

IN THE UNITED STATES OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8714
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANNY LEE BURCHAM and
JEFFREY D. COOKE,

Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Texas
(W 92 CR 22 1)

(August 19, 1993)

Before JOLLY, SMITH, and WIENER, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

Danny Lee Burcham and Jeffrey D. Cooke were convicted for conspiracy to possess with intent to distribute amphetamine. Burcham and Cooke appeal, raising issues involving their convictions and their sentences. After reviewing the claims of

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Burcham and Cooke, we find no reversible error and, accordingly, affirm both the convictions and the sentences of Burcham and Cooke.

I

In late 1991, a confidential informant contacted Burcham for the purpose of arranging a sale of drugs. Burcham was later contacted a number of times by an investigating agent with the Texas Department of Public Safety. The confidential informant often called Burcham two or three times a day, but was not authorized to coerce him into entering into any transaction.

A deal was set up for Burcham to purchase from an undercover agent one pound of amphetamine for \$13,500.00 and a barrel of phenylacetic acid. Burcham and Cooke followed the agent to a restaurant parking lot. Burcham then left the parking lot with the confidential informant, apparently to get money. When he returned, he and Cooke were then arrested. Agents seized a Crown Royal bag containing \$13,500.00, wrappers holding the money, and a list of chemicals taken from Burcham's wallet.

Burcham and Cooke were indicted for conspiracy to possess amphetamine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846. On October 14, 1992, a jury found both Burcham and Cooke guilty. Burcham was sentenced to 188 months imprisonment with a supervised release term of three years, a \$2,500.00 fine, and a special assessment of \$50.00. Cooke was sentenced to 121 months imprisonment with a supervised release term of three years,

a fine of \$1,200.00, and a special assessment of \$50.00. Burcham and Cooke appeal.

II

On appeal, Burcham argues first that the district court erred by refusing his requested jury instruction on abandonment. Second, Burcham argues that the district court erred by not suppressing evidence and that the government's conduct was outrageous. Third, Burcham argues that the district court acted unconstitutionally by using the weight of the projected amount of amphetamine from the phenylacetic acid in calculating his and Cooke's offense levels. Fourth, Burcham argues that the district court denied him due process by using the weight of the projected amount of amphetamine. Pursuant to Rule 28(i), Cooke adopts Burcham's arguments and presents two new ones. First, the evidence against him is insufficient to sustain the verdict and the verdict is against the great weight of the evidence. Second, the district court erred in its calculation of drug quantity attributable to Cooke.

III

A

Burcham and Cooke first argue that the district court erred in failing to give a jury instruction on abandonment. A district court abuses its discretion by denying a requested jury instruction only if the requested instruction (1) is substantively correct, (2) was not substantially covered in the charge actually delivered to the jury, and (3) concerns an important point in the trial so that

failure to give it seriously impairs the defendant's ability effectively to present a given defense. United States v. Arditti, 955 F.2d 331, 339 (5th Cir.), cert. denied, 113 S.Ct. 597 (1992).

At trial Burcham testified that the confidential informant kept phoning him to arrange for Burcham to purchase the drugs but that he always refused to comply. Burcham explained his taped conversations with the undercover agent as an attempt to help out a friend, the informant, by "acting out" a role as a drug buyer in order to "buy more time" for the informant from people who had threatened to kill him. Burcham states that he agreed to loan the informant money, but he later decided against loaning him the entire amount and that he never had the intent to buy drugs. Burcham testified that his intent on his trip to Texas was to visit his daughter and to attend the horse races.

The term "abandonment" is more commonly associated with a defendant's self-removal from an attempted crime; when the charged crime is conspiracy the correct term for a defendant's self-removal from the conspiracy is "withdrawal." For either, however, the defense is predicated upon the defendant first having the requisite intent for the crime charged before changing his mind and removing himself. United States v. Stouffer, 986 F.2d 916, 922 (5th Cir. 1993). Throughout his testimony, Burcham insisted that he never had the requisite intent for any conspiracy. Therefore, in the light of Burcham's own testimony, withdrawal or abandonment could not have taken place. For these reasons, the district court did

not abuse its discretion in refusing Burcham's requested jury instruction.

With respect to Cooke, he neither objected to the jury instructions nor requested the instruction. We therefore review only for plain error. Because Cooke did not assert the defense of abandonment or withdrawal, his substantial rights could not have been affected by any error from the denial of Burcham's requested instruction.

B

Burcham and Cooke next argue that the district court should have suppressed the physical and tape recorded evidence admitted at trial because of the outrageous conduct by the government. The record indicates that neither a pretrial motion for suppression of evidence nor any request for a pretrial hearing on the extent of the government's conduct was filed. Motions to suppress evidence must be raised prior to trial, and failure to do so constitutes a waiver. Fed.R.Crim.P. 12(b)(3) & (f). Because of this failure and because neither Burcham nor Cooke has shown that a miscarriage of justice resulted from admission of the evidence, we decline to review the merits of this argument. See United States v. Basey, 816 F.2d 980, 993-94 (5th Cir. 1987).

Burcham and Cooke also argue that their convictions should be overturned because of the outrageous conduct by the government. A defense of "outrageous conduct" is a question of law for the district court, not for the jury. United States v. Hudson, 982

F.2d 160, 163 (5th Cir. 1993). The defense of outrageous conduct is available "when the conduct of government agents is so outrageous that due process principles bar the government from invoking the judicial process to obtain a conviction." Id. This defense is available only in the rarest and most outrageous circumstances. United States v. Ivey, 949 F.2d 759, 769 (5th Cir. 1991), cert. denied, 113 S.Ct. 64 (1992).

