IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7084
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES CAUDILL,
LEO PALACIOS,
and
RALPH COLE,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR-C-91-00231)

(March 4, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

On various grounds, James Caudill, Leo Palacios, and Ralph Cole appeal their convictions of conspiracy to possess with intent to distribute marihuana and possession with intent to distribute marihuana, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(a)(B) and

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 Pursuant to that rule, the court has determined that this opinion should not be published.

(C) and 846. Finding no error, we affirm.

I.

On May 14, 1991, a fifteen-count indictment against nine defendants was filed in the Southern District of Texas. The case currently before the court concerns only the above-named three defendants.

The indictment stemmed from the drug trafficking activity of Andrew Jackson Whitmore. One of the principal prosecution witnesses in the cases was Linda Kay Hubanks, who testified that Whitmore's income came from buying and selling marihuana. Whitmore would make purchases of approximately 200 pounds of marihuana three to six times each month. Hubanks testified that Palacios was Whitmore's supplier.

Hubanks also testified that Cole assisted Whitmore in the illegal marihuana trafficking on at least three occasions from March 1990 through July 1990. On the third occasion, the truck used to bring the marihuana across the border was seized by Drug Enforcement Administration (DEA) agents. Hubanks testified that Cole and others had purchased the truck and registered it in the name of Teodora Maldonado because Maldonado had never been in any trouble, so that if the truck were stopped at a border checkpoint there would be no problem.[1]

Caudill, Cole, and Palacios were convicted for conspiracy to

[1] Hubanks also testified that Caudill was a broker and participated in the narcotics trafficking between March and July 1990. Caudill does not challenge the sufficiency of the evidence supporting his conviction.

possess with intent to distribute more than 100 kilograms of marihuana, as charged in count one. Cole also was convicted of the possession of 86 kilograms of marihuana as charged in count 15.

II.

A.

Cole and Palacios argue on appeal that there was insufficient evidence to convict. Both acknowledge that the government had the burden of proving that there was an agreement to violate the drug laws, that they knew of this conspiracy, and that they voluntarily joined it. United States v. Onick, 889 F.2d 1425, 1432 (5th Cir. 1989).

Palacios does not argue that there was no evidence of his involvement in the conspiracy; he simply contends that the witnesses testifying to his involvement were unworthy of belief. The standard for determining sufficiency of the evidence to support a conviction is whether "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd, 462 U.S. 356 (1983). In making this determination we view the evidence in the light most favorable to the government, and we resolve inferences and credibility choices in favor of the verdict. United States v. Santisteban, 833 F.2d 513, 516 (5th Cir. 1987).

Under this standard of judging credibility, Palacios's assertion that Hubanks and other witnesses were lying cannot support his claim that the evidence was insufficient. As shown

above, Hubanks was clear and unequivocal in her testimony that Palacios voluntarily participated in the conspiracy to violate the drug laws.

Cole has taken a different tack and argues that the government proved a conspiracy different from the one alleged in the indictment. It is Cole's position that there were several small conspiracies, rather than one large one. Cole does not claim that he was not involved in any conspiracy to violate the narcotics laws.

In United States v. Richerson, 833 F.2d 1147, 1152-53 (5th Cir. 1987), we held that the principal factors to be used in determining the number of conspiracies proved at trial are "(1) the existence of a common goal[;] (2) the nature of the scheme[;] and (3) overlapping of participants in the various dealings." In addressing the issue of common goal, we cited United States v. Rodriguez, 509 F.2d 1342, 1348 (5th Cir. 1975), for the proposition that a three-year plan to buy cocaine, which involved varying participants, was sufficient to be defined as a common purpose. 833 F.2d at 1153.

The pertinent facts of this case are that Whitmore was in the business of selling large quantities of marihuana. In Richerson, we held that "[a] single conspiracy exists where a `key man' is involved in and directs illegal activities, while various combinations of other participants exert individual efforts toward a common goal." 833 F.2d at 1154. "The members of a conspiracy which functions through a division of labor need not have an

awareness of the existence of the other members, or be privy to the details of each aspect of the conspiracy." Id. This is precisely what happened in this case. Whitmore was the "key man." He directed the marihuana-dealing activities. He decided when and how the drugs were to be bought, sold, moved, and packaged. As such, the evidence in this case points to a single conspiracy.

Cole contends that the conspiracy proved and the conspiracy alleged in count one of the indictment were not the same, as he had not conspired with all of the individuals named in count one and had conspired with other unnamed individuals. This contention has no merit. As shown above, it is not necessary for each member of the conspiracy to be aware of every aspect of that conspiracy in order to be guilty. See id. Accordingly, we affirm the convictions of Palacios and Cole, as there was sufficient evidence to show that there was an agreement to violate the drug laws, that these two individuals knew of the agreement, and that they voluntarily joined it.

B.

