

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7284
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FERNANDO PENA,

Defendant-Appellant.

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

(CR-L-91-207-01)

(January 8, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Fernando Pena was convicted by a jury of conspiracy to possess with intent to distribute heroin, and for distribution of heroin, in violation of 18 U.S.C. § 2, and 21 U.S.C. §§ 841 and 846. He was sentenced to serve consecutive

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

prison terms of 78 months each on the three counts of which he was convicted, plus five years of supervised release and a special assessment of \$150. On appeal, Pena complains that the evidence was insufficient to support his conviction on each of the three counts of which the jury found him guilty, and that the district court incorrectly calculated his offense level. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Daniel Rodriguez, a Laredo police officer, was working undercover as part of a narcotics task force when, on May 10, 1991, he was introduced to Pena for the purpose of purchasing drugs. Rodriguez was told by Pena that he could provide anything, and it was agreed that Pena would provide an ounce of heroin for \$4000. As the discussions progressed, Pena told Rodriguez that they could do a five-ounce deal. Pursuant to this plan, Pena introduced Rodriguez to one Marcelino Rodriguez (Mayo). They agreed that Mayo would sell five ounces of heroin to Pena for \$3000 an ounce and that Pena then would resell it to Rodriguez for \$4000 an ounce. Following completion of negotiations that transpired over the next several days, Rodriguez was contacted by Pena and was told that he had only one and one-half ounces of heroin. Pena was advised by Rodriguez that he did not wish to deal in such a small amount, so the transaction never took place. On May 31, 1991, Rodriguez telephoned Pena for the purpose of transacting a five-ounce heroin deal. Expecting Mayo to produce the five ounces of heroin, Pena

and Rodriguez met at the site of Pena's bail bond business, but Mayo never arrived.

On June 10, 1991, Rodriguez and Pena met one Hector Rivera, again for the purpose of Rodriguez's buying five ounces of heroin, but Rivera could not produce the drugs at that time. Three days later, on June 13th, however, Pena was told by Rivera that he had three ounces of heroin for sale. The deal was struck at Pena's house that day: Rivera and his associates delivered the heroin, which was slightly less than three ounces; and Rodriguez paid them \$11,300 for the drugs and paid Pena the prearranged brokerage fee of \$750.

On June 20, 1991, Rodriguez introduced Pena to Customs Agent Roland Ramon who was posing as Rodriguez's uncle. The three men began negotiations on a 30-ounce heroin deal. These discussions continued until September 12, 1991, by which time Pena still had not acquired the heroin. Pena was arrested ten days later.

As a result of the foregoing occurrences, Pena, Mayo and Rivera were named in a four-count indictment. Count one charged the three defendants with conspiracy to possess with intent to distribute heroin. Count two charged the three defendants with conspiracy to distribute heroin. Count three charged Pena and Rivera with possession with intent to distribute heroin. Count four charged Pena and Rivera with distribution of heroin. The district court dismissed count two as duplicative. The jury found Pena guilty as charged on the three remaining counts. After sentencing, Pena timely appealed.

II

ANALYSIS

A. Sufficiency of the Evidence

Pena claims that the evidence is not sufficient to support any of the three counts of conviction. The standard for reviewing a jury verdict for sufficiency of evidence is well settled.

Viewing the evidence in the light most favorable to the jury verdict, we must determine whether "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." We do so, recognizing that "it is the sole province of the jury to weigh the evidence and the credibility of the witnesses."

United States v. Martin, 790 F.2d 1215, 1219 (5th Cir.), cert. denied, 479 U.S. 868 (1986) (citations omitted).

To prove the conspiracy count, the government had to show that there was an agreement to violate the drug laws, that Pena knew about the agreement, and that he voluntarily joined and participated in it. United States v. Salazar, 958 F.2d 1285, 1291 (5th Cir.), cert. denied, 113 S.Ct. 185 (1992). To prove the possession count, the government had to show that Pena knowingly possessed the heroin and intended to distribute it. United States v. Rodriguez-Mireles, 896 F.2d 890, 893 (5th Cir. 1990). To prove the distribution charges, the government had to show that Pena knowingly distributed heroin. United States v. Lechuga, 888 F.2d 1472, 1478 (5th Cir. 1989). Also, a defendant is "liable for the substantive offense committed by his co-conspirators that was the object of the conspiracy of which he was a member." Id.

With respect to the actual heroin transaction which occurred

on June 13, 1991, the government introduced the testimony of Officer Rodriguez to show that Pena arranged with Rivera for the purchase and sale of the heroin, that the transaction took place in Pena's house, that Pena was present throughout the entire exchange, and that the money for the heroin was placed into Pena's hands along with his \$750 brokerage fee. On appeal, Pena argues that there was no evidence that he conspired with Rivera to sell the heroin, and that he did not know what was going on in his house. This is in direct contradiction to Officer Rodriguez's testimony.

The jury was free to believe the testimony of Officer Rodriguez over Pena's denials. The testimony of Officer Rodriguez is sufficient to prove that Pena and Rivera agreed to violate the narcotics laws and that Pena was voluntarily part of that conspiracy. Further, the evidence given by Officer Rodriguez shows that Pena was in the room and accepted payment for his services rendered in bringing about the heroin transaction. Even though Officer Rodriguez testified that Pena did not actually touch the heroin, the evidence is sufficient to show that Pena was an active participant in the distribution transaction. Moreover, Pena is responsible for the actions of his co-conspirators in carrying out the object of the conspiracy which was to distribute heroin. See Lechuga at 1479. As it is supported by more than enough evidence upon which a reasonable trier of fact could find guilt beyond a reasonable doubt, Pena's conviction on all three counts must stand. Martin, 790 F.2d at 1219.

On appeal, Pena has also argued that he could not properly be

convicted of conspiracy because Mayo, the alleged co-conspirator, was acquitted on the conspiracy count of the indictment. While inconsistent verdicts are permitted, see United States v. Powell, 469 U.S. 57, 62-69, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984), it is not necessary to reach this point. There was sufficient evidence to convict Pena of conspiracy in relation to the June 13, 1991, heroin transaction.

B. Offense Level

Pena complains that the district court erred in holding him responsible for conspiring to distribute five ounces of heroin, rather than 80.2 grams, the quantity actually delivered. The amount of drugs involved in an offense is a factual finding of the district court and therefore subject to the clearly erroneous standard of review. United States v. Morales-Vasquez, 919 F.2d 258, 263 (5th Cir. 1990). The district court was explicit in finding that the purpose of the conspiracy was to make a "five ounce deal" even though in the end only three ounces actually changed hands. "[I]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as a trier of fact, it would have weighed the evidence differently." Anderson v. City of Bessemer City, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Given the testimony of Officer Rodriguez, the district court's factual findings were plausible and must be affirmed.

For the foregoing reasons, Pena's conviction and sentence are
AFFIRMED.