UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4801

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIMMY CATO,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1:92-CR2-14)

(November 18, 1993)

Before GOLDBERG, JONES, and DUHÉ, Circuit Judges.[*]

EDITH H. JONES, Circuit Judge:[1]

Appellant, convicted of conspiracy to distribute cocaine, argues on appeal that the trial court misapplied Fed. R. Evid. 404(b) by admitting testimony concerning the factual circumstances of his prior conviction for selling crack cocaine. We hold that the trial court did not abuse its discretion and affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1]Judge Jones did not sit for oral argument due to illness, but will participate in the opinion with the aid of the tape recordings.

BACKGROUND

Jimmy Cato and thirteen co-defendants were charged in 1991 with conspiracy to distribute and to possess with intent to distribute cocaine. Cato and one other defendant pleaded not guilty. Six months before trial, Cato filed a motion for disclosure of any Fed. R. Evid. 404(b) evidence that the government planned to introduce. Cato anticipated that the government would offer proof of his prior crimes because evidence of extrinsic offenses are often admitted as relevant and probative of a defendant's intent in conspiracy cases. The government responded:

> [Cato] knows that he has a prior narcotics conviction which would be certainly relevant to the jury's determination of the Defendant's intent to involve himself in a narcotics conspiracy. . . . As far as any other Rule 404(b) evidence, the [government] will offer the same to the Court at the appropriate time for the Court's decision as to the admissibility of the evidence. Disclosure at this early stage of the litigation would be premature and is unwarranted.

Around this time, the government also provided Cato with his criminal history and a certified copy of his Texas Department of Corrections "pen packet." The pen packet contained Cato's 1986 conviction for distribution of cocaine and described the factual circumstances of his 1985 arrest for selling crack cocaine to an undercover police officer.

Six weeks before trial, the government filed a brief in support of admitting evidence concerning Cato's prior arrest and conviction: "The [government] anticipates that it will introduce . . . evidence that the Defendant . . . was arrested in Houston,

Texas on November 18, 1985 and charged with delivery of cocaine. Additionally, the United States would introduce evidence that the defendant, Cato, was convicted of the delivery on July 11, 1986." Cato did not file a response to the government's brief nor did he file a motion in limine concerning the manner in which the evidence might be presented to the jury.

On the third day of the seven-day trial, the attorney for the government notified Cato's attorney that the government intended to introduce testimony of the police officer who arrested Cato in 1985, Willis Reeves. At an evidentiary hearing before the district court the next day, out of the hearing of the jury, Cato's attorney objected to the proffered testimony which concerned the circumstances and details of Cato's 1985 arrest (the "extra evidence"). Cato argued that the government already had a 1986 conviction for cocaine delivery that it could introduce, and that the prejudicial effect of Reeve's testimony would outweigh any probative value on the issue of intent. Cato's attorney also objected to the sufficiency of the notice he had received regarding introduction of the extra evidence.

The district judge overruled both objections and allowed Reeves to testify. The judge instructed the jury, however, that Reeve's testimony "is not evidence that the defendant Cato is guilty of the crime for which he is on trial in this court; however, if you believe the testimony of Officer Reeves, such evidence is admitted for your consideration solely on the issue of intent or plan, if you believe that it has any bearing on that

issue." Reeves then testified as to the sequence of events concerning Cato's 1985 arrest in considerable detail (approximately five minutes) and identified a certified copy of the resulting judgment against Cato. Following trial, the jury returned a guilty verdict and Cato was sentenced to 420 months of imprisonment as a career offender.

DISCUSSION

Admissibility

We review a district court's decision to admit evidence under Rule 404(b)[2] for abuse of discretion. United States v. Carrillo, 981 F.2d 772, 774 (5th Cir. 1993). The admissibility of extrinsic acts under Rule 404(b) is governed by the two-part test set out in United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), cert. denied 440 U.S. 920, 99 S. Ct. 1244 (1979). First, the proponent of the evidence must demonstrate that the evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice. Beechum, 582 F.2d at 911.

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[2] "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case should provide reasonable notice in advance of trial or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Fed. R. Evid. 404(b).

Cato does not challenge the admission into evidence of his prior conviction for selling crack cocaine. Rather, he argues that the probative value of Officer Reeve's testimony concerning the circumstances of Cato's 1985 arrest was greatly outweighed by the danger of undue prejudice. He urges this Court to restrict Rule 404(b) evidence to the minimum amount of evidence necessary to advise the jury of the relevant intent at the time of the prior offense. Although Cato claims otherwise, his approach would usually limit the government's proof of 404(b) offenses to certified copies of judgment when available.