Caudill's sole claim on appeal is that the district court improperly cut short the cross-examination of two government witnesses, Hubanks and Linda England. "`Limitation of the scope and extent of cross-examination is a matter committed to the sound discretion of the trial judge reviewable only for a clear abuse of that discretion.'" United States v. Duncan, 919 F.2d 981, 988-89 (5th Cir.), cert. denied, 111 S. Ct. 2036 (1991) (citation

omitted).

Caudill complains generally that the district court repeatedly rushed cross-examination of prosecution witnesses. He specifically contends that the court did not allow adequate cross-examination of Hubanks on the extent to which she was motivated to testify by a favorable plea agreement.

The record shows that the district court did not prevent Hubanks from answering this question but simply prevented defense counsel from repeating the question. Defense counsel was allowed to question Hubanks extensively as to the nature of the plea agreement, which was placed into evidence. There is nothing in the record to show that the district court abused its discretion in not allowing defense counsel to ask repetitive questions.

Caudill contends that the district court did not allow defense counsel to question England adequately with respect to how long she had known a certain man before she moved in with him. The record shows that the district court again simply was stopping repetitive questioning. Caudill further contends that the district court improperly restricted cross-examination of England with respect to the smoking of marihuana.

The record reveals, however, that the district court merely questioned the relevance of asking England where in the house she smoked the marihuana. On appeal, Caudill has not even suggested the relevancy of whether England was smoking marihuana in the kitchen or in the bedroom. As a result, the district court did not abuse its discretion in limiting irrelevant questioning.

C.

Palacios contends that his counsel was ineffective because he failed to request a jury instruction on multiple conspiracies. The general rule in this circuit is that a claim of ineffective assistance of counsel cannot be determined on direct appeal when that claim has not been raised in the district court. United States v. Freeze, 707 F.2d 132, 138 (5th Cir. 1983). We have resolved such claims only in "rare cases where the record allow[s] [the Court] to evaluate fairly the merits of the claim." United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988).

This issue was not raised in the district court, and the record contains no evidence regarding counsel's strategic reasons for not requesting the multiple conspiracy instruction. As a result, we decline to address the merits of this claim, without prejudice to Palacios's right to raise it in a collateral proceeding.

D.

Cole contends that the prosecutor improperly commented in closing arguments about his refusal to testify.

> The test for determining whether a prosecutor's remarks constitute a comment on the defendant's silence is a twofold alternative one: "(1) whether the prosecutor's manifest intent was to comment on the defendant's silence or (2) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence."
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> As to the first possibility, the prosecutor's intent must be "manifest"; in other words, the test is not met

> if some other explanation for his remark is equally plausible." As to the second, "the question is not whether the jury possibly or even probably would view the challenged remark in this manner, but whether the jury necessarily would have done so."

United States v. Collins, 972 F.2d 1385, 1406 (5th Cir. 1992) (citations omitted), petition for cert. filed, 61 U.S.L.W. 3446 (Dec. 7, 1992) (No. 92-964).

The contested argument was made in relation to the tractor-trailer truck seized by the DEA on May 27, 1990. As part of the investigation, the DEA uncovered that the truck was registered in the name of Teodora Maldonado. Following further investigation, the DEA agents contacted Cole, who admitted that the truck belonged to him. On further questioning, Cole acknowledged that the vehicle had been registered in Maldonado's name, but he provided no explanation for this action.

In closing argument, Cole's counsel asserted that Cole had not placed the truck in Maldonado's name in order to deceive the DEA. Counsel supported this assertion by arguing that Cole had admitted ownership without hesitation when questioned by the DEA. In response to this argument, the prosecutor stated that

> [i]t's a matter of record also that Ralph Cole never, that if you recall Rick Warren, Agent Rick Warren, telling you that he seized that vehicle, Ralph Cole never contested that seizure. If he had never, if he had not been part of this venture, why didn't he contest that seizure and attempt to get his truck back?

Cole claims that this statement not only referred to evidence outside of the record but was an improper comment on his failure to testify. These contentions have no merit.

First, the DEA agents testified that they discovered that Cole

was the owner of the truck through their own investigation, not because Cole had come forward to contest the seizure of his truckload of perishable produce. The prosecutor did not go beyond the evidence, as this testimony showed that Cole had not made an effort to regain possession of the seized vehicle.

Second, the argument by the prosecutor does not demonstrate manifest intent to comment on Cole's failure to testify, as the argument was made in response to defense counsel's argument that Cole had been forthcoming with the information that he was the owner of the truck. See Collins, 972 F.2d at 1406. Additionally, the jury would not necessarily have considered this a comment on the failure to testify but could have viewed it as simply relating to the question of why one individual would register a truck in the name of another. The argument was directed not at the issue of whether Cole had testified at trial, but at why he had not explained the registration of the vehicle to the DEA when questioned about it. As such, Cole has not demonstrated that the prosecutor made an improper comment on his silence.

AFFIRMED.