**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 92-7701
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RANDALL WEST,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Mississippi
CR S92 17 (02)

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June 10, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Randall West appeals his conviction of conspiring to possess with intent to distribute more than 100 kilograms of marihuana, in violation of 21 U.S.C. § 846; possessing with intent to distribute marihuana, in violation of 21 U.S.C. § 841(a)(1); and traveling interstate in aid of unlawful activity, in violation of 18 U.S.C.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

§ 1952(a)(3). He also appeals his sentence. Finding no error, we affirm.

I.

A seven-count indictment charged John Burge, Rusty Crawford, West, and four others. A jury found West guilty on all counts. The district court sentenced him to serve 121 months in prison on the conspiracy count concurrently with six concurrent sixty-month terms on the other counts, for a total term of 121 months, plus five years' supervised release and a fine of $6,572.10.

II.

A.

West argues that the district court improperly disqualified his counsel, Richard Tonry, for a conflict of interest. A presumption favors representation by counsel of the defendant's choice; the presumption may be overcome by a showing of an actual or a serious potential conflict. Wheat v. United States, 486 U.S. 153, 163-64 (1988); United States v. Reeves, 892 F.2d 1223, 1227 (5th Cir. 1990).

A disqualification order will not be disturbed when the district judge "was well within his discretion." Reeves, 892 F.2d at 1227; contra United States v. Hughes, 817 F.2d 268, 270 n.1 (5th Cir.) (stating, prior to Wheat, that the "standard of review for a disqualification order is that of `simple error'"), cert. denied, 484 U.S. 858 (1987). In a habeas corpus case, we have stated that

the issue of whether a conflict exists is a mixed question of law and fact, requiring de novo review. Beets v. Collins, 986 F.2d 1478, 1482 (5th Cir. 1993).

A conflict may arise from the "successive representation of codefendants and trial witnesses." Id. at 1483. When an actual conflict exists, disqualification is appropriate. See id. at 1483-84.

Prior to trial, the government informed the court that it believed that Tonry had a conflict in his representation of West because Tonry also was representing Crawford in a state cocaine criminal proceeding in Louisiana. Crawford pleaded guilty in the instant case and would be a government witness against West. Crawford turned out to be one of the two key witnesses against West, as we discuss infra.

The district court held a hearing on the disqualification issue. The prosecutor told the court that Crawford would testify that he was part of a conspiracy that included West, who handled the money, made the arrangements, and gave the instructions in the marihuana operation. Crawford would testify that, at West's direction, he and others transported marihuana from the McAllen-Harlingen, Texas, area to Gulfport, Mississippi.

The district court called the problem a "thorny thicket." Tonry conceded that he was in the "untenable" position of not being able to advise Crawford on waiving any rights. The situation was "awkward," said Tonry.

Tonry also recognized that he would have to cross-examine

Crawford strenuously. Tonry could not say whether he would use any information protected by the attorney-client privilege in the cross-examination because he could not identify which of his conversations with Crawford were protected and which were not. He concluded that he would have to omit from his cross-examination any matter that was protected. Crawford refused to waive the attorney-client privilege and stated that he would object to any cross-examination that might involve privileged information.

The district court stated that West's counsel would need to attempt to impeach Crawford at trial and for sentencing purposes. The court found that an actual conflict existed because the attorney-client privilege limited Tonry's ability to impeach Crawford.

The court took an active role in exploring the conflict. He spoke with Crawford's counsel in the federal proceedings and heard from the prosecutor and Tonry. Tonry would have had a conflict in impeaching Crawford as a witness against West.

The district court did not abuse its discretion or make a "simple error." The prosecutor's and district court's explanations of the conflict, Crawford's refusal to waive the conflict, and Tonry's own confession of his dilemma show that, even reviewing the disqualification de novo, the disqualification was proper.

B.

