UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7791
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDELMIRO OLIVAREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(L-92-CR-140-1)

(March 14, 1994)

Before POLITZ, Chief Judge, JOLLY and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:[*]

Convicted of conspiracy to possess with intent to distribute marihuana and of multiple substantive possession counts, Edelmiro Olivarez appeals, urging error in the refusal of a jury instruction and challenging his sentence. Finding neither error nor abuse of discretion, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Olivarez was charged with conspiracy to possess with intent to distribute in excess of 1000 kilograms of marijuana, six counts of possession with intent to distribuate marijuana, 21 U.S.C. §§ 841(a)(1), (b)(1)(A),(B),(D), 846, and 18 U.S.C. § 2, and one count of money laundering, 18 U.S.C. §§ 2, 1956(a)(1)(A)(i). The money laundering count was dismissed by the government and the district court granted a judgment of acquittal on two of the possession counts. The jury convicted on the conspiracy and remaining possession counts. Olivarez was sentenced to concurrent terms of 121 months imprisonment on the conspiracy and three of the possession counts and a concurrent 60-month term on the other count, plus concurrent supervised release terms, a $5000 fine, and the statutory assessments. He timely appealed.

Analysis

Olivarez first contends on appeal that the following "missing witnesses" instruction should have been given to the jury because the government failed to call witnesses who had knowledge about the facts of the case:

> The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require the prosecution to produce as exhibits all papers and things mentioned in the evidence.
>
> However, in judging the credibility of the witnesses who have testified, and in considering the weight and effect of all evidence that has been produced, the jury may consider the prosecution's failure to call other

> witnesses or to produce other evidence shown by the evidence in the case to be in existence and available.
>
> The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence, and no adverse inferences may be drawn from his failure, if any, to do so.

The refusal to give a defendant's requested jury instruction is reviewed for abuse of discretion.[1] "An abuse of discretion occurs only when the failure to give a requested instruction serves to prevent the jury from considering the defendant's defense."[2] The district court invited Olivarez to argue to the jury that particular witnesses were not at the trial. Olivarez accepted the invitation; he was not prevented from effectively advancing this defense. We find no abuse of discretion in the trial court's refusal to submit the missing witnesses instruction as worded by Olivarez. The charge to the jury adequately covered all relevant matters.

Olivarez asserts for the first time on appeal that the district court should have given the proposed instruction because: (1) there were conflicts in the trial testimony of several witnesses, (2) certain witnesses did not mention Olivarez in their debriefings with DEA agents until offered a deal, and (3) many of the witnesses were available only to the government. These arguments lack persuasive force. It is well settled in this circuit that "drawing any inference from a party's failure to call

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[1] **United States v. Chaney**, 964 F.2d 437 (5th Cir. 1992).

[2] **United States v. Masat**, 948 F.2d 923, 928 (5th Cir. 1991), cert. denied, 113 S.Ct. 108 (1992).

a witness equally available to both sides is impermissible."[3] Olivarez does not demonstrate that any particular witness was peculiarly under the government's control or was not equally available to both parties.[4] Olivarez does not cite, nor are we aware of, any authority for the proposition that conflicting testimony mandates the giving of such an instruction.

Next Olivarez asserts as error the district court's consideration during sentencing of the quantities of drugs described in the dismissed counts. He argues that because the district court granted a judgment of acquittal on two counts, the amounts of drugs included in those counts should not be factored into the sentence calculation. This argument is foreclosed by our decision in **United States v. Juarez-Ortega**.[5] Olivarez points out that **Juarez-Ortega** involved an acquittal by a jury and not by the court. That is a distinction without a difference. To the extent that Olivarez challenges the use of the drug quantities in the dismissed counts as relevant conduct because of conflicting testimony, we note that the evidence of quantity need have only sufficient indicia of reliability to support its probable accuracy[6] and be proven by a preponderance of the evidence.[7] The district

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[3]**United States v. Iredia**, 866 F.2d 114, 118 (5th Cir.), cert. denied, 492 U.S. 921 (1989) (citations omitted).

[4]See, e.g., **United States v. Lamp**, 779 F.2d 1088 (5th Cir.), cert. denied, 476 U.S. 1144, 477 U.S. 908 (1986).

[5]866 F.2d 747 (5th Cir. 1989).

[6]U.S.S.G. § 6A1.3.

[7]**United States v. McCaskey**, 9 F.3d 368 (5th Cir. 1993).

court did not clearly err by including these drug quantities in its sentencing determination.[8]

Finally, Olivarez challenges the district court's refusal to grant a downward departure, pointing to the difference in the sentences imposed on him and his codefendants who, Olivarez contends, were far more culpable but received significantly less punishment. Olivarez urges us to reconsider our decision in **United States v. Ives**[9] that a sentencing judge has no authority to depart downward for the purpose of achieving sentencing parity or equity between codefendants. We are neither disposed nor prepared to do so. A prior panel opinion binds all subsequent panels absent an intervening decision by the Supreme Court or relevant action by the Congress. Only our court sitting en banc may overrule a prior panel decision.[10]

The convictions and sentences are AFFIRMED.

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[8]**Id**. at 372 (factual findings made by a district court in its determination of a defendant's relevant conduct for sentencing purposes are subject to the clearly erroneous standard of review).

[9]984 F.2d 649 (5th Cir.), cert. denied, 114 S.Ct. 111 (1993).

[10]**United States v. Zuniga-Salinas**, 952 F.2d 876 (5th Cir. 1992).