IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3094
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS CIPRANO and
ALIDA MUÑOZ,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana
(CR-92-0350 LLM)

(December 16, 1993)

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

PER CURIAM:*

Defendant-Appellant Thomas Ciprano was convicted by a jury of conspiracy with intent to distribute cocaine in violation of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

21 U.S.C. §§ 841(a)(1) and 846; and both he and Defendant-Appellant Alida Muñoz were convicted by the jury of attempted possession with intent to distribute cocaine, in violation of the same statutes. On appeal, Muñoz claims that her conviction was not supported by sufficient evidence; Ciprano proffered several alleged errors in connection with his conviction and his sentence. Finding no reversible error as to either Defendant-Appellant, we affirm.

I

FACTS AND PROCEEDINGS

Ciprano and Muñoz were charged in a two-count indictment with (1) conspiracy to possess with intent to distribute approximately six kilograms of cocaine hydrochloride and (2) intentionally attempting to possess approximately six kilograms of cocaine hydrochloride for distribution. A jury found Ciprano guilty of both counts but found Muñoz guilty only of the attempted-possession charge. The district court subsequently dismissed Muñoz's conspiracy charge without prejudice.

Ciprano received a life sentence on each count, to run concurrently. In the original judgment, the sentencing court imposed a supervised-release term of five years on each count, likewise to run concurrently. The court later amended the judgment and commitment order, however, to provide a supervised-release term of ten years on each count, to run concurrently. Muñoz received a prison sentence of 121 months, to be followed by a supervised-release term of five years. Both defendants timely appealed.

II

ANALYSIS

A. Muñoz: Sufficiency of the Evidence

Muñoz argues that her conviction for attempted possession of cocaine is not supported by sufficient evidence. According to her, the evidence merely shows that she was present at the scene of the offense.

The government was required to prove that Muñoz attempted to possess cocaine with intent to distribute it. 21 U.S.C. §§ 841(a)(1), 846. Section 841(a)(1) requires the government to prove (1) knowledge, (2) possession, and (3) intent to distribute drugs. United States v. Garza, 990 F.2d 171, 174 (5th Cir.), cert. denied, 114 S.Ct. 332 (1993). Possession of the illicit drug may be actual or constructive. United States v. Gardea Carrasco, 830 F.2d 41, 45 (5th Cir. 1987). "Constructive possession is the knowing exercise of, or the knowing power or right to exercise, dominion and control over the proscribed substance." Id. (citation and internal quotations omitted). In addition, possession may be established by circumstantial evidence. Id. Intent to distribute, moreover, may be inferred solely from possession of a large amount of the illicit substance. United States v. Prieto-Tejas, 779 F.2d 1098, 1101 (5th Cir. 1986). Knowing possession may be inferred from the control over the contraband along with other circumstantial evidence that is suspicious in nature or demonstrates guilty knowledge. United States v. Martinez-Mercado, 888 F.2d 1484, 1491 (5th Cir. 1989).

Byron Cruz, a merchant seaman, received and accepted an offer to transport cocaine from Buenaventura, Colombia, to the United States. On June 21, 1992, agents of the United States Customs Service (Customs) received information that Cruz had a suspected cargo of cocaine hydrochloride on the M/V CHIOS CHARM. When the ship arrived in New Orleans, agents boarded the vessel in search of the drugs. The agents contacted Cruz, who agreed to work with Customs and with the Drug Enforcement Administration (DEA). As part of his cooperation, Cruz produced approximately 25 kilograms of cocaine and a list of its proposed recipients. The cocaine was subsequently turned over to the DEA.

Six kilograms of cocaine were intended for a man named "Dario." In order to make a controlled delivery, the agents monitored several telephone calls. After calling Dario several times, Cruz was told, presumably by Dario, to call "Juan," who provided Cruz with a pager number in the Houston, Texas, area. Cruz telephoned the pager number and subsequently received a telephone call during which he learned that the persons who would be picking up the cocaine in New Orleans would be telephoning him.

