

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-8650
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DAVID RUSSELL ZELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
W 88 CR 10 6

April 29, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

David Zell appeals his conviction of conspiracy to possess methamphetamine with intent to distribute it. We find no error and affirm.

Appellant first argues that the district court erred in attributing to him the entire 26.84 kilograms of methamphetamine attributable to the conspiracy without making specific factual findings about the amount of drugs reasonably foreseeable by

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appellant. This issue was not raised in the district court. We, therefore, need not consider it unless it is a purely legal issue and the failure to consider it would result in manifest injustice. United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). The issue of what findings the court must make is a purely legal issue. See United States v. Puma, 937 F.2d 151, 159-60 (5th Cir. 1992), cert. denied, 112 S. Ct. 1165 (1992). Our failure to consider the issue, however, will not result in manifest injustice because evidence that Appellant was in complete charge of the entire religious cult and drug conspiracy is overwhelming. It is highly unlikely that any court could find that Appellant could not have foreseen the entire amount of drugs for which the conspiracy was responsible.

Appellant next complains that counsel was ineffective because he failed to move to sever Appellant's trial from that of the codefendant, he failed to move for exclusion of evidence concerning Zell's religious cult's religious and sexual practices, and because he failed to object to the presentence report. It is the general rule that a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court since no opportunity exists to develop the record on the merits of the allegations. United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988). We see no reason to deviate from the rule in this case because to do so would require fact-finding on our part.

Lastly, Appellant contends it was error for the district court

not to exclude the testimony about the religious and sexual practices of Appellant's religious cult. He specifically challenges the testimony of investigator Robert Wilkerson. There was no contemporaneous objection at trial. This failure mandates that we review only for plain error. United States v. Martinez, 962 F.2d 1161, 1166, n.10 (5th Cir. 1992). We find no plain error here. The testimony concerning Appellant's use of women as sexual gifts and his knowledge of voodoo was brought out by Appellant's own counsel on cross-examination. If the admission of such testimony was error, it was invited. United States v. Lopez-Escobar, 920 F.2d 1241, 1246 (5th Cir. 1991). Additionally, most of the challenged testimony was relevant to establish that Appellant was the ringleader of the drug manufacturing organization and that the religious cult and the drug organization were co-extensive. Some of the testimony concerning specific religious practices, sexual incidents, and the characterization of the group as "satanic" are of questionable relevance and were likely prejudicial. It was not so prejudicial, however, as to constitute plain error.

AFFIRMED.