UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-1082
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RITA E. SAZIMA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(4:92-CR-138-A)

(February 9, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

A jury found Rita E. Sazima guilty of conspiracy to manufacture and distribute amphetamine and phenylacetone. She received a 78-month term of incarceration, a 3-year term of supervised release and a $50 special assessment.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Testimony at trial indicated the following facts: A Fort Worth, Texas, undercover police officer, Scott P. Campbell, met David Lee Barksdale and Sazima at the Lone Star Oyster Bar in Arlington, Texas, on June 10, 1992, and engaged them in conversation concerning the manufacture of amphetamine and the hazards of the drug business. At that meeting, Sazima stated that she liked to do larger "cooks" (amphetamine manufacturing process) because manufacturing a small amount was not worth getting caught. Barksdale asked Campbell for some glassware to be used in the "cooking" process. He also told Campbell that he was planning a trip to San Diego, California, to obtain some chemicals used in the manufacturing process. When Barksdale expressed concern that the chemicals might not arrive in San Diego as contemplated, Sazima indicated her awareness of the situation. Sazima stated that she had called someone in France to order the chemicals, and that she knew how to obtain EPA and DEA control numbers to avoid Customs.

Two days later, Campbell met with Barksdale and Sazima again and delivered the glassware. They stated that they would "possibly" give him some amphetamine after they finished "cooking" it. Subsequently, in a telephone conversation, Sazima informed Campbell that Barksdale was in California obtaining chemicals and that she would have Barksdale contact Campbell on his return.

During a meeting on June 21, 1992, Barksdale told Campbell that Sazima was the "brain" behind the operation because she had the knack of rounding up the chemicals and glassware and could talk with people. All three agreed that Campbell would provide a

location to "cook" some amphetamine, and Campbell offered to buy a one-quarter pound which Barksdale agreed to sell to him. Approximately a week later, Campbell had a telephone conversation with Sazima wherein she stated that Barksdale was lazy, and she wanted Campbell to speak to him so as to motivate him to start "cooking" some more drugs.

On July 17, 1992, Campbell met with Barksdale and Sazima and agreed to travel with them to Crowley, Texas, to look at a house Campbell had offered to provide so that Barksdale and Sazima could "cook" some drugs. They traveled to the house and inspected it. Barksdale and Sazima were impressed with the house and were excited about the possibility of "cooking" some drugs.

Campbell met with Barksdale the next day, July 22, 1992, traveled to the "cook" site, unloaded the vehicles, went inside, and began setting up the glassware for the manufacturing process. Technical difficulties ensued during the manufacturing process, at which time Barksdale was arrested. Approximately three weeks later, Sazima surrendered to the DEA.

OPINION

Sazima contends that the district court erred by refusing to grant the request of her trial counsel, Jerry Brownlow, to withdraw. Sazima points to the fact that Brownlow had very limited experience in federal criminal trials and with the Sentencing Guidelines. She maintains that the district court's denial of the motion to withdraw was arbitrary and capricious. She is mistaken.

Brownlow filed a motion to withdraw on October 1, 1992. The Government responded, stating that it had no opposition because any delay would allow for additional time to locate Sazima's co-defendant, who was a fugitive at that time. Trial was set for October 19, 1992. The district court conducted a hearing and then denied the motion.

At the hearing, the district court questioned Brownlow and discerned the following:

1) Brownlow admitted being "totally unfamiliar" with the Sentencing Guidelines, but had made an effort to bring himself up to date;

2) Brownlow had tried several federal criminal cases approximately ten years earlier;

3) Brownlow did a fair amount of "plea work" (criminal) in state court and 25 percent of his practice was civil trial litigation; and

4) fifty percent of the reason that he filed the motion to withdraw was because he had only received $1,500 as a retainer for the case and Sazima would not pay any additional money which Brownlow wished to charge once he learned that the case would require a trial.

