

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 92-5207  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LARRY WAYNE MCCRAY,  
CEDRIC J. SMITH a/k/a  
"Set-T"

Defendants-Appellants.

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Appeal from the United States District Court  
For the Western District of Louisiana

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July 7, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

**BACKGROUND**

Larry Wayne McCray and Cedric J. Smith were convicted of bank robbery and carrying a firearm during a crime of violence. They were charged together with four counts of bank robbery and with

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

four counts of carrying firearms during the robberies: Count One--the January 24, 1990, robbery of the Pioneer Bank & Trust Co. on Line Avenue in Shreveport, Louisiana; Count Three--the February 23, 1990, robbery of the Premier Bank & Trust Co. on Greenwood Road in Shreveport, Louisiana; Count Five--the February 27, 1990, robbery of the Hibernia Bank on Lakeshore Drive in Shreveport, Louisiana; and Count Seven--the March 14, 1990, robbery of the Premier Bank on Line Avenue in Shreveport, Louisiana. Smith was also charged separately in Count Nine for a robbery on June 1, 1990, of the First National Bank of Mansfield in Stonewall, Louisiana.

On February 21, 1991, after being arrested in connection with another bank robbery, McCray gave a confession to these four robberies to Shreveport Police Detective Glenn Schach. McCray took police officers to the four banks which he had robbed, explained how the robberies were committed, and told police the names of other persons involved in the robberies. The content of McCray's confession was introduced into evidence at McCray's and Smith's joint trial through Schach's testimony. Because McCray identified Smith as one of the other robbers, the tapes and transcripts of McCray's confession were received into the record, but the district court ordered that they were not to be listened to by the jury or referred to by the attorneys.

The government introduced other evidence implicating Smith in five robberies. Smith's fingerprint was found on the teller cage of the Hibernia Bank in a location consistent with a surveillance video of one of the robbers shown leaping over the teller's cage.

Lisa Shelton, a teller at Hibernia Bank, identified Smith as one of the robbers.

Smith was also identified by a teller, Glenda Harper, in the Premier Bank robbery on Greenwood Road. "Bait money" consisting of \$20 bills with recorded serial numbers from the Premier Bank branches on Greenwood Road and Line Avenue, given to Smith by the tellers during the robberies, was recovered after Smith's sister deposited \$8,800 in cash, given to her by Smith, in her account at Premier Bank.

Steve Green and Adam Hayes, Smith's accomplices in one of the five robberies, testified about their roles and Smith's role in the June 1 robbery of First National Bank in Stonewall, Louisiana, and Hayes testified about Smith's and McCray's roles in the March 14, 1990 robbery of Premier Bank on Line Avenue.

#### **OPINION**

The Government argues that this Court does not have jurisdiction to consider Smith's appeal because he did not file a written notice of appeal within the delays allowed by Fed. R. App. P. 4(b). The Government contends that Smith's oral notice of appeal is not sufficient. Smith contends that his oral notice of appeal, supplemented by his later written notice, was effective. The parties were ordered to brief this issue in the briefing notice.

Smith gave oral notice of appeal on November 12, 1992, at his sentencing hearing. The district court clerk noted this in the minutes of sentencing on the docket sheet. Smith's attorney filed

a written notice of appeal on January 6, 1993. No document labeled as a notice of appeal was filed within the ten days allowed by Rule 4(b), and no document was filed within the thirty extra days allowed under Rule 4(b) which could be considered a motion for excusable neglect. See United States v. Golding, 739 F.2d 183, 184 (5th Cir. 1984).

The Government cites O'Neal v. United States, 264 F.2d 809 (5th Cir.), modified, 272 F.2d 412 (5th Cir. 1959), as authority for its argument that this Court does not have jurisdiction. In O'Neal, this Court dismissed an appeal where the only notice of appeal was given orally, although the district court clerk referenced the oral notice in a minute entry in the docket sheets and in a subsequent letter to the parties. This Court later modified O'Neal and found jurisdiction based on the fact that O'Neal had filed an appeal bond within the appeal delays.

