

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

---

No. 93-2089  
Summary Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WILLIAM GLENN MITCHELL,

Defendant-Appellant.

---

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

(CR-H-89-175-S3)

---

(June 29, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:\*

BACKGROUND

William Glenn Mitchell was indicted for conspiracy to possess with intent to possess over 1,000 kilograms of marijuana (count 1), conspiracy to commit multiple acts of racketeering activity (count

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

41), committing a pattern of racketeering activity (count 42), and possession with intent to distribute approximately 900 kilos of marijuana (count 88). Among the various double jeopardy motions filed by Mitchell<sup>1</sup> was his Motion to Dismiss Count 1 Due to Double Jeopardy. Mitchell contended in that motion that count one was based on conduct for which he was previously convicted in a federal district court in Tennessee in 1983. The Government responded to Mitchell's double jeopardy motions.

At a hearing, the district judge addressed and orally denied Mitchell's double jeopardy motions. After Mitchell filed a premature notice of appeal, this Court remanded the matter to the district court for written findings on the denial of the double jeopardy motions, retaining jurisdiction over the appeal. See United States v. Dunbar, 611 F.2d 985, 988-89 (5th Cir.), cert. denied, 447 U.S. 926 (1980). The district court entered its written Finding On Double Jeopardy Claims as follows:

This Court denied Mitchell's motion to dismiss counts of the indictment on double jeopardy grounds (#1169). Mitchell's claims are frivolous. A RICO conviction may be based in part on an offense for which the defendant has already been convicted and sentenced. Mitchell's argument does not advance further than repeated assertions that his past crimes cannot be asserted as RICO predicates.

#### OPINION

Mitchell argues that the district court erred when it denied his motion to dismiss count one of the indictment on double-jeopardy grounds. Mitchell's other double jeopardy arguments,

---

<sup>1</sup> Mitchell also filed two motions to dismiss count 41 and two motions to delete certain criminal acts from count 42.

raised in district court, are not briefed on appeal and are thus abandoned. See Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985).

"The Supreme Court has held that the denial of a double jeopardy motion is an appealable order under 28 U.S.C. § 1291." Dunbar, 611 F.2d at 987 (citation omitted). Legal conclusions supporting the denial of a defendant's double jeopardy motion are reviewed *de novo*. United States v. DeShaw, 974 F.2d 667, 669 (5th Cir. 1992). "[T]he defendant bears the initial burden of establishing a *prima facie* claim of double jeopardy. If the defendant does so, the burden shifts to the government to demonstrate by a preponderance of the evidence that the indictment charges a crime separate from that for which the defendant previously was placed in jeopardy." Id. at 670 (citing, *inter alia*, United States v. Stricklin, 591 F.2d 1112 (5th Cir.), cert. denied, 444 U.S. 963 (1979)).

Whether charges in an indictment violate the Double Jeopardy Clause is determined by the test in Blockburger v. U.S., 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); see United States v. Singleton, 16 F.3d 1419, 1422 & n.10 (5th Cir. 1993). Blockburger is satisfied if, based on the statutory elements, "each provision requires proof of an additional fact which the other does not." See Blockburger, 284 U.S. at 304; Singleton, 16 F.3d at 1422 & n.10. A conviction for conspiracy to possess with intent to distribute cocaine requires that two or more people agreed to violate the controlled-substances laws, that the accused knew of

the agreement, and that he voluntarily joined the conspiracy.<sup>2</sup> United States v. Martinez-Moncivais, 14 F.3d 1030, 1034 (5th Cir. 1994).

Mitchell contends, as he did in district court, that the Government violated the Double Jeopardy Clause because it was using the same conduct underlying his 1983 conspiracy conviction to convict him again under count one of the instant indictment. He argues further that, having established a prima facie case, the burden shifted to the Government to prove otherwise, which it failed to do.

Mitchell was charged for participation in a conspiracy that began in 1980 and continued until he was indicted in 1990. "[A] person's participation in a conspiracy ends when the person is arrested for his role in the conspiracy." United States v. Dunn, 775 F.2d 604, 607 (5th Cir. 1985). Mitchell concedes on appeal, as he did in district court, that he was arrested in 1982 and convicted for conspiracy in 1983. Although the district court did not address the issue in its written findings, the district court addressed the issue at the hearing in an exchange with the Assistant U.S. Attorney, noting that, as long as there was some "post-conviction activity," count one would not violate the double jeopardy clause. Although the specificity of the district court's

---

<sup>2</sup> In drug distribution cases, the Government does not need to prove an overt act in furtherance of the conspiracy. U.S. v. Ayala, 887 F.2d 62, 67 (5th Cir. 1989); see U.S. v. Shabani, \_\_\_ U.S. \_\_\_, 114 S.Ct. 1047, 127 L.Ed.2d 370 (1994) (certiorari granted on whether an overt act must be proved in a controlled-substances conspiracy).

findings leave something to be desired, remand is not necessary for *de novo* review of the district court's ruling.

Mitchell's participation in the previous conspiracy for purposes of a double-jeopardy analysis ended when he was arrested in 1982. See Dunn, 775 F.2d at 607. "[F]urther [participation in an] `old' conspiracy after being charged with that crime becomes a new offense for purposes of a double jeopardy claim." Id. (citing Stricklin, 591 F.2d at 1121 n.2). In addition to charging a conspiracy continuing until 1990, the indictment charged Mitchell, inter alia, with possession with intent to distribute drugs in 1987. Mitchell's post-conviction involvement in drug-related activities demonstrates that the Government was not charging conduct identical to that underlying the 1983 conviction and indicates "the nature and scope of the activity which the Government sought to punish." Stricklin, 591 F.2d at 1122 (citation and internal quotation omitted).

Mitchell argues that the Government did not meet its burden because it merely alleged post-conviction activity and failed to support the allegation with some kind of evidence. Mitchell's argument is meritless. In Stricklin, cited by Mitchell, the defendant was convicted for a drug conspiracy and possession charge occurring in New Mexico on August 18, 1974. 591 F.2d at 1115, 1121. The defendant was later charged with a drug conspiracy occurring between September 1971 and June 1976, with overt acts occurring between September 1971 and November 1973. Id. at 1116. This Court held that the defendant asserted a *prima facie* double

jeopardy claim because he made a showing that the events charged in the Texas and New Mexico indictments involved transactions that were part of a larger conspiracy, undertaken pursuant to a single agreement. Id. at 1122.

In contrast to the facts in Stricklin, where the possession counts and the overt acts charged in the latter indictment occurred *before* the acts charged in the previous one, the indictment in Mitchell's case charged drug-related activity in 1987, *after* Mitchell's arrest pursuant to his conviction in Tennessee. As set forth above, Mitchell could be charged with rejoining the "old" conspiracy. See id. at 1121 n.2. The Government could use "underlying facts in that offense as the basis for a charge that he committed a different offense." Id. at 1120. It follows that, because Mitchell failed to make a *prima facie* showing of a double jeopardy claim, the burden did not shift to the Government to prove that count one charged a different crime. See DeShaw, 974 F.2d at 670.

AFFIRMED.