UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92 - 5210

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

VERSUS

JOHNATHAN WAYNE FONTENETTE,

Defendant - Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1:92-CR-35-7)

(March 9, 1994)

Before DUHE, EMILIO GARZA, Circuit Judges and STAGG[1], District Judge.

PER CURIAM:[2]

Appellant challenges his conviction for conspiracy to possess cocaine base with intent to distribute in violation of 21 U.S.C. § 846. Finding no error, we affirm.

Defendant Fontenette and seven others were charged in a seven count indictment. Fontenette was charged in count one with conspiracy to possess with intent to distribute cocaine base and in

---

[1]District Judge of the Western District of Louisiana, sitting by designation.

[2]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 Pursuant to that rule, the court has determined that this opinion should not be published.

count four with aiding and abetting in the distribution of cocaine base[3]. Fontenette's seven co-defendants[4] entered pleas of guilty, and Fontenette proceeded to trial. On September 11, 1992, the jury returned a guilty verdict on the conspiracy count, but acquitted Fontenette on the aiding and abetting count.

Fontenette raises two issues on appeal for our consideration. First, he argues that the evidence was legally insufficient to convict him of conspiracy. Secondly, he argues that the verdicts were inconsistent, and thus reversal is required.

I. FACTS

Defendant's arrest and conviction resulted from his involvement with George Leonard Jasper, Jr. The government began to investigate George Jasper and his narcotics enterprises in late 1990. Jasper was believed to be involved in extensive drug trafficking activities in Houston and Beaumont, Texas. A confidential informant, Thomas Rogers, had been supplying the government with information regarding Jasper. The arrest of Jasper and Fontenette on the present charges resulted from their participation in a drug buy arranged with Rogers.

The drug transaction resulting in Fontenette's arrest occurred on February 12, 1992. Jasper and Rogers talked in person on February 11, 1992, and on the phone the following day to schedule the drug purchase. The government recorded the February 12th

---

[3]21 U.S.C. §841(a)(1); 21 U.S.C. §860(a); 18 U.S.C. §2.

[4]Fontenette's co-defendants were George Leonard Jasper, Jr., Craig Anthony Eckford, Pamela Gail Mathis, Larry Lee Grace, Elizabeth Denise Powell, Alice Brown, and Shanderia Maria Hicks.

meeting and phone call. During the February 11, 1992 meeting with Rogers, Jasper referred to Fontenette as "Pep"[5] and identified him as someone who could be contacted to arrange crack purchases. The defense elicited testimony from Jasper that he and Thomas Rogers frequently joked with each other about different subjects and were sarcastic in their conversation. In her closing argument, Fontenette's attorney suggested that Jasper's statements implicating Fontenette were made in jest.

The defendant and Jasper were both present at the sale on February 12, 1992. Although the purchase was made in the presence of Fontenette, at no time during the transaction did he have actual possession of the drugs or the money received from Rogers.

The government introduced evidence that Jasper and Fontenette shared a jail cell in Jefferson County from August, 1991 until January, 1992. The prosecution suggested that Jasper recruited Fontenette during this period. To rebut the suggestion that Jasper and Fontenette were in a secluded area conducive to contact during their mutual incarceration, defense counsel introduced evidence that the cell contained twenty-five prisoners. In addition, Craig Anthony Eckford, a co-conspirator who was also in the cell during this time, testified that he did not know Fontenette except for when they were in jail together. Defendant's counsel suggested that due to his extensive involvement in the conspiracy, Eckford would have been aware had Fontenette been involved in the conspiracy. Moreover, Jasper testified that he never enlisted

[5]Fontenette's nickname.

Fontenette to participate in his drug trafficking activities while they were in prison together.

Jasper explained that he grew to be very fond of Fontenette, and viewed him as a "little brother." He justified Fontenette's presence at the arranged drug buy on February 12, 1992 as simply the aftermath of a meeting during which Jasper cut Fontenette's hair. The haircut occurred at the residence of Jasper's lady friend, Elizabeth Powell. Since Fontenette was unacquainted with other occupants of the home, Jasper stated that it was quite natural for him to leave with and to accompany Jasper to the park, where the sale occurred.[6] However, Jasper also admitted that he was careful about those in whose presence he did and discussed business. Additionally, the government introduced evidence that Jasper had written a letter to Elizabeth Powell, stating that "me and Pep talked and everything is cool."

Thomas Rogers, the confidential informant, testified that he met Fontenette in jail when accompanying Elizabeth Powell on her visits to George Jasper. He also stated that Powell related to him that Fontenette would be selling crack cocaine for Jasper. Rogers further testified that Jasper, in his experience, preferred to have

---

[6]Jasper testified that he spoke to Fontenette on February 12, 1993. Fontenette inquired about Jasper's plans for the day, and Jasper responded that he was going to give Elizabeth Powell's son a haircut. Powell was Jasper's girlfriend as well as a co-conspirator. Fontenette stated that he wanted a haircut also, and Jasper told him to go to Powell's home. Jasper testified that he was supposed to meet Thomas Rogers in the park after the haircut, and Fontenette just happened to go with him. Mr. Jasper maintained that the sole purpose for Fontenette's presence was to obtain a haircut and visit with Jasper.

people with him when he was dealing drugs. Additionally, he maintained that he had never known Jasper to deal drugs in the presence of a stranger. However, Fontenette's counsel emphasized Rogers' reaction as recorded on the tape of the arranged drug buy. Upon seeing Fontenette at the park, Rogers stated, "What is this? What is this?" Fontenette's counsel argued that because Rogers was so involved with Jasper, he certainly would have been aware had Fontenette also been involved in the conspiracy.