Smith filed a financial affidavit in the district court to support his request to have counsel appointed to represent him on appeal. Although the affidavit does not bear a stamp indicating the date of filing, it was signed on November 12, 1992, and the district court appointed appellate counsel on November 18. Smith was sentenced on November 12, and judgment was entered on November 23.

In Smith v. Barry, \_\_\_ U.S. \_\_\_, 112 S. Ct. 678, 682, 116 L. Ed. 2d 678 (1992), the Supreme Court held that an appeal brief filed within the period for filing a notice of appeal, if it met the requirements of Fed. R. App. P. 3(c), could be considered as a

notice of appeal. In keeping with this principle of liberal construction, the affidavit in this case can be considered as Smith's notice of appeal, because it reasonably complies with the requirements of Rule 3(c). It indicates his name, Cedric Smith, and that he is the appellant; it indicates the case name, the district court case number, and the statutes under which he was convicted, which could be construed as stating the judgment from which he is appealing; and it indicates that he is appealing from the Western District of Louisiana, for which the only avenue of appeal is the Fifth Circuit. This interpretation is consistent with recent circuit cases decided after Smith v. Barry. See U.S. v. Moats, 961 F.2d 1198, 1204 (5th Cir. 1992) (petition for permission to appeal from an interlocutory order functioned as notice of appeal); United States v. Carson, 969 F.2d 1480, 1486 n.2 (3rd Cir. 1992) (letter by attorney to judge requesting informata pauperis (IFP) status functioned as notice of appeal). United States v. Lopez, No. 92-4901, (5th Cir. June 23, 1993, unpublished) (written notices of appeal prepared and signed by clerk). We find appellate jurisdiction exists in this case.

Smith argues that the district court erred in overruling his motion for mistrial on the grounds that the introduction of McCray's statement through the testimony of Schach violated his Sixth Amendment right to confrontation under Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

Because McCray's statement named Smith as an accomplice in the robberies, the Government did not play the tape or make the

transcripts available to the jury. Instead, the Government introduced the substance of McCray's confession through Detective Schach's testimony. Schach did not identify Smith as McCray's accomplice; however, he did state that McCray had referred to his accomplice by name and described the actions of this other robber. After Schach had testified at some length about McCray's confession, Smith's attorney made a motion for mistrial based on Bruton. He argued that the manner in which the U.S. Attorney was questioning Schach regarding whether McCray had named his accomplice created the inference that Smith was this other person. The district court instructed the U.S. Attorney to avoid asking Schach if McCray had mentioned the name of the other person and denied the motion for mistrial. Smith's counsel agreed that the Government's promise to not ask Schach any further about whether McCray had mentioned the name of the other robber was satisfactory.

The Government argues that Smith has not preserved this issue for appeal because his objection was untimely and because the Government restricted its questioning to defense counsel's satisfaction with no further objections. Because Smith did make an objection to the testimony and the record is adequate for review, Smith has preserved this issue for appeal.

In Bruton, the Supreme Court held that a defendant is deprived of his rights under the Confrontation Clause of the Sixth Amendment when his nontestifying co-defendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider the confession only against

the confessor. 391 U.S. at 126. This Court reviews Bruton issues under the abuse of discretion standard. United States v. Beaumont, 972 F.2d 91, 95 (5th Cir. 1992).

The Government argues that this case does not present a Bruton issue because Schach's testimony did not specifically name Smith. Smith argues that because he and McCray were the only people on trial, the only reasonable conclusion is that McCray was referring to Smith.

A defendant's Sixth Amendment right to confrontation is not violated unless the co-defendant's statement directly incriminates him without reference to other admissible evidence. Beaumont, 972 F.2d at 95. In Beaumont, the co-defendant stated that he got the money from and was doing a favor for "a friend." Other admissible evidence led to the conclusion that the "friend" was the defendant. This Court held that the statements did not directly implicate the defendant, and therefore, did not violate Bruton. Id.