West argues that Crawford should not have been permitted to testify about the meaning of hand-written notes about which he had

no personal knowledge. We do not disturb a district court's evidentiary ruling except for an abuse of discretion that results in the deprivation of some substantial right of a party. United States v. Wicker, 933 F.2d 284, 289 (5th Cir.), cert. denied, 112 S. Ct. 419 (1991).

Fed. R. Evid. 701 provides,

> If a witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions and inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Admissibility pursuant to rule 701 requires that "the witness has personal knowledge of the facts from which the opinion is derived." United States v. Carlock, 806 F.2d 535, 551 (5th Cir. 1986). "There must also be a rational connection between the opinion and the observed factual basis from which it is derived." Id. Additionally, the opinion must be of some help in understanding or resolving an issue of fact. Id.

Crawford testified that West's handwriting was similar to his own and that he observed West's handwriting many times. The prosecutor handed Crawford a spiral-bound notebook and directed Crawford's attention to one page on which someone had written many numbers. The notebook had been found by officers in a search of West's residence in Harlingen. Crawford was asked whether he recognized the handwriting. The court sustained West's objection.

The prosecutor then asked Crawford whether he had ever seen West write numbers, and Crawford said that he had at every drug deal in which he participated with West, which was many times.

With the court's permission, the prosecutor showed the page to Crawford.

Over West's objection, Crawford testified that he had never seen that page before but that the figures represent amounts of money and quantities of marihuana. Crawford identified numbers on another piece of paper similarly. That second piece of paper had also been found at West's house. The handwriting on both sheets was the same, said Crawford. He had often seen West do calculations like those on the paper. He identified the handwriting on another paper as West's.

Crawford testified from his personal knowledge about drug transactions and how West recorded them. His opinion that the numbers reflected drug quantities and amounts of money is rationally related to his observation of West's recording drug transactions. The opinion is probative of West's guilt; without an explanation, the recorded numbers found in West's house are not probative. The admission of Crawford's opinion testimony was not an abuse of discretion.

C.

West argues that the credible evidence adduced at trial is insufficient to support the verdict. Crawford and Burge, he argues, were not credible because self-interest, and not the truth, motivated their testimonies, which were uncorroborated. "The uncorroborated testimony of an accomplice or co-conspirator will support a conviction, provided that this testimony is not incredi-

ble or otherwise insubstantial on its face." United States v. Singer, 970 F.2d 1414, 1418 (5th Cir. 1992).

1.

John Burge testified that he was a "mule" in West's marihuana operation, in which West kept the books, controlled all of the money, and paid everybody. Crawford and West's brother Leroy, a/k/a Roy, and West would generally accept the marihuana from him and separate it into one-pound packages.

West and Roy paid him $25 for each pound of marihuana that he transported for them. At the direction of West and others, Burge took many trips )) close to a dozen )) on commercial airplanes carrying marihuana from Harlingen, Texas, to New Orleans. He described numerous trips, including those he made with Crawford. West always gave him the money with which to purchase the marihuana, in $1,000 stacks of bills.

At one point, West offered Burge and others a "working vacation" on Padre Island. During that "vacation," Burge made four trips back to Mississippi with marihuana. West flew one trip himself. When West checked into motels with members of the operation, he used various names that were not his own, including Steve Campbell.

West and Roy then informed Burge that they would begin a new system, packaging the marihuana in vacuum-sealed Seal-O-Meal bags. West later announced that staying in a motel was too expensive, and he rented a house in Harlingen.

Marihuana in Seal-O-Meal packages enclosed in ice chests was shipped from that house to Mississippi, the first one via Federal Express. The conspirators sprayed urethane foam around the chest to seal it. They made other, similar shipments. West would take the packages to either Federal Express or Airborne Express for delivery.

When one shipment did not arrive in Mississippi, West telephoned the Airborne Express office. He was told to call the "claims department" in Harlingen. When he made that call, the person answering the telephone announced that the office was that of the Harlingen police. West hung up.

