant Kennedy was convicted by a jury of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848, and conspiracy to distribute in excess of ten kilograms of cocaine, a violation of 21 U.S.C. § 846. He was sentenced to prison for life for his continuing criminal enterprise conviction, and given a concurrent term of 240 months for his conspiracy conviction. He appeals. We affirm his conviction and sentence for the continuing criminal enterprise and vacate the conviction and sentence for the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

conspiracy charge.

The record is lengthy and detailed and firmly establishes that Kennedy was a leader of a criminal enterprise known as M.A.T.D. Productions which, distributed hundreds of kilograms of cocaine in numerous locations in this country over a period at least from 1986 until 1990, and which directly involved at least eleven persons and generated millions of dollars of revenue.

Appellant's first complaint of error involves the events immediately preceding his arrest. His home was under surveillance. He and another person were observed driving away from the residence and were followed to a Federal Express office where Appellant was observed to remove two brown boxes from the trunk of the vehicle, and deliver them into the Federal Express office for shipment. Appellant then left the building. The boxes were taken into custody by a police officer and, when presented to a drug-sniffing dog, the dog alerted. The officers then obtained a warrant and pursuant thereto opened the boxes discovering ten kilograms of cocaine and the Appellant's fingerprints on the plastic bags contained within the boxes. Kennedy argues to this Court that the boxes were illegally seized and the evidence should have been suppressed. While Appellant did move to suppress this evidence in the district court, he did not do so on the ground now alleged. As a result, he has waived his right to present the issue to this Court. Fed. R. Crim. P. 12(f); United States v. Cannon, 981 F.2d 785, 787 (5th Cir. 1993). Nor has Appellant shown cause for relief from the rule of waiver. He has not provided this Court with a

transcript of the suppression hearing to demonstrate that he did indeed develop the issue at that hearing. Having failed to show cause why he should be relieved from the rule of waiver, we hold that the issue has been waived.

Appellant next complains that his due process rights were violated because the Government suppressed evidence which under the Jencks Act 18 U.S.C. § 3500; Brady v. Maryland, 373 U.S. 83 (1963); and Giglio v. United States, 405 U.S. 150 (1972), the Government was required to disclose. In the district court Appellant moved for production of Brady and Jencks Act material. The Government agreed to comply with his request forty-eight hours prior to trial. At the hearing on the discovery motions Appellant indicated satisfaction with the Government's response. At the pretrial conference the district court ordered the Government to make the materials available no later than four days before trial. The Government was prepared to comply. If the Appellant did not obtain the materials at that time that was due to his own lack of due diligence and does not preserve a Brady claim. United States v. Marrero, 904 F.2d 251, 261 (5th Cir.), cert. denied, 498 U.S. 1000 (1990).

Kennedy raises numerous objections to the jury instructions, none of which were made in the trial court and, therefore, we review only for plain error. See United States v. Barakett, 994 F.2d 1107, 1112 (5th Cir. 1993), pet. for cert. filed, (U.S. Sept. 22, 1993). He contends first that the jury should not have been instructed regarding deliberate ignorance because there are no

facts in the record supporting such an instruction. He argues that to give it created a risk that the jury might convict on a lesser negligence standard. A review of the record shows conclusively that the jury could not have been misled as to the proper standard of knowledge to apply to the defendant because it was presented with abundant evidence, including Appellant's own inculpatory statements, that Appellant had actual knowledge of the conduct involved.

Kennedy also complains of the court's failure to require the jury to unanimously identify the five or more persons Kennedy supervised in order to trigger the five person element of the CCE charge. We have already ruled that such a charge is not required. United States v. Linn, 889 F.2d 1369, 1374 (5th Cir. 1989), cert. denied, 498 U.S. 809 (1990).

Appellants remaining jury instruction issues are all without merit and do not amount to plain error.

Next Appellant claims ineffective assistance of trial counsel. He did not raise this issue below but contends that this is one of the cases in which the record is in such condition that the matter can be raised and resolved on direct appeal. See United States v. Higdon, 832 F.2d 312, 314 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988). For this claim to be resolved on direct appeal the record must provide substantial details concerning the attorney's conduct. United States v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991). The record in this case is devoid of such detail. We therefore decline to address the merits of this argument but do so

without prejudice to Appellant's right to raise the issue in a proper motion under § 2255.

Appellant correctly contends that his convictions for continuing criminal enterprise and conspiracy to distribute cocaine violate the double jeopardy clause and that concurrent sentences for the two crimes are improper. Congress did not intend to impose cumulative penalties under §§ 846 and 848. Jeffers v. United States, 432 U.S. 137 (1977); United States v. Devine, 934 F.2d 1325, 1342 (5th Cir.), cert. denied, 112 S.Ct. 349 (1991). In fact, the Government concedes this and argues that remand for resentencing on the CCE conviction is not necessary. We agree. In Devine, 934 F.2d at 1343, and in United States v. Gonzales, 866 F.2d 781, 786 (5th Cir.), cert. denied, 490 U.S. 1093 (1989), this Court held that the proper remedy for convictions on both the greater offense of CCE, and the lesser included offense of conspiracy to distribute, is to modify the judgment, vacating the conviction and sentence on the lesser included offense. In both those cases we declined to remand for resentencing. We follow the same procedure here and vacate the conviction and sentence on the conspiracy to distribute count. We are satisfied from this record that the conspiracy conviction did not lead the trial court to impose a harsher sentence on the CCE count than she would have without the conspiracy. The offenses were grouped together pursuant to § 3D1.2(b) as part of a common scheme or plan. These grouping rules required that the offense with the highest offense level, the CCE offense, be used to determine Appellant's base

offense level and this was done. The total resulting offense level was forty-four which is one higher than the highest listed in the sentencing table, mandating a life sentence. It is thus clear that Appellant's conviction and sentence for conspiracy to distribute cocaine had no effect on the sentence imposed in connection with his CCE conviction.

Appellant's argument that a drug conspiracy charge cannot be used as a predicate offense to a CCE conviction has been answered unfavorably to his position by this Court previously. United States v. Hicks, 945 F.2d 107, 109 (5th Cir. 1991).

Appellants final contention is that the evidence was insufficient to support his conviction. We have carefully reviewed the record and find this position to be totally without merit. We do not detail the evidence here for it would serve no purpose. Suffice it to say that we are convinced that it was more than adequate to prove the essential elements of the conviction beyond reasonable doubt.

Accordingly, we affirm the Appellants conviction and sentence for the continuing criminal enterprise offense and we vacate the Appellant's conviction and sentence for conspiracy to distribute cocaine.

AFFIRMED IN PART AND VACATED IN PART.