In United States v. Espinoza-Seanez, 862 F.2d 526, 533-35, (5th Cir. 1988), the confession of a co-defendant was introduced which referred to two other members of a conspiracy. These defendants were not referred to by name, but as "the man" who was helping him distribute the marijuana and some one else who was supposed to pick up a car. This Court stated that it was not the statement which implicated these two defendants but their own actions. This Court held that the confession was properly admitted. Id.

The district court did not abuse its discretion in denying Smith's motion for a mistrial. McCray's statement as testified to by Schach did not directly implicate Smith. McCray merely described the actions of his accomplice. Smith was implicated by other evidence, the testimony of the bank tellers and his accomplice Hayes, the surveillance videos, and his fingerprints, which matched his actions to those described by McCray. That Smith was the other person referred to by McCray's statement was not the only logical conclusion to be drawn from the statement alone. The indictment charged McCray, Smith, and others known and unknown.

McCray argues that the evidence was insufficient to convict him because the Government's case was based entirely upon his recanted statements made when his capacity to act rationally was diminished by alcohol and drug use.

McCray gave his statement regarding his participation in the four robberies on February 21, 1991. On February 25, McCray denied that he had participated in these robberies. He claimed at that time that he had been "high" when he gave the statement on the 21st. He claimed to have smoked drugs and drank alcohol.

McCray filed a motion to determine the voluntariness of his statement in the district court. The district court held a suppression hearing and ruled that the statement was voluntary and admissible. The district court specifically found that McCray's claim that he was under the influence of drugs and alcohol at the time he gave the statement was incredible in view of the testimony of the officers and from listening to the tape.



McCray does not challenge this finding by the district court. He does not challenge the admissibility of the confession. He merely argues that his confession to the four robberies, given at a time when his faculties were impaired, was insufficient to support his conviction. He contends that there was no other physical evidence linking him to the crimes, yet he does not argue which elements of the crimes were not proven by his confession.

McCray moved for judgment of acquittal at the close of the Government's case, and the district court assumed a motion for judgment of acquittal at the close of all the evidence. "The standard for review for sufficiency of evidence is whether any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." United States v. Garza, 990 F.2d 171, 173-74 (5th Cir. 1993) (internal quotations and citation omitted).

McCray was convicted under 18 U.S.C. §§ 924(c) and 2113(a) and (d). Section 2113(a) requires proof that the defendant, "by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association." 18 U.S.C. § 2113(a) (West Supp. 1993). Section 2113(d) increases the penalty if the defendant commits the offense in subsection (a) by putting in jeopardy the life of any person by the use of a dangerous weapon. 18 U.S.C. § 2113(d) (West 1984).

Section 924(c) increases the penalty if the defendant uses a dangerous weapon during a crime of violence. 18 U.S.C. § 924(c) (West Supp. 1993).

Schach testified at trial that McCray confessed that he had entered the four banks in question armed with weapons, that he ordered the people in the bank to lay on the floor while his accomplice got the money from behind the counters, and that they exited the bank with the money. Schach's testimony relating McCray's confession was sufficient to support McCray's convictions.

McCray's attorney cross-examined Schach about McCray's statement given a few days later in which McCray recanted and claimed incapacity due to drugs and alcohol. On redirect examination, Schach testified that he saw no evidence of McCray's use of drugs or alcohol. The jury was free to believe McCray's first statement in which he confessed to the robberies, and this Court cannot supplant the jury's choice. Garza, 990 F.2d at 174.

AFFIRMED.

Staff counsel makes no recommendation on this issue and leaves the ultimate decision as to whether the affidavit should be considered as Smith's notice of appeal to the Court. However, staff counsel will address Smith's issue on appeal in case this Court decides it has jurisdiction.