

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-5734

UNITED STATES,

Plaintiff-Appellant,

VERSUS

ROYACE ANTHONY MOORE AND
ERIC JONES,

Defendants-Appellees.

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

SA 91 CR 486 6

(August 24, 1993)

Before JONES and DeMOSS, Circuit Judges, and KAZEN,* District
Judge.

PER CURIAM:**

*District Judge of the Southern District of Texas, sitting
by designation.

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opinion should not be published.

I.

In November 1991, Drug Enforcement Administration (DEA) Special Agent David Ambrose and Bexar County District Attorney Investigator Willie Guerra began investigating a group they suspected were trafficking in crack cocaine.

On December 3, 1991, Guerra and Ambrose drove to defendant Quintin Beneby's apartment complex to buy two ounces of crack cocaine for \$2000.

During the meeting, Defendant Royace Anthony Moore walked up to the three men. Beneby introduced Moore as his brother, handed Moore a slip of paper with a pager number on it, and instructed Moore to go upstairs to call the "man" and tell him the "money people" were waiting. Moore is not related to Beneby but was his roommate.

Guerra waited by his car while Beneby checked the back parking lot and Moore walked upstairs to the apartment. Several minutes later, Moore ran back downstairs from the apartment and told both Beneby and Guerra that the "man" called back and would arrive between 3:15 and 3:20 PM. Beneby said that he would continue to check the parking lot where his man sometimes parked while his "brother" Moore waited in the apartment in case the man called. When Moore reentered the apartment, Agent Ambrose noticed a movement in the venetian blinds indicating Moore was acting as a lookout during the transaction.

At 3:20, co-defendants Eric Jones and James Glass arrived. Jones delivered the crack cocaine to Beneby who referred to both

Jones and Glass as his "main people". Jones sold Guerra two ounces of crack cocaine for \$2000.

Eight days later, Jones agreed to sell ten ounces of crack cocaine for \$8000 to Guerra immediately and an additional six ounces in the future. When Guerra and Ambrose showed up for the sale to Beneby and Jones, the DEA agents arrested all the suspects.

On March 4, 1992, Moore and Jones were indicted with (1) conspiracy to distribute more than fifty grams of cocaine base and (2) aiding and abetting the distribution of more than fifty grams of cocaine base on December 3, 1991. The indictment also charged Jones with (1) aiding and abetting the distribution of more than fifty grams of cocaine base on December 11, 1991 and (2) using and carrying a firearm during and in relation to a drug trafficking crime.

Shortly before trial, a Bexar county psychiatrist examined Beneby and reported he was not competent to stand trial. On August 28, 1992, the district court ordered Beneby transferred to the Medical Center for Federal Prisoners for further evaluation.

On September 9, the jury found Jones guilty on all four counts and found Moore guilty of the aiding and abetting count. The jury found Moore not guilty on the conspiracy count. Moore was sentenced to a 140 month term of imprisonment, a five-year term of supervised release and a mandatory assessment of \$50. Jones was sentenced to a prison term of 420 months, a five-year supervised release and mandatory assessments totalling \$200.

On appeal, the defendants contend that:

1. The district court violated their sixth amendment rights to cross-examine adverse witnesses by allowing the statements of co-conspirator Quintin Beneby into evidence.

2. The district court abused its discretion by denying their motions for continuances to determine co-defendant Beneby's mental state at the time of the offense.

3. The district court improperly denied defendant Jones' request that the jury be advised of Beneby's lack of competence to stand trial.

4. The district court erred in not reducing Moore's sentence for his minor role.

5. The evidence was insufficient to support the conviction of defendant Moore.

II

The district court found that Beneby's unavailability to testify or be cross-examined did not affect the admissibility of the statements because statements made by a coconspirator during and in furtherance of a conspiracy are admissible as non-hearsay. Rule 801(d)(2)(E), Fed.R.Evid. Moreover, the requirements for admission under Rule 801(d)(2)(E) are identical to the requirements of the Confrontation Clause. Bourjaily v. United States, 483 U.S. 171, 175 (1987).

The district court denied Moore's motion for continuance because it was not satisfied that Beneby would testify if called, Beneby's attorney having recommended that Beneby invoke his Fifth Amendment privilege; because it was convinced the testimony would be exculpatory; because it believed Beneby was not qualified to testify as a witness given his lack of competence to stand trial, and because it did not believe Beneby was competent to waive his Fifth Amendment privilege. The court reasoned that Beneby's

competence at the time of trial was not relevant to his state of mind when the offenses were committed. Furthermore, the continuance requested by Jones was untimely and would have required disruption of the trial and Jones presented no evidence that he could have secured favorable testimony given additional time.

The court denied Jones' request that the jury be advised of Beneby's lack of competence to stand trial because it found Beneby's lack of competence to stand trial had no bearing on Beneby's sanity at the time of the crime.

Finally, the record reflects that the court's sentence did take into account defendant's minimal role.

After a careful review of the record, we find no error in the district court's rulings as to grounds one through four.

With regard to ground five, we believe Investigator Guerra's testimony, corroborated by Agent Ambrose's testimony, provides sufficient evidence to justify Moore's conviction of aiding and abetting the distribution of more than fifty grams of cocaine. According to Investigator Guerra's testimony, Moore approached while Beneby and Guerra waited for Jones to arrive with the cocaine. Moore co-operated with Jones by taking a telephone number and instructions from Beneby to contact the "man" and tell him the people were waiting with the money. Moore told Guerra and Beneby that the "man" had called and told them when the drug suppliers would arrive. Moore then returned to the apartments and moved the blinds in a manner indicating that he was watching the transaction.

The jury could reasonably find from this conduct, that Moore

associated himself with Beneby's venture in a way calculated to bring about the venture's success.

We therefore AFFIRM the convictions and sentences of both defendants.