

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8670

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT LOUIS STEPHENS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-91-CR-141)

July 22, 1993

Before REAVLEY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Robert Louis Stephens challenges his convictions arising out of a guilty plea to drug-related charges, contending that their federal prosecution violates the United States and Texas Constitutions. We **AFFIRM**.

I.

During an investigation of suspected cocaine dealer Keithan Jerome Owens, police officers in Austin arranged for a drug purchase from him. Stephens arrived at the designated location in

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Owens' automobile and was arrested on a state charge for delivery of a controlled substance. Austin police recovered 116.87 grams of crack cocaine and a loaded pistol from the vehicle. Owens was arrested later that evening. During execution of a search warrant at Owens' residence, officers seized two ounces of crack cocaine, a weapon, and approximately \$4,000 cash. Federal agents were not involved in the investigation, surveillance, or arrest.

The following day, state officials referred Stephens to federal authorities for prosecution. A federal indictment charged him with (1) conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (count one); (2) possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) (count two); and (3) use of a firearm during the commission of a drug trafficking offense, in violation of 18 U.S.C. § 924(c) (count three).

Stephens moved unsuccessfully to dismiss the indictment, contending that his due process rights were violated by the referral of his case to federal authorities, and that there was no valid basis for federal jurisdiction, because there was no federal involvement in the events leading to his arrest. He then unconditionally pleaded guilty to counts one and three, and was sentenced, *inter alia*, to 180 months imprisonment on the former, and a consecutive 60-month term on the latter.

II.

Stephens contends (1) that his federal prosecution, simply to obtain a harsher sentence, violates his due process rights under

the Texas Constitution; (2) that his federal prosecution usurps Texas' jurisdiction over its citizens and violates the Tenth Amendment to the United States Constitution, because there is no basis for federal jurisdiction; and (3) that his case should be remanded for state prosecution, because there is no evidence that racially neutral procedures governed its referral to federal authorities. Stephens' contentions are strikingly similar to those advanced in our court by his co-defendant, Owens. **United States v. Owens**, ___ F.2d ___, ___, 1993 WL 255415 (5th Cir. 1993). Assuming that all of these issues were raised in the district court, we hold that they are totally without merit.

A.

As a result of his unconditionally pleading guilty, Stephens waived all non-jurisdictional defects preceding the plea. **Id.** at ___, 1993 WL 255415 at *1. Accordingly, he waived the contentions (1) that his referral for federal prosecution violates the Texas Constitution, **id.** at ___, 1993 WL 255415 at *1 (Owens' argument that search and seizure conducted by Texas officials violated a more expansive provision of the Texas Constitution waived by guilty plea); (2) that he was prosecuted in federal court solely to increase his punishment, **id.** at ___, 1993 WL 255415 at *1; and (3) that the referral by state officials was racially discriminatory, **id.** at ___, 1993 WL 255415 at *1 (Owens' argument that federal prosecutor chose to prosecute him in federal court because of his race waived). As in **Owens**, "[n]one of these arguments challenges the jurisdiction of the district court, and all of the alleged

defects occurred before [Stephens'] guilty plea." *Id.* at ____, 1993 WL 255415 at *1.

B.

Stephens' jurisdictional Tenth Amendment contention is substantially identical to that in *Owens*.² Stephens was prosecuted under the same statutes as Owens, all of which are valid exercises of Congress' power under the Commerce Clause. *Id.* at ____, 1993 WL 255415 at *2. Accordingly, Stephens' federal prosecution does not violate the Tenth Amendment. *Id.* at ____, 1993 WL 255415 at *2.³

III.

The judgment of the district court is

AFFIRMED.

² The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

³ Stephens' motion to supplement the record on appeal, which was carried with the case, is **DENIED** as moot.