When informed by the judge that he was more proficient than ninety-nine percent of the court-appointed lawyers, he accepted "the court's wisdom" and "could not quarrel with that." When questioned, Sazima testified that she had discussed her situation with a few other lawyers but could not afford them. The district court, noting the pending trial date, denied the motion to withdraw.

This Court will uphold the district court's denial of a motion to substitute counsel unless that denial was either unreasonable and arbitrary, see Lowenfield v. Phelps, 817 F.2d 285, 289 (5th

Cir. 1987) (appointed state-court counsel), aff'd, 484 U.S. 231 (1988), or an abuse of discretion. See United States v. Mitchell, 777 F.2d 248, 257 (5th Cir. 1985) (federal prosecution), cert. denied, 476 U.S. 1184 (1986). Sazima has not alleged any specific prejudice which resulted from Brownlow's representation. Additionally, she did not request to proceed pro se, nor has she shown that substitute counsel was available.

In fact, she testified that she had been unable to hire suitable substitute counsel. Furthermore, although the district court instructed her to renew the motion to withdraw should she locate new counsel, Sazima never renewed her motion. Sazima also failed to request a continuance to allow her time to attempt to find new counsel. The district court did not commit reversible error. See Mitchell, 777 F.2d at 256-57.

Sazima next contends that the trial court erred by refusing to adjourn trial to allow her to obtain witnesses. The crux of her argument is this: Two defense witnesses appeared without coat and tie, as was required by the Local Rules. The witnesses left to suitably attire themselves, but failed to return in time to testify. She maintains that their testimony was vital to corroborate her assertion that she was violently opposed to the manufacturing of the amphetamine.

The district court ordered Sazima to have all witnesses in court the morning of trial. Sazima's counsel indicated to the court that the witnesses would be present. Prior to lunch, the district judge saw the defense witnesses and reminded Sazima's

counsel that the witnesses must be attired with coats and ties. Later that afternoon, after Sazima was cross-examined, and three defense witnesses had testified, Sazima's counsel informed the court that two additional defense witnesses, Dr. Swift and Harold Davis, who had been present but left to seek suitable attire, had failed to return.

The district court allowed Brownlow to search for the missing witnesses. Upon his return without the witnesses, the defense rested and the Government closed. Brownlow then requested a ten-minute recess to try once again to locate the witnesses. The district court noted that the defense had rested and denied the motion.

The denial of a motion for continuance is reviewed for an abuse of discretion. United States v. Botello, 991 F.2d 189, 193 (5th Cir. 1993), petition for cert. filed, (Sept. 2, 1993) (No. 93-5835). To succeed with a motion for continuance based on the unavailability of a witness, Sazima must show: 1) that she exercised due diligence to obtain the attendance of the witness; 2) that the witness will offer substantial favorable evidence; 3) that the witness is available and willing to testify; and 4) that the denial of the continuance would materially prejudice her. Sazima has not shown an abuse of discretion.

Only one of the two witnesses returned. Thus, it appears that only one witness was available and willing to testify. That witness arrived after the trial was over, and stated that he did not really know Sazima but lived near her and was going to testify

regarding "the man with the bat." In her appellate brief, Sazima maintains that this testimony was central to her theory of defense that she had violent arguments with Barksdale concerning his involvement with the manufacture of drugs. She maintains that one of the uncalled witnesses, although she does not specify which one, could corroborate her testimony that Eddie Catron showed up at her home with a baseball bat, knocked on the door violently, threatened Barksdale, and insisted that Barksdale go through with the drug deal.

Assuming Sazima is correct, she still has failed to state specifically what the witness would have testified to, or how that testimony would be substantial favorable evidence. Furthermore, in light of Campbell's testimony implicating Sazima directly in the conspiracy, Sazima has not shown that the denial of the continuance materially prejudiced her. See United States v. Whiteside, 810 F.2d 1306, 1308 (5th Cir. 1987).