Burge testified pursuant to an agreement with the government. If he told the truth, the government would recommended a sentence not to exceed two years.

2.

Crawford also testified that he worked for West and his brother in the illegal drug operation, along with Burge and others. West was the head of the organization. Crawford's job was to separate larger amounts of marihuana into smaller amounts.

About eight times he went to the airport to meet Burge and Leroy, who were carrying shipments of marihuana from south Texas. Four trips were to the Gulfport airport and four to the New Orleans airport.

West and Crawford also took Burge and Leroy to the New Orleans and Gulfport airports when they departed for Texas. Before

Crawford deposited them at the airport, West would give Burge and Leroy money in thousand-dollar packages. Crawford helped bundle the cash.

When Leroy and Burge returned to the airport in New Orleans or Gulfport, Crawford would pick them up in response to a telephone call from one of them. He would take them either to his home or to a motel in Gulfport, where they would prepare the smaller packages of marihuana. John Galbo would sell the smaller packages and give the money to West, and the process would start over.

Burge and Leroy brought back about fifty pounds of marihuana in each of approximately eight trips. West and Crawford also picked up Burge and Leroy while they were on "vacation" in Padre Island.

When Burge and Leroy were arrested in Texas, Crawford flew with West to check on Leroy. Back in Louisiana, he later picked up West at the New Orleans airport. West was carrying marihuana in two suitcases. Thereafter, the organization began shipping via express companies. Crawford also testified pursuant to an agreement with the government.

3.

West's assertion that the foregoing testimony was not corroborated is not accurate. The Airborne Express station manager in Harlingen testified that West deposited two packages for shipment by Airborne Express. The packages contained thirty-nine pounds of marihuana in ice chests covered in a foam sealant. The

packages were turned over to the Harlingen police.

Suitcases found in the bedroom of the house that West rented in Harlingen contained seeds and a green leafy substance. At the time of a trip to Harlingen that Burge described )) July 1990 )) a Steve Campbell was registered at the Harlingen Holiday Inn, according to the records described by the general manager.

West asserts that Burge's and Crawford's testimonies are "contradictory and do not have the ring of truth in them." He cites contradictions as to dates of trips, weight of each shipment, and their individual financial arrangements. West himself, however, acknowledges that Burge did not give exact dates, but Crawford did not either. He acknowledges that Burge testified that the typical shipment weighed 40-50 pounds and that Crawford testified that it was "around fifty pounds, however, it could be less." West acknowledges that Burge testified that he himself received $25 per pound per trip and that Crawford testified that he himself received no direct compensation "except that his bills were paid."

West argues that the testimonies contain contradictions, but he has not described such contradictions. Determining whether the testimonies had the "ring of truth in them" is a decision reserved to the jury, not this court. West's assertions that Burge's and Crawford's testimonies were not credible do not make them so. Burge's and Crawford's testimonies were not incredible or insubstantial on their face.

D.

West argues that the amount of marihuana upon which his offense level was based is too large because the only evidence thereof was the uncorroborated testimonies of Burge and Crawford. He also argues that his adjustment for being a leader or organizer was also improperly based upon the uncorroborated testimonies of Burge and Crawford.

The district court may consider any evidence that has "sufficient indicia of reliability to support its probable accuracy," including evidence not admissible at trial. U.S.S.G. § 6A1.3, comment.; United States v. Manthei, 913 F.2d 1130, 1138 (5th Cir. 1990). The district court may rely upon trial evidence in determining a sentencing. United States v. Jackson, 978 F.2d 903, 913 (5th Cir. 1993), petition for cert. filed, No. 92-8422 (Apr. 13, 1993). As evidence used for sentencing need not rise to the level of evidence used to convict, West's failure to show that the testimonies of Burge and Crawford were too unreliable to support the conviction necessarily means that he cannot show that they were too unreliable to support the sentence.

AFFIRMED.