UNITED STATES COURT OF APPEALS For the Fifth Circuit

No. 92-8411 Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROY MARION JONES,

Defendant-Appellant.

Appeal from the United States District Court For the Western District of Texas

(A 83 CR 36)

October 25, 1993

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND 1

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The facts presented in this opinion are based on the facts given in this Court's opinion in Jones's direct appeal. See United States v. Jones, No. 91-8399 (5th Cir. March 10, 1992) (unpublished).

This case involves a 1982 conspiracy to import 1000 pounds of marijuana into the United States from Mexico. Roy Marion Jones was to fly an Aero-Commander airplane containing the marijuana from a ranch in Mexico to a ranch in Texas. Jones test flew the Aero-Commander, but it was apparently unsuitable and arrangements were made for a Beechcraft Bonanza aircraft to be used.

Subsequently, the Bonanza was located on radar, heading north over international waters on a course for the United States. Three planes from the Customs Service were dispatched to intercept the Bonanza. Drug Enforcement Agent Richard Braziel made radio contact with the pilot of the Bonanza and recognized the voice as that of Jones. The Bonanza then landed at the Killeen, Texas, airport followed shortly by the Customs planes. When the government agents arrived at the Bonanza, the pilot was gone, but the load of marijuana was not. One of Jones's fingerprints was found on the entry door of the aircraft. Jones was not located, but was reported to be hiding in Mexico.

Jones was indicted for his part in the above conspiracy on April 6, 1983, but was not brought to trial until April 1991. Jones had been arrested and convicted on a cocaine charge in Barraquilla, Colombia, in 1983 and was incarcerated in a Colombian jail until 1988. Jones was using a alias at the time. Following release from the Colombian jail, Jones lived in Central and South America under a false name. He was not arrested until he returned to Miami, Florida, in late 1990. A jury found Jones guilty of conspiring to import marijuana and conspiring to possess with

intent to distribute marijuana. Jones was found not guilty on the counts of the indictment charging him with the actual importation and possession of the marijuana. The district court sentenced Jones to five years on each conspiracy count, with the terms of imprisonment to run consecutively. Jones was also ordered to pay a \$15,000 fine.

On direct appeal, Jones argued that the delay in bringing him to trial violated his constitutional right to a speedy trial, that the evidence to support his conspiracy convictions were insufficient, and that the district court abused its discretion in sentencing him. This Court affirmed the conviction and sentence.

Jones filed a motion to correct or reduce his sentence pursuant to Fed. R. Crim. P. 35 arguing the second and third issues listed above. The district court denied the motion because it lacked merit. Jones timely filed a notice of appeal. Subsequently, Jones filed an unopposed motion with this Court to remand the case so that the district court could consider the Supreme Court case of Dogqett v. United States, ___ U.S. ___, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (speedy trial issue). This Court granted the motion. After allowing briefing on the subject of Jones's right to a speedy trial, the district court again found no merit in Jones's Rule 35 motion. The district court returned the case to this Court and this Court reinstated Jones's appeal.

OPINION

The version of Fed. R. Crim. P. 35(a) applicable to defendants such as Jones, who committed offenses prior to November 1, 1987,

provides that "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." Motions under Rule 35(a) are restricted to correcting illegal sentences²; and are not for raising issues challenging the validity of the underlying conviction. <u>United States v. Hanyard</u>, 762 F.2d 1226, 1229 (5th Cir. 1985).

The questions of whether Jones was denied his constitutional right to a speedy trial and whether he should have been acquitted on the conspiracy counts because he was acquitted on the substantive counts of the indictment both present issues attacking the validity of his underlying conviction. Therefore, denial of the Rule 35 motion with respect to these issues was correct.

Jones argues that the district court abused its discretion in sentencing him to two consecutive five-year terms of imprisonment. Jones's offense was committed before the effective date of the sentencing guidelines. A sentence imposed within the statutory limits in such a case is generally not subject to appellate review. United States v. Castillo-Roman, 774 F.2d 1280, 1283 (5th Cir. 1985). A pre-guidelines sentence will only be overturned if it was arbitrarily and capriciously imposed, a gross abuse of discretion. See United States v. Johnson, 823 F.2d 840, 842 (5th Cir. 1987).

The district court denied the motion because it lacked merit; however, the Government had asserted to the district court that a Rule 35 motion was not the proper mechanism to bring these claims. As a result, this Court may affirm the district court's denial of the Rule 35 motion on this basis. See Bickford v. International Speedway Corp., 654 F.2d 1028, 1031 (5th Cir. Unit A August 31, 1981).

On direct appeal, Jones unsuccessfully argued that the sentence was excessive because it was more than his codefendants received. In his Rule 35 motion, Jones argues that the district court incorrectly imposed a consecutive rather than concurrent sentences because the conspiracy to import marijuana and the conspiracy to possess with intent to distribute marijuana arose from the same transaction. Imposition of consecutive sentences for these two separate counts of conviction was approved by the court in <u>United States v. Rodriguez</u>, 612 F.2d 906, 920-25 (5th Cir. 1980) (en banc), <u>aff'd sub nom</u>. <u>Alberanz v. United States</u>, 450 U.S. 333 (1981).³ Jones has not shown any abuse of discretion on the part of the district court.

AFFIRMED.