Sazima next contends that she was denied effective assistance of trial counsel because her trial counsel: 1) failed to move for dismissal pursuant to Fed. R. Crim. P. 29; 2) failed to make an opening statement to the jury; 3) failed to familiarize himself with the Local Rules which require witnesses to wear a coat and tie; 4) rested before requesting a continuance (to procure the attendance of improperly attired witnesses); and 5) failed to offer into the record a complete recitation of the testimony which the witnesses who were not properly attired would have offered. She is mistaken.

The claim of ineffective assistance of counsel cannot be raised on direct criminal appeal unless the record is sufficiently developed with respect to the merits of the ineffective-assistance claim. United States v. Garza, 990 F.2d 171, 178 (5th Cir.), cert. denied, 114 S.Ct. 332 (1993). The claim was not raised in the district court nor is the record sufficiently developed. Therefore, this Court will dismiss this portion of the appeal without prejudice to Sazima's right to raise the issue in a 28 U.S.C. § 2255 motion. United States v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991), cert. denied, 114 S.Ct. 135 (1993).

Sazima contends that the evidence of guilt was insufficient to sustain her conviction. She concedes that her trial attorney failed to move for a judgment of acquittal. Therefore, the Court "review[s] the sufficiency of the evidence . . . only to determine whether affirmance of [Sazima's conviction] would result in a manifest miscarriage of justice. This occurs only if the record is devoid of evidence pointing to guilt." United States v. Pruneda-Gonzalez, 953 F.2d 190, 193-94 (5th Cir.)(internal quotations and citations omitted), cert. denied, 112 S.Ct. 2952 (1992).

The Government had to prove beyond a reasonable doubt: 1) the existence of an agreement between two or more persons to violate narcotics laws; 2) Sazima's knowledge of that agreement; and 3) her voluntary participation in the conspiracy. The Government was not required to present direct evidence of the conspiracy. United States v. Cardenas, ___ F.3d ___, (5th Cir. Dec. 9, 1993 No. 92-8660), 1993 WL 503257 at * 16.

Sazima does not provide record cites to support her contention, but instead, alleges that Campbell's testimony was insufficient to establish her guilt because he failed to tape-record his conversations with her. She maintains that she tried to persuade her boyfriend, Barksdale, not to become involved in illegal activities. Her argument is unpersuasive.

The record is not devoid of evidence pointing to guilt. Campbell testified regarding at least seven meetings or telephone conversations he conducted with Sazima. He testified that Sazima stated that "she liked to do larger 'cooks' because it's not worth the chance getting caught 'cooking' a little bit of dope in lieu of a larger amount. If you are going to 'cook', you might as well 'cook' a whole bunch." Campbell also testified that on at least two occasions, he contacted Sazima who relayed messages to Barksdale relating to the controlled substances in question. Additionally, he testified that at a meeting with Barksdale and Sazima, Barksdale stated that Sazima had a knack for rounding up chemicals and glassware to be used in the manufacturing process and that she was the "brain . . . because he didn't have the patience to talk to the people on the telephone" to set up the procurement of chemicals.

Furthermore, Sazima participated in the discussions regarding the "cook" house. Campbell, Sazima and Barksdale all went to inspect the "cook" house. Sazima also called Campbell on one occasion and informed him that she and Barksdale had "just returned

back from Forth Worth where they had just purchased a quantity of, what she said, brand-new acetic anhydride."

Although Sazima maintains that Campbell's testimony should not have been credited by the jury, the jury determined otherwise. All credibility questions are resolved in favor of the verdict. United States v. Tansley, 986 F.2d 880, 885 (5th Cir. 1993). Under the Pruneda-Gonzalez standard of review, Campbell's testimony is sufficient to support the verdict.

Sazima also challenges the propriety of the district court's determination of her base offense level. She maintains that the quantity of drugs used to determine her base offense level was clearly erroneous. Her argument is unavailing.

The district court determined Sazima's base offense level of 26 pursuant to U.S.S.G. § 2D1.1 based on the quantity of approximately three pounds of amphetamine. Sazima objected, asserting that trial testimony did not support the quantity of drugs used by the district court. The district court denied the objection. This Court reviews for clear error the district court's determination of the applicable quantity of drugs for sentencing purposes. United States v. Mergerson, 4 F.3d 337, 346 (5th Cir. 1993).

