

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7374

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

EARVIN PORTIS,
FRED HICKS,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Mississippi
CR H 91 00015 (P) (07)

May 28, 1993

Before JOHNSON, SMITH and EMILIO M. GARZA, Circuit Judges.

JOHNSON, Circuit Judge:*

Earvin Portis and Fred Hicks were arrested when police broke up a drug trafficking organization in Laurel, Mississippi. Following a jury trial, both were convicted of possession of cocaine with intent to distribute. Portis was also convicted of using a firearm during and in relation to a drug trafficking

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession." Pursuant to that rule, the Court has determined that this opinion should not be published.

crime. Both defendants now appeal. Finding no reversible error, this Court affirms.

I. FACTS AND PROCEDURAL HISTORY

The defendants in this case, Earvin Portis and Fred Hicks, got caught in the net when police broke up a drug trafficking organization headed by Frederick Lampley. The indictment named multiple defendants, but all defendants except Portis and Hicks eventually pled guilty.

According to the evidence presented at trial, Hicks was not a professional drug dealer. Instead, he was a cocaine addict who sometimes did "special favors" for Lampley in return for cocaine. Lampley testified at trial that these favors included holding the cocaine during a sale and counting money. The proof presented by the government against Hicks included tape recordings of Hicks and Lampley selling crack cocaine to a confidential informant on December 20 and 27, 1990. The confidential informant testified that Hicks held the cocaine for Lampley and counted the money after the sale.

In contrast, Portis was a drug dealer who worked directly for Lampley. On November 1, 1990, Portis was "jumped" and robbed by three men in a dispute over a drug sale. Afterward, Lampley gave Portis a gun to protect himself and told Portis to "straighten out his business." The next day Portis found one of the three men, Melvin Naylor, in a bar and shot him twice in the

head. Portis later confessed to the shooting but claimed that he shot Naylor in self-defense.

On January 23, 1991, police officers executed a search warrant at the residence of Portis's grandmother. When the warrant was served, Portis answered the door. His seventy-seven year old grandmother was asleep in the back of the house. Inside the house, police found quantities of cocaine hidden in the freezer and in a sugar bowl. Police also discovered a plastic bag containing \$486; Portis had another \$140 in his pocket. Portis told police that his grandmother had nothing to do with the cocaine.

After a jury trial, both Hicks and Portis were found guilty of possession of cocaine with intent to distribute. 21 U.S.C. § 841(a)(1). Additionally Portis was convicted of use of a firearm during and in relation to a drug trafficking crime. 18 U.S.C. § 924(c). On this appeal, both defendants raise multiple points of error, none of which have merit.

II. DISCUSSION

A. *Issues Raised by Fred Hicks*

1. *Jail Docket Records*

Much of the evidence against Hicks consisted of tape recordings of Hicks and one of the co-defendants, Fred Lampley, selling crack cocaine to a confidential informant. Hicks argued at trial that it was not his voice on the tapes and that the police had misidentified him as Lampley's accomplice. In support

of his theory, Hicks attempted to show that police had originally identified him as a participant in other drug transactions that took place earlier in December--even though Hicks was actually in jail on those earlier dates. To prove his point, Hicks cross-examined a police detective whose case report stated that taped conversations from those earlier dates "included Fred Lampley, Fred Hicks and others." Hicks also called the jail records custodian to testify that he had been incarcerated during the first half of December. However, the district court refused to allow Hicks to introduce the actual jail docket records into evidence. Hicks now argues that this was reversible error.

The exclusion of evidence by the district court is reviewed under an abuse of discretion standard. *United States v. Shaw*, 920 F.2d 1225, 1229 (5th Cir.), *cert. denied*, 111 S. Ct. 2038 (1991). This Court will reverse only if the evidentiary ruling affects a substantial right of the complaining party. FED. R. CRIM. P. 52.

In this case, it is difficult to see how the exclusion of the trial records could have affected a substantial right of Hicks. The charges against Hicks were for drug transactions that occurred after he was released from jail. Hicks was allowed to make his arguments concerning the misidentification and to introduce evidence that he was in jail in early December. The government did not dispute the testimony of the jail records clerk so there was no reason for Hicks to offer additional evidence on this point. The exclusion of this type of cumulative

evidence could not have affected the trial so as to require reversal.

2. *The Tape Recordings*

Hicks also argues that the prosecution failed to meet its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to provide Hicks with the original tape recordings. In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Although the full reach of *Brady* is perhaps unclear at times, the doctrine has never been stretched to the lengths requested by Hicks. There was absolutely nothing to indicate that the original tape recordings were exculpatory. Hicks was provided with copies of the tape recordings, but he never made any request for the originals. "[W]here the defendant's own lack of reasonable diligence is the sole reason for not obtaining the pertinent material, there can be no *Brady* claim." *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980).

Even in a case where *Brady* has some conceivable application, a defendant is not entitled to a new trial unless this Court determines that "there is a reasonable probability that the trial result would have been different." *United States v. Nixon*, 881 F.2d 1305, 1308 (5th Cir. 1989). In this case, there is

absolutely nothing to indicate any possibility that the trial result would have been different had Hicks been given the original tapes.

