

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7301
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SANTOS BENAVIDES GONZALEZ,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(CR M-91-149-S1-03)

(February 10, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Santos Benavides Gonzalez was convicted of three counts of possession with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(c). He was sentenced to 97 months imprisonment.

One of the bases of appeal in this case centers around Randall Rene Garza, who was a paid government confidential

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

informant and a key prosecution witness. During cross-examination, Gonzalez attempted to elicit testimony concerning the arrest of Garza's uncle and Garza's arrest for assault, both unrelated to the charged offenses. Gonzalez argues that he attempted to show that Garza testified in an attempt to curry favor with the Government so it would influence these pending cases. The evidence was excluded following an ex parte conference between the prosecutor and the district judge.

The other basis of appeal focuses on the district court's finding that Gonzalez had not accepted responsibility and denial of a two-level downward departure. The presentence report stated that Gonzalez "was fully aware that he was committing a crime; however, the defendant felt he was pressured into doing so by the [confidential informant, Garza]." "Mr. Gonzalez claim[ed] that the only reason he went to trial was to establish the fact that there was a form of entrapment."

I

Gonzalez argues that the district court erred by excluding evidence about Garza's motive in giving testimony in favor of the prosecution.

Outside of the jury's presence, Gonzalez's attorney questioned Garza whether he had asked the Government for help with his uncle's case. Garza denied that there was any such deal. The district court ruled that Gonzalez failed to establish a motive on Garza's behalf and limited the cross-examination. Gonzalez's attorney

questioned DEA Agent Robert Howell outside of the jury's presence about whether phone calls had been made on Garza's behalf concerning assault charges pending against him. Howell testified that phone calls had been made, but denied that the calls were made in payment for Garza's testimony. The district court ruled that the defense could not question further Garza concerning these matters.

"Any incentive a witness may have to falsify his or her testimony is relevant to the witness' credibility and the weight the jury should accord to the testimony." U.S. v. Anderson, 933 F.2d 1261, 1276 (5th Cir. 1991). "A party challenging a witness generally is given the opportunity to pursue all relevant lines of inquiry aimed at discovering and disclosing bias." Id. Although the trial court has the discretionary authority to limit cross-examination, that authority "comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." U.S. v. Mayer, 556 F.2d 245, 250 (5th Cir. 1977)(internal quotations and citation omitted).

The evidence showing that Garza had asked for assistance with his own case and that of his uncle, corroborated by ATF Agent Howell's testimony that calls were made on Garza's behalf, was sufficiently probative of Garza's possible bias in favor of the government to warrant admission into evidence. We conclude, however, such error was harmless beyond a reasonable doubt. See U.S. v. Garza, 754 F.2d 1202, 1207 (5th Cir. 1985).

"Before an error may be considered harmless beyond a reasonable doubt, the reviewing court must determine that `absent the so-determined unconstitutional effect, the evidence remains not only sufficient to support the verdict but [is] so overwhelming as to establish the guilt of the accused beyond a reasonable doubt.'" Garza, 754 F.2d at 1207 (quoting Harryman v. Estelle, 616 F.2d 870, 876 (5th Cir. 1980)(en banc)).

The record reveals overwhelming evidence of Gonzalez's guilt. Videotapes of conversations between Gonzalez and the confidential informant were played for the jury. DEA Undercover Agent Luis Saldana testified that he bought heroin from Gonzalez. A tape of this transaction was introduced into evidence. Saldana made arrangements to buy additional quantities of heroin from Gonzalez. Furthermore, Gonzalez's own testimony was corroborative of the prosecution's undeniable evidence of his guilt. Gonzalez testified that his relative, Simone Benavides, Jr., asked him if he knew anybody who would buy drugs. Because Garza had mentioned drugs to Gonzalez, Gonzalez took Garza to meet with Benavides. Gonzalez testified that he relayed information about drugs and negotiated prices between Garza and Benavides. Gonzalez further testified that on the day he was arrested he had picked up the heroin for the buy from Benavides.

Finally, it should be noted that the jury heard testimony that Garza was a paid government informant and a convicted felon. The district court instructed the jury to consider his testimony

accordingly. In sum, the evidence establishes Gonzalez's guilt beyond a reasonable doubt. Thus, in the light of the record in this case, the error of limiting the cross-examination was harmless.

II

Next, Gonzalez asks this court to review the contents of the ex parte conference for what possibly could be favorable to the defense. Gonzalez refers to the ex parte conference between the judge and the prosecutor as "sealed," but there is no indication that the conference, assuming it was recorded by the court reporter, was transcribed or that defense counsel ordered its transcription and inclusion in the record. No transcript of the ex parte conference, sealed or unsealed, was submitted to this court to review. The appellant has the burden of including in the record on appeal transcripts of all proceedings relevant to the issues on appeal. Fed. R. App. P. 10(b). This court will not consider an issue about which the record on appeal is insufficient. Powell v. Estelle, 959 F.2d 22, 26 (5th Cir.), cert. denied, 113 S.Ct. 668 (1992). For that failure, the contents of the ex parte conference cannot be considered.

III

Finally, Gonzalez argues that the district court erroneously failed to grant him the two-level reduction in his offense level for acceptance of responsibility. Gonzalez contends that he testified, admitted his involvement, and explained that he had been

approached by Garza to purchase drugs. Gonzalez explained that Garza, to whom he owed money, was pressuring him to traffic in drugs. Gonzalez contends that his defense--that he was coerced by Garza--is "grounds for a downward departure" under U.S.S.G. § 5K2.12, p.s. Section 5K2.12 provides that "the court may decrease the sentence" if the offense was committed as a result of "serious coercion, blackmail or duress." Gonzalez, however, admitted at trial that he did not feel coerced to deal in drugs. Gonzalez was asked, "So, for the opportunity to get rid of a \$300 debt, you decided to get into the drug business?" Gonzalez testified, "No, I don't think I was getting into drugs for that. That's why I was looking for that money, because he had already (indiscernible) any debt."

We will uphold a district court's sentence if it results from a correct application of the guidelines to factual findings that are not clearly erroneous. U.S. v. Chavez, 947 F.2d 742, 746 (5th Cir. 1991). The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility, and therefore this court's review of this finding is more deferential than the pure "clearly erroneous" standard. U.S. v. Brigman, 953 F.2d 906, 909 (5th Cir.), cert. denied, 113 S.Ct. 49 (1992). To be entitled to the two-level reduction, a defendant must accept responsibility for all relevant conduct. § 3E1.1(a), comment. (n. 1(a)). "[A] defendant who falsely denies, or frivolously contests, relevant

conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility."

Gonzalez's trial testimony was often contradictory. He repeatedly asserted that he did not remember events. He testified that the drug negotiations were between other parties. He denied that he gave drugs to DEA Agent Rick Saldana in exchange for money. He denied that he saw or handled drugs.

Yet, Gonzalez also testified that when his relative, Simone Benavides, Jr., asked him if he knew anyone who would buy drugs, he effectively relayed the information and prices for drugs between Garza and Benavides. He testified that he picked up the heroin from Benavides. He later testified that Benavides put something in his car, but that he didn't know what it was that Benavides put in his car.

Because of these inconsistencies, the district court found that Gonzalez had never accepted responsibility for his crimes. The district court clearly did not err in denying Gonzalez the two-level reduction for acceptance of responsibility.

IV

For the reasons stated herein, the convictions of Santos Benavides Gonzalez are

A F F I R M E D.