UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3057

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EUNICE ASPRILLA and OMAR PIEDRAHITA,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana
(CR-92-345 LLM (4))

(November 19, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendants, Eunice Asprilla ("Asprilla") and Omar Piedrahita ("Piedrahita"), were jointly tried before a jury and convicted of conspiring to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (1988). Both defendants now appeal their convictions and sentences. We affirm

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* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the district court in part, but we remand to the district court to review in camera possible Jencks Act material.

I

In June 1992, Byron Cruz, a government informant, arranged with sources in Columbia to smuggle twenty-five kilograms of cocaine into the United States. The Columbian supplier told Cruz to deliver eight kilograms of the cocaine to either "Gloria" or "San Martin" and gave Cruz a phone number to call when he reached the United States. An individual identified as German Piedrahita supplied Cruz with two additional kilograms of cocaine to be delivered to the defendant Piedrahita. Upon reaching the New Orleans with the cocaine, Cruz informed Customs agents of the scheme. The agents seized the cocaine and provided Cruz with packages similar to those containing the cocaine. Cruz then called the telephone number given to him by the Columbian supplier so that he could notify Gloria or San Martin of his arrival in New Orleans.[1] Cruz originally spoke with an unidentified man and woman, who told him to call back the next day. The next day, a woman who identified herself as Gloria informed Cruz that she would be flying into New Orleans later that day, accompanied by an unnamed male, and to call her at a specified New Orleans phone number at a specified time. When Cruz called the number given to him by Gloria, Piedrahita answered. Cruz gave Piedrahita the name

[1] This number, a New York area code, was registered to Asprilla.

of the New Orleans hotel at which he was staying, and Piedrahita told Cruz that he and Gloria would meet Cruz there.

When Asprilla and Piedrahita met Cruz at the motel, Asprilla introduced herself as Gloria. Cruz showed the defendants the "dummy" packages of cocaine, and Asprilla left the room to retrieve the purchase money. Agents arrested Asprilla as she left the room, seizing over $2000 and airline tickets in the names of Piedrahita and "Gloria Gomez." While Asprilla was absent from the room, Piedrahita began opening one of the dummy packages of cocaine. At that point, Customs agents entered the room, arrested Piedrahita, and seized $8470 from him.

II

Asprilla and Piedrahita contend that the evidence was insufficient to support their conspiracy convictions. They also argue that the district court abused its discretion in refusing to undertake an *in camera* inspection of notes made by Cruz that the defendants argue may have been helpful to their defenses. The defendants finally assert that the district court erred with regard to their sentences. These claims are without merit.

A

Asprilla and Piedrahita first contend that the district court erred in denying their motion for judgment of acquittal because the evidence presented by the government was insufficient to establish venue in the Eastern District of Louisiana))in their words, "there was no evidence that [they] had conspired with anyone in the

Eastern District of Louisiana." We conclude, however, that venue in that district was proper.

Criminal defendants have a right "to be tried in the state and district in which the crime is committed." *United States v. Davis*, 666 F.2d 195, 198 (5th Cir. 1982). "Venue is proper in conspiracy cases in any district where the agreement was formed or an overt act occurred. *United States v. Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984). The prosecution need only demonstrate the propriety of venue by a preponderance of the evidence. *Id.* Thus, the question on appeal is "whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict," *United States v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2952, 119 L. Ed. 2d 575 (1992), the prosecution proved, by direct or circumstantial evidence, that an overt act occurred in the Eastern District of Louisiana. *Davis*, 666 F.2d at 199; *see also United States v. White*, 611 F.2d 531, 534-35 (5th Cir.), *cert. denied*, 446 U.S. 992, 100 S. Ct. 2978, 64 L. Ed. 2d 849 (1980).

The evidence presented by the government supports the inference that venue was proper in the Eastern District of Louisiana. The defendants and their drug source in Columbia devised a scheme by which to smuggle cocaine into the United States. They then arranged with Cruz to pick up the cocaine in New Orleans, traveled to New Orleans, met with Cruz there, and attempted to purchase the contraband. Indeed, Piedrahita admitted under oath arranging with German Piedrahita to smuggle two

kilograms of cocaine into the United States from Columbia and traveling to New Orleans to procure the drugs. These acts are sufficient to establish venue in the Eastern District of Louisiana.[2]

B

The defendants contend that the district court's denial of their request for production of notes prepared by Cruz, the government informant, violated both the Jencks Act, 18 U.S.C. § 3500,[3] and the Supreme Court's holding in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963), that

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[2] The defendants further contend that they were convicted of conspiring not with each other but with some third person. Asprilla and Piedrahita argue that the third person was Cruz, the government agent. From this conclusion, they assert that their convictions must be reversed because a government agent cannot be part of a conspiracy. The defendants ignore, however, one very important fact))the jury need not have found that Asprilla and Piedrahita conspired with each other. While the evidence, examined in the light most favorable to the verdict with all credibility choices made in favor of the government, *Pruneda-Gonzalez*, 953 F.2d at 193, supports the conclusion that Asprilla and Piedrahita conspired with each other, it also supports the conclusion that each defendant conspired with someone in Columbia to unlawfully smuggle cocaine into the United States. Thus, because each defendant then committed an overt act in the Eastern District of Louisiana in furtherance of that conspiracy, venue was proper. *Davis*, 666 F.2d at 199.

[3] This section provides in part:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

the government must disclose to a defendant any evidence favorable to him or her that is material either to guilt or punishment. The government admits that it had disclosed to the defendants only portions of Cruz's notes, but contends that the unproduced notes do not pertain to either Asprilla or Piedrahita.[4]

After learning that other notes made by Cruz existed, the defendants asked the court to order their production. The government responded that the unproduced notes "had nothing to do with the dope that was coming for Gloria or Omar." The defendants then asked the district court to inspect the notes in camera to determine if the government's assertion was correct. Although the government stated that it would produce the notes for such an inspection, the district court denied the defendants' motion.

