

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2374
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VICTOR BALA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-92-35-4)

(April 6, 1994)

Before POLITZ, Chief Judge, DAVIS and SMITH, Circuit Judges.

POLITZ, Chief Judge:*

Convicted of conspiracy to possess with intent to distribute more than a kilo of heroin, 21 U.S.C. §§ 841, 846, and for distributing heroin within 1000 feet of a public school, 21 U.S.C. § 860, Victor Bala appeals, complaining of the instructions to the jury, rulings on evidence, and the adequacy of the evidence. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

DEA agents Paul Roach and Keith Jones, investigating heroin trafficking in Houston, discovered heroin transactions at Aita's Beauty Supply. Working undercover Roach secured a heroin sample there and was introduced to Vincent Aitaegbebhunu, the owner. Pretending to be an organized crime figure, Roach arranged for the purchase of 32 grams of heroin from Aitaegbebhunu for \$9000. Aitaegbebhunu claimed that he could deliver heroin by the kilo and indicated his willingness to become Roach's supplier in Houston.

Roach arranged for a purchase of 100 grams. Aitaegbebhunu testified that he telephoned Bala and asked if he could secure 200 grams. Bala agreed to try and later met with Aitaegbebhunu at Aita's giving assurance that he would call his Baltimore contact. Bala informed Aitaegbebhunu shortly thereafter of his ability to deliver 100 grams but only if Aitaegbebhunu was certain that Roach would be available on the appointed day. Aitaegbebhunu called Roach to confirm an exchange of 100 grams of heroin for \$20,000 on Sunday, December 8, 1991 at Aita's. The night before Aitaegbebhunu spoke again with Bala to verify the next day's transaction. Bala then advised that his contact was en route to Houston.

On December 8, Aita's was placed under surveillance by DEA agents who watched Bala and another arrive. Bala told Aitaegbebhunu that he did not wish to be seen by the buyer and it was agreed that he and his contact would stay in the office while Aitaegbebhunu concluded the trade. Bala weighed two cellophane bags of heroin on a small scale he had brought and handed the bags

to Aitaegbebhunu. The bags contained roughly 100 grams of heroin.

Aitaegbebhunu awaited agents Roach and Jones and joined them in their auto. The exchange took place as the auto was driven around; the agents took the heroin and gave Aitaegbebhunu \$20,000 in cash. Aitaegbebhunu returned to Aita's, deducted his \$1000 commission, and gave Bala the \$19,000. Bala handed the money to his contact and the two departed.

Bala testified and asserted his innocence, stating the he had no knowledge of heroin but merely picked up an acquaintance of his cousin at the airport and drove him to Aita's and then back to the airport. The jury concluded otherwise and returned a verdict of guilty on both counts. The court imposed concurrent sentences of the mandatory minimums of ten years imprisonment and Bala timely appealed.

Analysis

Bala advances several assignments of error. He first contends that the district court improperly instructed the jury by including a charge on a dismissed importation count. The record belies this claim. The trial court did not instruct the jury on an importation count. Rather, the court instructed the jury to consider only the two counts in which Bala was charged, directing it to ignore the other counts in the indictment.

Bala next argues that the court admitted hearsay evidence before a finding was made that he was part of the conspiracy. Bala contends that without this evidence he could not have been linked

to the conspiracy. Bala is in error.¹ The prosecutor did offer hearsay when on direct examination Aitaegbebhunu was asked about a conversation with Bala's cousin. An objection by the defense was sustained. The only other conversations about which Aitaegbebhunu testified were his conversations with Bala. That was not hearsay.² This argument lacks merit.

Bala next complains about the adequacy of the evidence tying him to the conspiracy. We must view the evidence in the light most favorable to the jury's verdict and reject same only if we conclude that no rational jury could have found Bala's guilt proven beyond a reasonable doubt.³ The evidence must establish an agreement between two or more persons to violate federal drug laws, Bala's knowledge of, and his voluntary participation in that agreement.⁴ These may be proven by circumstantial evidence.⁵

It cannot be gainsaid that credibility evaluations lie peculiarly within the jury's province. The jurors obviously chose to believe Aitaegbebhunu whose testimony, if accepted, established the conspiracy and Bala's willing and material participation therein.

¹Fed.R.Evid. 801(d)(2)(E); **United States v. Bourjaily**, 483 U.S. 171 (1987).

²Fed.R.Evid. 801(d)(2)(A).

³**United States v. Martinez**, 975 F.2d 159 (5th Cir. 1992), cert. denied, 113 S.Ct. 1346 (1993).

⁴**United States v. Gallo**, 927 F.2d 815 (5th Cir. 1991).

⁵**United States v. Sing**, 922 F.2d 1169 (5th Cir.), cert. denied, 111 S.Ct. 2066 (1991).

Bala maintains that he was denied a fair trial because of agent Roach's repeated wrongful representations of personal knowledge of material facts. The trial court was clearly and understandably annoyed by the agent's conduct, describing it at a bench conference as perjury. Although we find reprehensible Roach's attempts to clothe his testimony with a value it did not possess, we are not prepared to annul the jury's verdicts because of it. When challenged Roach conceded the source of his information and on cross-examination defense counsel skillfully underscored the part of Roach's testimony which was based on his personal knowledge and the part which was not. There was no motion to strike, no motion for a mistrial, and no request for a special jury instruction. This assignment of error is not persuasive.

Finally, Bala contends that the evidence does not establish that the transaction took place within 1000 feet of a school because the transfer from Aitaegbebhunu to the agents took place in the auto as it was being driven at a point more than 1000 feet from the identified school. Bala delivered the heroin to Aitaegbebhunu for tender to the undercover agents in Aita's premises. A Houston police officer testified that Aita's was 165 feet from the school. This assignment also lacks merit.

The convictions are AFFIRMED.