Soon afterwards, Cruz received a telephone call from a man who referred to the six kilograms of cocaine as the "six cousins." Money was referred to as "cartas." The male caller also disclosed that it would take him two or three hours to get the money. Cruz and the caller then arranged to meet the following day.

The next morning, Cruz and the caller agreed to meet in the parking lot behind the One Canal Place building. The caller also

indicated that an "aunt" would be with him, and he described how he and the woman would be dressed.

The meeting took place as scheduled: The three participants met and after brief salutations, Cruz asked the man and the woman if the woman knew "about the business," to which both the man and the woman responded affirmatively. The man then stated that the money was "ready" and that they would have it in an hour. Cruz then handed the bag to the man and stated: "Here, take your cocaine." This delivery occurred in the woman's presence and she evidenced no surprise. The man and the woman then suggested to Cruz that they "go somewhere else and talk." At trial, Cruz identified Ciprano as the man he spoke with on the telephone and the man he met in the parking lot, and Muñoz as the woman who accompanied Cruz.

Muñoz challenges Cruz's testimony that certain statements made during the meeting were not recorded because they were inaudible. In effect, Muñoz is arguing that the jury should not have believed Cruz's testimony about what was said during the meeting. The jury, however, was solely responsible for determining the weight and credibility of the evidence. See Martinez, 975 F.2d at 161.

After construing the facts and all reasonable inferences in accordance with the jury's verdict, we are satisfied that a reasonable trier of fact could have found that the evidence established Muñoz's guilt beyond a reasonable doubt. See Martinez, 975 F.2d at 160-61.

B. Ciprano: Evidentiary Ruling

Ciprano argues that the district court abused its discretion in allowing the admission of his 1987 state conviction. According to Ciprano, the evidence of that conviction was not only irrelevant but more prejudicial than probative.

The standard of review of admission of evidence is abuse of discretion. United States v. Anderson, 933 F.2d 1261, 1267-68 (5th Cir. 1991). We are "highly deferential" to a district court's evidentiary rulings, but "review of evidentiary rulings in criminal trials is necessarily heightened." Id. Even if error occurred, it is subject to a harmless-error analysis. United States v. Capote-Capote, 946 F.2d 1100, 1105 (5th Cir. 1991), cert. denied, 112 S.Ct. 2278 (1992).

Whether evidence of an extrinsic act is admissible under Rule 404(b) of the Federal Rules of Evidence (FRE) is governed by an application of the two-part Beechum test. United States v. Carrillo, 981 F.2d 772, 774 (5th Cir. 1993); see United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). "`First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character.'" Carrillo, 981 F.2d at 774 (quoting Beechum, 582 F.2d at 911). "`Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of FRE 403.'" Carrillo, 981 F.2d at 774 (quoting Beechum, 582 F.2d at 911). As character evidence may lead a jury to convict a defendant based on

bad character regardless of guilt, such evidence may be excluded even if it has some probative value. Id.

Over Ciprano's objection at trial, the district court admitted evidence that in December 1987 he was convicted of a felony offense for delivering less than 28 grams of cocaine. This evidence was relevant to show that Ciprano knew the code terms about which Cruz testified, that Ciprano knew the bag Cruz had during the meeting contained cocaine, and that Ciprano knew that the meeting was for a drug transaction. The evidence also showed "absence of mistake or accident." See FRE 404(b). The issue of knowledge was especially significant in this case, given the use of coded terms by Cruz and Ciprano in their telephone conversations.

The probative value of this evidence clearly outweighed any danger of unfair prejudice to Ciprano. Additionally, the district court minimized the possibility of unfair prejudice by instructing the jury that it could consider the evidence of the prior conviction to determine intent, motive, opportunity, plan, preparation, or whether Ciprano committed the acts for which he is on trial by accident or mistake. See United States v. Henthorn, 815 F.2d 304, 308 (5th Cir. 1987) (limiting instruction minimizes the possibility of prejudice). Although the court did not specifically mention "knowledge," the instruction nevertheless minimized any unfair prejudice that could have resulted. Ciprano, therefore, has not shown that the district court abused its discretion in allowing this evidence. Alternatively, we conclude that any error from the admission of evidence of Ciprano's prior

offense was harmless, as this evidence had "no substantial influence on the jury's decision to convict." See United States v. Gadison, _____ F.3d _____ (5th Cir. Nov. 15, 1993, No. 92-4218), 1993 WL 468544, at *4.