"If the defendant makes a timely request and there is some indication in the record that the materials meet the Jencks Act's definition of a statement, the district court has a duty to inspect the documents in camera." *United States v. Fragoso*, 978 F.2d 896, 899 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1664, 123 L. Ed. 2d 282 (1993); *United States v. Welch*, 810 F.2d 485, 490 (5th Cir. 1987); *United States v. Hogan*, 763 F.2d 697, 704 (5th Cir. 1985). There is no question that Cruz was both the witness and the person who authored the notes. Thus, the district

[4] The government supplemented the record on appeal with a full set of Cruz's notes. Piedrahita seeks to strike the notes from the record on appeal because they were not provided to the district court. As we do not rely on the notes in any way in reaching our decision, we find Piedrahita's motion to strike the supplemental record to be unnecessary and therefore deny it.

court should have examined the notes to determine if they were Jencks Act statements. *Welch*, 810 F.2d at 490-91. Accordingly, we remand to permit the district court to determine in the first instance whether these notes constitute statements relating to the subject matter of Cruz's testimony under the Jencks Act. *See Id.*; *Hogan*, 763 F.2d at 704. If the district court decides that the notes need not be produced under the Jencks Act, it should supplement the record with the notes and make sufficiently detailed findings to enable us to review the decision should the defendants challenge it. If the district court concludes that the notes should have been produced, it then should determine whether the failure to furnish them at the conclusion of Cruz's testimony was harmless. "Unless the district court is persuaded that the error was harmless, it should vacate the judgment of conviction and grant a new trial." *Welch*, 810 F.2d at 491. The district court's determination of this issue is a fact question that will not be overturned unless clearly erroneous. *Hogan*, 763 F.2d at 704.[5]

C

Piedrahita appeals the sentence imposed by the district court under the sentencing guidelines. He contends that the district court erred in failing to sentence him "to the lowest possible sentence as provided in the applicable sentencing guidelines in

[5] As we remand on the Jencks Act issue, we need not determine in the first instance whether the notes constitute *Brady* material. The district court should evaluate this additional claim on remand.

view of the great personal problems facing [him]." We find Piedrahita's contention to be without merit.[6]

The jury found Piedrahita guilty of conspiring to possess with intent to distribute two kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The district court sentenced Piedrahita to a prison term of 60 months. Congress has provided for a five-year minimum term of imprisonment for persons violating these sections when more than 500 grams of cocaine are involved. 21 U.S.C. § 841(b)(1)(B). Thus, despite the fact that the sentencing guidelines allowed for a lesser sentence to be imposed, the district court did not err in sentencing Piedrahita. *See United States v. Schmeltzer*, 960 F.2d 405, 408 (5th Cir.) (holding that "statutorily mandated sentences . . . prevail over the guidelines when in apparent conflict"), *cert. denied*, ___ U.S. ___, 113 S. Ct. 609, 121 L. Ed. 2d 544 (1992); *see also* U.S.S.G. § 5G1.1(b) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.").

III

A

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[6] Asprilla also argues that her sentence should be reversed because "at most [she] could only have conspired with Piedrahita to possess [two kilograms of] cocaine." However, she fails to brief the issue, thus waiving it for the purpose of this appeal. *United States v. Green*, 964 F.2d 365, 371 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 984, 122 L. Ed. 2d 137 (1993).

Asprilla additionally contends that the district court erred by admitting in evidence transcripts of telephone conversations between Cruz and Gloria that identified her as Gloria.[7] The district court did not err, however, because the record evidence indicates that Asprilla used Gloria as a pseudonym. For example, by the time the transcripts were admitted in evidence, Cruz already had identified Asprilla as the person whom he knew as Gloria. Moreover, Gloria told Cruz that she would be traveling to New Orleans with a man and directed Cruz to call a New Orleans telephone number at a specified time. When Cruz called that number, Piedrahita answered and told Cruz that he and Gloria would come to Cruz's hotel room. Piedrahita and Asprilla then arrived at Cruz's hotel room. Asprilla, upon arriving at Cruz's hotel room, introduced herself as Gloria. Finally, Asprilla, when arrested, possessed an airline ticket in the name of Gloria Gomez that indicated Gloria had traveled from New York to New Orleans. Thus, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, *Pruneda-Gonzalez*, 953 F.2d at 193, the district court did not err by admitting the transcripts in evidence.

B

Asprilla further argues that she was denied her Sixth Amendment right to effective assistance of counsel because her trial counsel, among other things, failed to pursue a potential

[7] The transcripts carried the notation "GLORIA = EUNICE ASPRILLA."

plea bargain opportunity. However, Asprilla failed to present this argument to the district court.[8] "The general rule in this circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court since no opportunity existed to develop the record on the merits of the allegation." *United States v. Higdon*, 832 F.2d 312, 313-14 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1051, 98 L. Ed. 2d 1013 (1988). As this is not a case where the record allows us to fairly evaluate the merits of Asprilla's claim, we will not do so. Accordingly, we dismiss this portion of Asprilla's appeal without prejudice to her right to raise the issue in an appropriate proceeding. *See United States v. Casel*, 995 F.2d 1299, 1307 (5th Cir. 1993).

IV

Accordingly, we REMAND to permit the district court to determine in the first instance whether the notes described herein constitute either Jencks Act or *Brady* material. We AFFIRM the district court's decision on all other issues.

[8] Although Asprilla contends that she did present her ineffective assistance of counsel claim to the district court, the two places she cites in the record as support for this contention do not provide it with any support.