We decline to adopt Cato's narrow interpretation of Rule 404(b) for several reasons. First, Cato cites no authority that bars the government from introducing background evidence that led to an accused's prior conviction. To the contrary, Rule 404(b) indicates that the district judge must balance the prejudicial effect of such evidence against its probative value in view of the availability of other means of proof and other factors appropriate under Rules 403 and 404. See Advisory Committee Note, Fed. R. Evid. 404(b). Indeed, this Court has stated that the danger of undue prejudice is actually substantially lessened when the proffered evidence of a prior crime or act resulted in a conviction. United States v. Logan, 949 F.2d 1370, 1380 n.17 (5th Cir. 1991), cert. denied, 112 S. Ct. 1597 (1992); 112 S. Ct. 1982 (1992). Like Cato, the defendant in Logan had pleaded not guilty to conspiracy to distribute cocaine. The Logan Court upheld the admission of evidence concerning 70 marijuana plants discovered in

the defendant's back yard for which he had been convicted. The Logan Court found that evidence suggesting the cultivation of marijuana was probative for purposes of intent, knowledge, and absence of mistake or accident in the conspiracy charges. 949 F.2d at 1380. We find no meaningful distinction between Logan and the instant case.

Second, the trial judge has somewhat greater discretion to admit intent evidence under Rule 404(b) in conspiracy cases. In resolving the parties' contentions at the evidentiary hearing, the district judge relied partly on our statements in United States v. Roberts, 619 F.2d 379 (5th Cir.), reh'g denied, 625 F.2d 1016 (5th Cir. 1980): "In every conspiracy case . . . a not guilty plea renders the defendant's intent a material issue and imposes a difficult burden on the government. Evidence of such extrinsic offenses as may be probative of a defendant's state of mind is admissible unless he affirmatively takes the issue of intent out of the case." 619 F.2d at 383 (citation omitted). In this case, Cato's prior conviction was for "unlawfully, intentionally, and knowingly delivering by actual transfer a controlled substance, namely cocaine." This conviction could have arisen from a variety of factual scenarios, ranging from an isolated and relatively innocuous indiscretion to extensive drug dealing. It was reasonable for the trial judge to conclude that Reeve's testimony was more probative than prejudicial because it offered the jury tangible evidence of intent indiscernible from a photocopy of Cato's court judgment. See United States v. Cooper, 942 F.2d 1200,

1205 (7th Cir. 1991) (upholding admission into evidence of factual circumstances surrounding a prior drug transaction and arrest to show the defendant's intent, opportunity, and knowledge to take part in a conspiracy, his opportunity to acquire and distribute the cocaine, and his knowledge of the distribution network), cert. denied, 112 S. Ct. 1303 (1992).

Finally, excluding the circumstances of an arrest simply because a conviction resulted could lead to anomalous results. Under Cato's proposal, if the other crime or act did not result in a conviction, the government could introduce prejudicial facts concerning the prior bad act more easily than if the defendant had been convicted. Whatever the reason for the absence of a conviction, Cato's restrictive interpretation would tend to disadvantage defendants facing their first conviction and benefit repeat offenders.

We do not hold that the government may routinely introduce factual circumstances and details surrounding a prior conviction under 404(b). In this conspiracy case, however, the district judge applied the Beechum analysis, ruled that the relevancy of the extra evidence outweighed the danger of undue prejudice, and carefully instructed the jury that it could consider the evidence solely on the issue of Cato's intent or plan. We find no error in his approach or determination.

Notice

Rule 404(b) requires the government to provide "reasonable notice . . . of the general nature of any such evidence

it intends to introduce at trial." The trial court has discretion to determine whether a particular notice is reasonable in light of the circumstances of each case. Advisory Committee Note, Fed. R. Evid. 404(b). The trial judge, although he gave no explicit basis for his ruling, ruled that the government's notice to Cato was adequate.

Cato contends that the government's response to its motion for disclosure of Rule 404(b) evidence and its trial brief in support of the admission of an extrinsic offense did not reasonably notify him that the government would introduce the prejudicial details of his prior arrest. The government intimated six months prior to trial, however, that it would introduce evidence to supplement Cato's 1986 conviction under 404(b). Moreover, the government's trial brief stated that it anticipated that it would introduce "evidence that the defendant . . . was arrested in Houston, Texas on November 18, 1985 and charged with delivery of cocaine. Additionally, the United States would introduce evidence that the defendant, Cato, was convicted of the delivery on July 11, 1986." (Emphasis added). Clearly, Cato had notice that more than the certified copy of judgment would be offered against him. Given the government's statements, the trial judge was within his discretion to rule that Cato had received adequate and reasonable notice.

In light of the foregoing, the judgment of the district court is **AFFIRMED**.