C. Ciprano: State Felony as Federal Felony

Pursuant to 21 U.S.C. § 851, the government filed a bill of information to establish Ciprano's two prior felony drug convictions, and he acknowledged the correctness of the bill. The probation officer took into account this superseding bill of information and the fact that the amount of cocaine involved in this case was more than five kilograms to conclude that a life sentence was mandatory. Ciprano objected to this conclusion; according to him, the state conviction dated September 6, 1991, for possession of less than 28 grams of cocaine, should not have been used to impose the life sentence in this case. He reasons that because the possession of less than one ounce of cocaine is a misdemeanor under federal law, it should not be counted. Ciprano repeated his objection at sentencing, as he does on appeal.

A sentence will be upheld on appeal unless it was imposed in violation of the law; imposed as a result of an incorrect application of the sentencing guidelines; or is outside the range of the applicable sentencing guideline and is unreasonable. United States v. Sosa, 997 F.2d 1130, 1131 (5th Cir. 1993).

The term "felony drug offense" in 21 U.S.C. § 841(b)(1)(A) includes "a felony under any law of a State . . . that prohibits or restricts conduct relating to narcotic drugs, marihuana, or

depressant or stimulant substances." Ciprano's argument that the September 1991 felony conviction should not have been relied on to calculate his life sentence fails because the statutory language clearly provides that the term "felony drug offense" includes any drug felony under any law of any state. See 21 U.S.C. § 841(b)(1)(A).

D. Ciprano: Disproportionality in Sentence and Crime

Ciprano also argues that his life sentence is unconstitutional because it is disproportionate to the crime and to his criminal history. Yet we have held, for example, that a life sentence without the possibility of parole for distributing twenty-two doses of heroin for no monetary profit does not amount to cruel and unusual punishment under the Eighth Amendment, even though the offender had no record of violent behavior. Terrebonne v. Butler, 848 F.2d 500, 501-507 (5th Cir. 1988), cert. denied, 489 U.S. 1020 (1989). Accordingly, the life sentence in this case, involving six kilograms of cocaine and prior felony convictions, fails to amount to cruel and unusual punishment.

E. Ciprano: Correction Following Notice of Appeal

During the sentencing hearing, the district court orally imposed two concurrent ten-year terms of supervised release. The judgment and commitment order, however, reflect two concurrent five-year terms of supervised release. On February 11, 1993, the day before the filing of the judgment and commitment order, Ciprano filed his notice of appeal. Subsequently, on February 25, 1993, the district court signed an order correcting the term of

supervised release in the judgment and commitment order to reflect the punishment orally imposed during the sentencing hearing. Ciprano now argues that the district court erred by amending the judgment and commitment order after the filing of his notice of appeal.

If a discrepancy exists between an orally imposed sentence and a written order of judgment and commitment, the oral sentence controls. United States v. Shaw, 920 F.2d 1225, 1231 (5th Cir.), cert. denied, 111 S.Ct. 2038 (1991). The controlling sentence in this case, therefore, is the one announced during the sentencing hearing, which provides for a total supervised-release term of ten years. A clerical error in a judgment "arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders." FED. R. CRIM. P. 36. Ciprano's reliance on FED. R. CRIM. P. 35 is misplaced, as the district court in this case did not correct the sentence; it merely corrected an error in the judgment and commitment order. The court, therefore, committed no reversible error.

III

CONCLUSION

Finding no reversible error, the convictions and sentences of Muñoz and Ciprano are, in all respects,

AFFIRMED.