Reverse sting operations do not, without more, constitute outrageous conduct. Id. Furthermore, a defendant who actively participates in a crime cannot avail himself of the outrageous conduct defense. Id. Burcham made a call to the undercover agent and testimony shows that both Burcham and Cooke indicated their desire to purchase the amphetamine and phenylacetic acid. In the light of this testimony, Burcham and Cooke cannot avail themselves of this defense. Moreover, a review of the actions of the government makes it clear to us that its conduct does not rise to the required "extreme" level. See United States v. Evans, 941 F.2d 267, 271 (5th Cir. 1991).

C

Cooke next argues that the evidence was insufficient to convict him of the charged conspiracy. We review the evidence in the light most favorable to the government, drawing all reasonable inferences in support of the verdict, and will affirm the conviction if a rational trier of fact could have found that the evidence established each essential element of the offense beyond

a reasonable doubt. United States v. Stone, 960 F.2d 426, 430-31 (5th Cir. 1992). In order to establish a conspiracy under 21 U.S.C. § 846, the government must prove beyond a reasonable doubt that (1) an agreement between two or more persons to violate the narcotics laws, (2) each alleged conspirator knew of the conspiracy and intended to join it, and (3) each alleged conspirator did participate in the conspiracy. United States v. Leed, 981 F.2d 202, 204-05 (5th Cir.), cert. denied, 61 U.S.L.W. 3834 (June 14, 1993).

Cooke argues that the government's evidence proved only that he was present at the scene and that he associated with Burcham, proof insufficient for conviction. After reviewing the record, however, we conclude that a rational juror could have found sufficient evidence to support the reasonable inferences that Cooke had knowledge of the conspiracy, intended to be part of the conspiracy, and actively engaged in the conspiracy.

First, Burcham indicated that he would transport the phenylacetic acid in a "big car" and arrived at the meeting in a Lincoln owned by Cooke's mother. The undercover agent testified that when he asked where the actual transaction would occur, Cooke replied, "Let's just do it." Indeed, it was Cooke who pulled out the sack of money from under his seat and handed it to Burcham. After the agent viewed the money, Burcham returned it to Cooke. Burcham became concerned about an unidentified individual in the parking lot, but the agent testified that Cooke said, "Let's go

ahead and get this over with, go ahead and do it." After being arrested, Cooke stated that the cash was not his and he was being paid \$1,000.00 to make the trip with Burcham. Upon this evidence, a rational juror could find sufficient evidence to convict Cooke.

D

Next, Burcham and Cooke argue that the district court incorrectly calculated the offense levels by using the projected yield of amphetamine from the precursor chemical phenylacetic acid. Both Burcham and Cooke objected to this calculation. Burcham and Cooke argue that the district court's calculation of the offense level is an unconstitutional legislative function by the court. This argument is premised upon their assertion that the Sentencing Guidelines offer no guidance regarding how to determine a sentence based upon the phenylacetic acid. This view of the Guidelines is incorrect.

A district court may consider the amount of phenylacetic acid relevant to the conduct of conviction and the conduct relevant to the conspiracy to possess with intent to distribute amphetamine. United States v. Hoster, 988 F.2d 1374, 1378 (5th Cir. 1993); U.S.S.G. § 2D1.1, comment. The agent testified that his negotiations with Burcham included two 110-pound barrels of phenylacetic acid, that Burcham indicated that he could convert this acid into a finished product within a few days, and that a 110-pound barrel, on average, would produce 65 pounds of amphetamine. Moreover, a recipe for amphetamine was found in

Burcham's wallet. Therefore, the phenylacetic acid was relevant to the illegal conduct being punished.

Furthermore, this court has determined that when phenylacetic acid is relevant to the conduct of the drug conviction, § 2D1.11 is used to determine the portion of the offense level attributable to the acid. Hoster, 988 F.2d at 1382-83. Burcham and Cooke's argument that the Guidelines are internally inconsistent and unconstitutionally vague must therefore fail.¹

E

Next, Burcham and Cooke argue that the district court denied them due process by considering speculation of how much amphetamine could have been produced from the two 110-pound barrels of amphetamine. The agent estimated from his experiences the projected yield; neither Burcham nor Cooke countered with any credible evidence. If information is presented to the sentencing judge with which the defendant would take issue, "the defendant bears the burden of demonstrating that the information cannot be relied upon because it is materially untrue, inaccurate or unreliable." United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). Since Burcham and Cooke had the opportunity to do this but failed to do so with any credible evidence, there has been no due process violation.

¹Neither Burcham nor Cooke raises the issue on appeal of the possible misapplication of § 2D1.1, which the district court used instead of § 2D1.11; therefore, the issue has been abandoned.

F

Cooke next argues that the district court failed to make the necessary findings in order to attribute the phenylacetic acid to him. The district court found that Cooke's actions showed an awareness of the situation and that the evidence of the projected yield was sufficiently reliable. The district court's implicit finding that the phenylacetic acid was reasonably foreseeable to Cooke is reviewed for clear error. United States v. Byrd, 898 F.2d 45, 452 (5th Cir. 1990). We do not reverse if the district court's finding is plausible in the light of the entire record. United States v. Fields, 906 F.2d 139, 142 (5th Cir.), cert. denied, 498 U.S. 874 (1990).

The record reveals that Cooke was in the car being used in the attempt to purchase the amphetamine and phenylacetic acid. He participated in conversations concerning the transaction. He indicated to the agent that the trunk was empty and could hold the barrel of phenylacetic acid. Based on this evidence, there is no reversible error in the district court's determination that the phenylacetic acid should be attributed to Cooke.

IV

For the above reasons, the convictions and the sentences of both Burcham and Cooke are

A F F I R M E D.