II. DISCUSSION

A. Insufficiency of evidence

Defendant's first point of error is that the evidence was insufficient to convict him of conspiracy. This court will reverse the jury's verdict "only if a reasonably minded jury must necessarily have entertained a reasonable doubt of a defendant's guilt." United States v. Vergara, 687 F.2d 57, 60 (5th Cir. 1982), citing United States v. Bell, 678 F.2d 547 (5th Cir. 1982) (en banc), aff'd, 462 U.S. 356, 103 S.Ct. 2398 (1983). Further, the evidence must be viewed in the light most favorable to the party prevailing at the district court level. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457 (1942).

Defendant was convicted of conspiracy to possess with intent to distribute fifty or more grams of cocaine base. To establish the existence of a conspiracy, the government must prove beyond a reasonable doubt 1) the existence of an agreement between two or more persons to distribute drugs, 2) the defendant's knowledge of the agreement, and 3) the defendant's voluntary participation in

the agreement. United States v. Maltos, 985 F.2d 743, 746 (5th Cir. 1992), citing United States v. Gallo, 927 F.2d 815, 820 (5th Cir. 1991). The essence of the conspiracy is the making of the unlawful agreement, not the accomplishment of the unlawful objective. Ianelli v. United States, 420 U.S. 770, 95 S.Ct. 1284 (1975); United States v. Cuesta, 597 F.2d 903, (5th Cir.); cert. denied, 444 U.S. 964, 100 S.Ct. 451 (1979). However, "mere presence at the crime scene or close association with conspirators, standing alone, will not support an inference of participation in the conspiracy." United States v. Maltos, 985 F.2d 743, 746 (5th Cir. 1992), citing United States v. Fitzharris, 633 F.2d 416, 423 (5th Cir. 1980), cert. denied, 451 U.S. 988, 101 S.Ct. 2325 (1981). Therefore, the government was required to prove beyond a reasonable doubt that Fontenette entered into an unlawful agreement to sell crack cocaine. Maltos at 746. There was admittedly little direct evidence with which to convict the defendant. However, the government introduced ample circumstantial evidence from which a reasonable jury could have concluded that this burden was met. Introduction of circumstantial evidence is proper. United States v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989). Defendant was present at the illegal drug transaction. Although he did not directly participate in the exchange of money and cocaine, he witnessed the entire incident. Perhaps the most persuasive evidence of guilt was Jasper's own testimony that he was careful about the people in whose presence he dealt drugs. There was evidence sufficient to allow the jury to reject defendant's

argument that he was only fortuitously present at the drug buy. In addition, both George Jasper and Elizabeth Powell made references to the defendant's involvement in the drug conspiracy. Defendant emphasizes the uncontested fact that he did not become associated with the conspiracy until several days before its demise. However, late involvement in a conspiracy does not preclude conviction for participation in it. United States v. Leach, 613 F.2d 1295, 1299 (5th Cir. 1980).

Weighing evidence and making credibility judgments of witnesses is not the role of this court. United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1983). If a reasonably minded jury could have found that the evidence introduced at trial proved the defendant's guilt beyond a reasonable doubt, then the conviction must stand. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). This court finds that a rational trier of fact could have concluded that defendant was guilty of participation in conspiracy to distribute cocaine base.

B. Inconsistent verdicts

Defendant's second argument is that the jury verdicts were inconsistent, thus mandating reversal. Defendant argues that his acquittal on the aiding and abetting count precludes the jury from finding fulfilment of one requirement for conviction of conspiracy, namely that he voluntarily joined and participated in the agreement to distribute a controlled substance. United States v. Powell, 469 U.S. 57, 105 S.Ct. 471 (1984) involved a jury that acquitted a defendant on counts of conspiracy and possession, but convicted her

on the compound offenses of using the telephone to commit the alleged conspiracy and possession. The court refused to allow the defendant to challenge the inconsistent verdicts, stating that some jury error has almost certainly occurred when inconsistent verdicts are returned. However, "it is unclear whose ox has been gored." Powell at 477. The court stated that:

> First, inconsistent verdicts ... should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury's error. The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable at the defendant's behest.

Powell at 57-58. In addition, this court is not convinced that these verdicts were inconsistent. Conspiracy does not require completion of the contemplated criminal act. Cuesta at 917. Therefore, to convict Fontenette of conspiracy, the jury did not have to find that he participated in the actual sale to Thomas Rogers. It had to find that he entered into an agreement to participate in that sale, and there was sufficient evidence for it to so conclude.

For the foregoing reasons, the judgment of the lower court is **AFFIRMED.**