The PSR stated that, according to DEA Agent Wayne Fitch, Barksdale and Campbell set up two flasks which could have produced approximately one-and-a-half pounds of amphetamine per flask, for a total of three pounds. At sentencing, Fitch testified that he had investigated numerous clandestine amphetamine laboratories, and

based on the amount of chemicals seized from the house where Campbell and Barksdale had attempted to manufacture amphetamine, the manufacturing process could have easily yielded three pounds.

Although Sazima maintains that she was not part of a "jointly undertaken activity" and that the amount of drugs which could have been produced was not "reasonably foreseeable" to her, as required by § 1B1.3(a)(1)(B), she is mistaken. Sazima met with Campbell and Barksdale and they traveled to the manufacturing site to inspect it prior to the "cook." Sazima was impressed with the house and excited about the "cook." She stated that she could get food, water, and supplies. She also told Campbell that she and Barksdale had just purchased a new quantity of acetic anhydride to be used in the "cook." Campbell also testified that she and Barksdale had "cooked" ten pounds of amphetamine on a prior occasion. In light of Campbell's testimony, the district court did not clearly err in finding that Sazima was part of a jointly undertaken activity and that the amount of drugs was reasonably foreseeable to her.

Sazima alleges that the district court erred in increasing her offense level for the obstruction of justice. She is wrong.

This Court reviews the district court's finding that Sazima obstructed justice under the "clearly erroneous" standard. United States v. McDonald, 964 F.2d 390, 392 (5th Cir. 1992). The PSR recommended an enhancement to Sazima's base offense level for obstructing justice based on perjured trial testimony. Sazima objected to the enhancement. She maintains that she did not give perjured testimony but was "simply making a defense, and the

defense primarily went to the issue of the undercover agent's specific recollection of what she may have said that could have been construed as a statement in furtherance of a conspiracy."

The district court denied the objection and found that as opposed to denying guilt, "she specifically denied some things that [the undercover agent] had given testimony about that were directly pertinent to the offense conduct." The district court further found the undercover agent's testimony to be credible and did not believe that Sazima "was telling the truth."

Section 3C1.1 provides for an enhancement if a defendant willfully obstructs, impedes, or attempts to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of an offense. A court may not penalize a defendant for denying guilt, but may enhance based on perjury. United States v. Laury, 985 F.2d 1293, 1308 (5th Cir. 1993); see United States v. Dunnigan, ___ U.S. ___, 113 S.Ct. 1111, 1115-17, 122 L.Ed.2d 445 (1993).

Dunnigan requires that the district court "review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same." Dunnigan, 113 S.Ct. at 1117. The district court's determination that an obstruction-of-justice enhancement is required is sufficient "if the court makes a finding of an obstruction or impediment of justice that encompasses all of the factual predicates for a finding of perjury." A separate and clear finding on each element of the alleged perjury, although

preferable, is not required. Laury, 985 F.2d at 1308 (quoting Dunnigan, 113 S.Ct. at 1117).

The district court found that Sazima specifically denied some of the things that Campbell testified about which were directly pertinent to the offense conduct. On appeal, Sazima maintains that she attended the meetings with Campbell but tried to keep Barksdale from engaging in the illegal activity, and that Campbell's testimony concerning what she said was not corroborated, but her testimony was believable. However, the record indicates that Sazima specifically denied ever talking to Campbell about "cooking" amphetamine. The jury heard both Campbell's and Sazima's versions of the events. The jury probably determined that Sazima lied when she testified that Campbell was mistaken about what he claimed she said. The district court made a similar but independent finding. Consequently the district court's finding of obstruction of justice satisfies the Dunnigan factors. See Dunnigan, 113 S.Ct. at 1117; United States v. Mena, No. 92-1673 (5th Cir. June 2, 1993).

AFFIRMED.