Hicks also claims that under *Brady* the prosecution was somehow obligated to help him locate an expert to perform a voice-print analysis on the tape recordings. It almost goes without saying that this claim is meritless. *Brady* has no application to Hicks's search for an expert witness. But even if it did, *Brady* does not obligate the government to provide defendants with evidence that they could obtain from other sources by exercising reasonable diligence. *United States v. McKenzie*, 768 F.2d 602, 608 (5th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986). It cannot be seriously argued that an expert in voice-print analysis could only be obtained from the prosecution.

Additionally, an indigent defendant requesting non-psychiatric experts must demonstrate something more than a mere possibility of assistance. Such experts should be provided only if the evidence is both critical to the conviction and subject to varying expert opinion. *Yohey v. Collins*, 985 F.2d 222, 227 (5th Cir. 1993). In this case, not only did Hicks fail to demonstrate that the identification of his voice would be subject to varying expert opinion, Hicks never requested the expert to begin with. Neither the district court nor the prosecution is required to read Hicks's mind.

B. *Issues Raised by Earvin Portis*

1. *Motion to Suppress*

After the start of the trial, Portis made an oral motion to suppress the evidence seized in the search of his grandmother's residence. Portis argues that the district court erred in denying that motion for two reasons. First, Portis contends that the prosecution never disclosed the name of the confidential informant used to obtain the search warrant. Second, Portis was never provided with a copy of the search warrant or affidavit.

This Court reviews the district court's denial of a motion to suppress for abuse of discretion. *United States v. Knezek*, 964 F.2d 394, 397 (5th Cir. 1992).¹ In this type of a suppression motion,² Portis has the burden of proving, by a preponderance of the evidence, that the material in question was

¹ The standard of review, however, can vary depending upon the actual reason for the denial of the motion. For example, whether a defendant has standing to challenge an allegedly illegal search is a question of law that is reviewed de novo. *United States v. Ibarra*, 948 F.2d 903, 905 (5th Cir. 1991). In this case, lack of standing was one of the reasons given by the district court for denying Portis's motion to suppress. Since we conclude that Portis did not present any adequate justification for suppressing the evidence, this Court does not have to reach the issue of standing. Accordingly, for the purposes of this appeal, we assume that Portis has standing to challenge the government's seizure of the evidence in question.

² The government bears the burden of proof when the suppression motion concerns the voluntariness of a confession, the voluntariness of consent to a warrantless search, the inevitable discovery of evidence, or a waiver of *Miranda* rights. *United States v. Hurtado*, 905 F.2d 74, 76 (5th Cir. 1990) (en banc).

obtained in violation of his constitutional rights. *United States v. Castaneda*, 951 F.2d 44, 48 (5th Cir. 1992).

As an initial matter, we note that one of the reasons given by the district court for the denial of Portis's motion was that it was not timely. Under Rule 12 of the Federal Rules of Criminal Procedure, motions to suppress must be raised prior to trial. FED. R. CRIM. PROC. 12(b)(3). Failure to do so constitutes a waiver, although the trial court may grant relief from the waiver for cause. FED. R. CRIM. PROC. 12(f). A district court does not abuse its discretion in denying a motion to suppress solely on the ground that it was not filed prior to trial. *Knezek*, 964 F.2d at 397. This Court could therefore affirm on this ground alone. However, since the district court also considered the merits of Portis's motion, we will also.

Portis's first argument is that the evidence should have been suppressed because of the prosecution's failure to disclose the name of the confidential informant used in the affidavit supporting the search warrant. Despite the fact that a magistrate judge's discovery order instructed the government to disclose the identity of all confidential informants, the prosecution only disclosed those informants that the government intended to call as witnesses. The Supreme Court has held that the government must disclose an informant's identity in cases in which the informant actively participated and/or was a witness to

the underlying act or transaction.³ *Roviaro v. United States*, 353 U.S. 53 (1957). Where the informant's involvement has been limited to providing evidence relevant to probable cause--as is the case here--disclosure is not required. *McCray v. Illinois*, 386 U.S. 300 (1967). Here, the confidential informant only provided information used to establish probable cause for the search warrant, so disclosure was not required under *McCray*.

Since the disclosure of this informant was not required under *McCray*, Portis is simply alleging an error in the discovery process. As such, this Court reviews only for abuse of discretion and will reverse only if a defendant can show prejudice to his substantial rights. *United States v. Ellender*, 947 F.2d 748, 756 (5th Cir. 1991). The district court concluded that the magistrate judge's discovery order was ambiguous and that the prosecution acted in good faith. Both at trial and before this Court, Portis has failed to suggest any way that the failure to disclose caused prejudice to his substantial rights.

Next, Portis argues that suppression was warranted because the prosecution failed to provide him with copies of the search warrant and the affidavit. Without question, Portis was entitled to copies if he had requested them. However, Portis admitted before the district court that he never requested copies of the search warrant and affidavit. In his brief before this Court,

³ In this case, the prosecution had intended to introduce evidence that the confidential informant actually purchased crack cocaine from Portis on the day the search warrant was served. The district court suppressed that evidence because of the prosecution's failure to disclose the informant.

