IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7563

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSE S. AVILA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
CR B 92 102 01

September 17, 1993

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Jose S. Avila was convicted by a jury of conspiracy to import a quantity exceeding 1,000 kilograms of marijuana and of aiding and abetting the importation of more than 100 kilograms of marijuana. He was sentenced to 151 months imprisonment and also received concurrent five-year terms of supervised release. Avila now appeals his conviction and sentence. After a careful review

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

of the record, we affirm the district court's judgment of conviction and sentence.

I.

On February 3, 1992, Jose S. Avila and others were charged with (1) conspiracy to import marijuana and (2) conspiracy to possess with intent to distribute more than 100 kilograms of marijuana. He was placed in custody on February 6, 1992.

On April 28, 1992, the government filed a superseding three-count indictment against Avila which alleged, in count one, that Avila conspired to import more than 1,000 kilograms of marijuana and, in counts two and three, that on different occasions Avila aided and abetted the importation of more than 100 kilograms of marijuana. The next day the government moved to dismiss the charges against Avila in the original indictment, inasmuch as the grand jury returned the superseding indictment against him.

On April 30, 1992, Avila appeared at the arraignment on the superseding indictment with new counsel. After the district court granted a motion to substitute counsel, Avila's new counsel announced ready for trial as scheduled for May 18, 1992. He neither objected to the new indictment nor requested a continuance.

The day before the trial, the government moved to dismiss count two from the superseding indictment. Trial by jury commenced as scheduled, and Avila was convicted on counts one and three as alleged in the superseding indictment. Avila was then

sentenced to 151 months imprisonment and also received concurrent five-year terms of supervised release.

II.

Avila first argues that the district court erred in allowing his trial to proceed on the superseding indictment on May 18, 1992, less than thirty days from Avila's first appearance through counsel. He contends that 18 U.S.C. § 3161(c)(2) requires that unless a defendant consents in writing to the contrary, the trial must not commence less than thirty days from the date on which the defendant appears through counsel--which, according to Avila, was the date on which he appeared with new counsel at the arraignment on the superseding indictment, or April 30, 1992.

We must first note that because Avila did not object to the trial proceeding as scheduled, the decision to allow the case to proceed is reversible error only if the district court committed plain error under Fed. R. Crim. P. 52(b), an error that affects "substantial rights." See United States v. Olano, 113 S. Ct. 1770, 1776 (1993). Even if we were to find such an error, we should correct it only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Id. at 1779 (internal quotation omitted).

The Supreme Court has made it clear that the unambiguous language of § 3161(c)(2) indicates that Congress did not intend for the filing of a superseding indictment to renew the

commencement of the thirty-day trial preparation period set forth in the statute. United States v. Rojas-Contreras, 474 U.S. 231, 234 (1985). Furthermore, § 3161(c)(2) makes obvious the fact that the date commencing the thirty-day preparation period is that on which the defendant first appears *through* counsel.

Although the parties did not provide this court with the record reflecting exactly when Avila's initial appearance with counsel was made following the original indictment on February 3, 1992, the record does indicate that Avila's former counsel had conducted "extensive discovery." The record also indicates that Avila's former counsel stated that he had filed a motion to withdraw as Avila's attorney on or about April 18, 1992, and that Avila's former counsel was expected to appear at the April 30 arraignment as the attorney of record. Thus, the record reflects that Avila's former counsel represented him more than thirty days before the May 18, 1992 trial date.

Assuming, however, that Avila is correct in his assertion that he was allowed only nineteen days of preparation, he must still show that he was prejudiced by the untimely commencement of trial in order to obtain a new trial. United States v. Marroquin, 885 F.2d 1240, 1245 (5th Cir. 1989), cert. denied, 494 U.S. 1079 (1990). Avila has not made even an assertion of prejudice; moreover, Avila specifically disavowed any interest in prolonging the case beyond the scheduled trial date, and his new counsel did not request a continuance at the arraignment on the superseding indictment. Therefore, Avila has failed to show that

the district court committed plain error by allowing his trial to commence on May 18, 1992.

III.

Avila also claims that the district court erred in admitting a document into evidence found in his home pursuant to a search warrant. He contends that the document in question--a note in his handwriting, found in his wallet, which contained a price list of various firearms--was "extrinsic" evidence of "other acts" under Fed. R. Evid. 404(b). He argues that this evidence should not have been admitted because it was irrelevant and highly prejudicial. The government claims, however, that the evidence was inextricably intertwined with the crime of conspiracy with which Avila was charged and thus classified as "intrinsic" evidence of "other acts."

This court has clearly differentiated between "extrinsic" evidence of other acts, whose admissibility is prescribed by Fed. R. Evid. 404(b), and "intrinsic" evidence of other acts, whose admissibility is determined under the general relevancy provisions of Fed. R. Evid. 402 and 403. See United States v. Williams, 900 F.2d 823, 825 (1990). Despite the different standards for determining the admissibility of "extrinsic" or "intrinsic" evidence, we need not determine in the instant case whether the handwritten note in question was "extrinsic" or "intrinsic" evidence and thus whether the district court used the correct standard in determining the admissibility of such

evidence. For even if we assume arguendo that the admission of this evidence was erroneous, the error was harmless in light of the substantial evidence of Avila's guilt presented at trial. See United States v. Williams, 957 F.2d 1238, 1242 (5th Cir. 1992) (unless a reasonable possibility exists that the improperly admitted evidence contributed to the conviction, reversal is not required); United States v. Jiminez-Lopez, 873 F.2d 769, 771 (5th Cir. 1989).

IV.

Avila further argues that the district court erred in sentencing him to a punishment that was consistent with the amount of marijuana alleged in the indictment and found by the jury to have been involved in the offense--specifically, marijuana in excess of 1,000 kilograms. He contends that he should have been sentenced only for his participation in transporting a total of 854 kilograms of marijuana by plane on three separate occasions.

A district court may calculate the amount of drugs upon which a sentence should be based from not only that amount seized or specified in the charging instrument but also from those amounts that were part of a common scheme or plan to distribute. See United States v. Montes, 976 F.2d 235, 240 (5th Cir. 1992), cert. denied, 113 S. Ct. 1831 (1993); United States v. Ponce, 917 F.2d 841, 844 (5th Cir. 1992). Thus, a "conspirator may be sentenced on the basis of the conduct of coconspirators taken in

furtherance of the conspiracy if that conduct was known or reasonably foreseeable." United States v. Thomas, 963 F.2d 63, 64 (5th Cir. 1992). The district court's final calculation is a factual finding and will thus be altered only if it is found to be clearly erroneous. United States v. Mitchell, 964 F.2d 454, 457 (5th Cir. 1992).

It is apparent from the record that the district court repeatedly made it clear at the sentencing hearing that, based on the evidence which it heard at trial, more than 1,000 kilograms of marijuana were directly attributable to Avila's own conduct and participation in the charged drug smuggling operation. Although Avila claims that the government proved only that he actually piloted a maximum of 854 kilograms of marijuana, the evidence presented at trial and the information contained in the pre-sentencing report demonstrate that it was clearly foreseeable to Avila that the conspiracy involved the importation of at least 1,000 kilograms of marijuana. The finding by the district court, therefore, is not clearly erroneous.

V.

For the foregoing reasons, we AFFIRM the district court's judgment of conviction and sentence.