IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8709
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NOE HERRERA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP-92-CR-239-3)

(December 22, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.[*]

PER CURIAM:

Appellant Herrera was found guilty by a jury of conspiracy to possess with intent to distribute marijuana and cocaine and with a particular incident of possession with intent to distribute cocaine on March 2, 1992. He was sentenced to concurrent life terms of imprisonment on each count, followed by five years of supervised release. On appeal, he asserts that there

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

was a fatal variance between the single conspiracy charge in the indictment and the evidence of multiple conspiracies produced at trial.[1] We find no error and affirm.

Herrera was indicted for a conspiracy with 12 other individuals to possess and distribute marijuana and cocaine between August 1, 1991 and June 30, 1992. In three separate counts, Herrera was charged with specific incidents of possession with intent to distribute involving fewer than all the named conspirators. The jury was unable to reach a verdict on two of the substantive possession counts.

Herrera contends that the evidence showed the existence of three to five separate conspiracies during the time period within which the single conspiracy was charged. The jury's "inconsistent" verdict, which failed to convict him for two substantive counts of possession during this same time span, allegedly shows that they could not "discriminate the evidence between the individual participants in this criminal activity and charged offenses."

As Herrera's brief acknowledges, even if there were multiple conspiracies,[2] in order to succeed on the variance theory,

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[1] Herrera has also asserted a violation of the Federal Speedy Trial Act. 18 U.S.C. § 3162. He did not, however, file a motion in the trial court seeking dismissal of the indictment based on a violation of that law. He is therefore precluded from asserting a violation on appeal. 18 U.S.C. § 3162(a)(2); United States v. Hausmann, 711 F.2d 615, 618 (5th Cir. 1983).

[2] This court must uphold a jury finding of a single conspiracy unless the evidence, examined in the light most favorable to the government, would preclude a reasonable jury from finding a single conspiracy beyond a reasonable doubt.

the defendant must demonstrate that his substantial rights have been prejudiced. This court has held, however, that "if the government proves the existence of multiple conspiracies and the defendant's involvement in at least one of them, then clearly there is no variance affecting the defendant's substantial rights." United States v. Sanchez, 961 F.2d 1169, 1177 (5th Cir.), cert. denied, 113 S. Ct. 330 (1992). Viewed in the light most favorable to the verdict, Sanchez, supra, the evidence of Herrera's activities to direct and supervise the transportation of large amounts of cocaine and marijuana during the charged period of the conspiracy was overwhelming. Herrera's substantial rights simply were not prejudiced because he was involved in so much conspiratorial conduct with various of the codefendants. If anything, the jury demonstrated its acumen and correct understanding of the case by failing to reach a verdict on two of the substantive counts. If they had misunderstood Herrera's

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United States v. DeVarona, 872 F.2d 114, 118 (5th Cir. 1989). Viewing the evidence in the light most favorable to the government, a jury could find that Herrera was the pivotal figure in an organization including as members codefendants Frausto, Nava, Martinez, Anderson, and others, that obtained cocaine from Juarez, Mexico, and arranged for the transportation of the drugs to Chicago and Los Angeles. The evidence reflected that the cocaine transfers or proposed transfers occurred in August and October 1991 and in May 1992 and were accomplished by using the services of long-haul truck drivers. Using the same modus operandi, Herrera, Frausto, Sandoval, and Rojo were involved in the transfer of marijuana to Arizona and cocaine to Chicago in January, February, and March 1992. Herrera was the organizer of both ventures that involved overlapping participants and used the same method of transporting the drugs for distribution within a ten-month time span. A reasonable jury could have found that Herrera and his subordinates were involved in a single conspiracy to distribute cocaine and marijuana as alleged in the incident.

involvement or had "tainted" him by association with all of Martinez's transactions, they would have been swayed to convict him on all of the substantive counts.

AFFIRMED.