Portis contends that he had no knowledge of the existence of the warrant until the trial had started.⁴ While that might be considered cause for failing to file the suppression motion before the start of the trial, it certainly does not warrant excluding the evidence in question. The burden was still on Portis to prove, by a preponderance of the evidence, that the material in question was obtained in violation of his constitutional rights; and Portis made no attempt to introduce any evidence at all that could show a constitutional violation. It was therefore not error for the district court to deny Portis's motion to suppress.

2. *Sufficiency of Evidence*

Portis also argues that the district court erred in not granting Portis's motion for judgment on the drug possession charge. Portis was convicted under 21 U.S.C. § 841(a)(1) which requires (1) possession of a controlled substance, (2) knowingly and (3) with the intent to distribute it. *United States v. Garcia*, 917 F.2d 1370, 1374 (5th Cir. 1990). Portis argues that there was no evidence that he had "dominion and control" over the cocaine discovered in his grandmother's house.

⁴ This claim is somewhat incredible since Portis was present when his grandmother was served with the warrant; in fact it was Portis who opened the door for the police. Also, five days before trial, Portis was given copies of the police incident report indicating that the search warrant was served on Portis's grandmother.

When evaluating the sufficiency of evidence on appeal, this Court considers the evidence in the light most favorable to the verdict. *Glasser v. United States*, 315 U.S. 60, 80 (1942). The standard is whether, given the evidence presented at trial, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *United States v. Ivy*, 929 F.2d 147 (5th Cir.), *cert. denied*, 112 S. Ct. 234 (1991).

Under this very deferential standard of review, it appears that there was more than enough evidence for a jury to conclude that it was Portis's cocaine in the sugar bowl and in the freezer. Under section 841(a)(1), possession may be either actual or constructive and may be proven by either direct or circumstantial evidence. *Garcia*, 917 F.2d at 1376. Although there is some question as to whether Portis actually resided at the house, he gave that address to police as his residence after his arrest. Also, Portis told police that the cocaine did not belong to his grandmother, and he had a large amount of cash actually in his pockets. Finally, Lampley testified during the trial that Portis sold cocaine for him. The district court did not err in denying Portis's motion for judgment on the drug possession charge.

In a similar vein, Portis argues that there was insufficient evidence on the firearms charge. However, Portis never moved for judgment on this charge. As a result, this Court reviews for plain error and will reverse only if affirmance would result in a "manifest miscarriage of justice." *United States v. Singer*, 970

F.2d 1414, 1418 (5th Cir. 1992). Portis was convicted under 18 U.S.C. § 924(c) which makes it a crime to use or carry a firearm during and in relation to a drug trafficking crime. We find that there is sufficient evidence in the record to support the jury's verdict.

3. *The Jury Charge*

Next, Portis argues that the district court erred in failing to give a jury charge on Portis's claim of self-defense. Yet Portis never requested a charge on self-defense, and he did not object to the district court's proposed jury instructions. "[T]he failure of the district court to afford an instruction to the jury cannot be complained of on appeal in the absence of request or objection by counsel in the trial court." *United States v. Barnett*, 945 F.2d 1296, 1300 (5th Cir. 1991).

4. *Prosecutorial Misconduct*

Portis argues that the district court erred in failing to grant a mistrial based upon the prosecutor's improper remarks during closing argument. The standard of review for a denial of a motion for mistrial is abuse of discretion. *United States v. Rocha*, 916 F.2d 219, 234 (5th Cir. 1990). This Court will only reverse a conviction for prosecutorial misconduct if the misconduct was so pronounced and persistent that it casts serious doubts upon the correctness of the jury's verdict. *United States v. Carter*, 953 F.2d 1449, 1457 (5th Cir. 1992). In this case the

allegedly improper statements by the prosecution were not sufficient to cast any doubts at all upon the jury verdict.

5. *Application of the Sentencing Guidelines*

Finally, Portis argues that the district court erred in its application of the sentencing guidelines to his conviction for drug possession. In sentencing Portis, the district court applied the base offense level for crack or cocaine base. For the amount of cocaine involved (16.9 grams), possession of free base cocaine results in a base offense level of 26. See U.S.S.G. § 2D1.1(c). An equal amount of cocaine in a powder form would result in base offense level of 12. This Court applies a clearly erroneous standard to the district court's factual determination that the substance involved was cocaine base. *United States v. Young*, 981 F.2d 180 (5th Cir. 1992).

Portis argues that the determination of the district court was error because the crime laboratory chemist only testified that the substance found in the apartment with Portis was cocaine. The chemist did not specify whether the drug was in a powder or a free base form. However, the chemist's written report stated that the cocaine was in free base form, and a copy of that report was included in the presentence report. The presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial court in making factual determinations. *United States v. Robins*, 978 F.2d 881 (5th Cir. 1992). The district court was therefore justified

in relying on the presentence report, and the court's determination that the controlled substance was cocaine base was not clearly erroneous.

III. CONCLUSION

For the reasons stated, we find that none of the issues raised by the defendants have merit. Accordingly, the judgment of the district court is AFFIRMED.