UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3153

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DWAYNE MARSHAL

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR-92-214-J)

(August 15, 1994)

Before POLITZ, Chief Judge, JONES, Circuit Judge and FULLAM[*], District Judge.

JOHN P. FULLAM, District Judge:[**]

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[*] District Judge of the Eastern District of Pennsylvania, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Dwayne Marshall[1] was convicted of conspiring to possess cocaine with intent to distribute and of using firearms in the course of a drug trafficking offense. Because we believe that the trial judge impermissibly directed a verdict for the government on the second count, we reverse that portion of Marshall's conviction.

I. Background

This case arose from a Drug Enforcement Agency (DEA) reverse sting operation. An informant introduced DEA Agent Francisco Garza to one Adolphus ("Al") Wilson. Garza, posing as a cocaine supplier named "Mario," negotiated the sale of several kilograms of cocaine to Wilson at a price of $15,000 per kilogram. Wilson testified that he was negotiating on Marshall's behalf, and that Marshall was to finance the deal.

On April 13, 1992, Marshall arrived at Wilson's home in a burgundy-colored rental car. Marshall instructed Wilson to bring along his gun. The pair then proceeded, with Marshall in the burgundy vehicle and Wilson following in a white rental car, to an unidentified house in New Orleans. Marshall retrieved from beneath a sofa a bag of money, a machine gun and two clips of ammunition, which he placed in the trunk of his car.

The meeting with Mario was to take place at a Mexican restaurant. After some initial confusion, Marshall and Wilson arrived at the correct location and both parked behind the

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[1] Although appellant's surname is spelled "Marshal" in the caption, the correct spelling is apparently "Marshall."

building. Wilson entered the restaurant and joined Mario at the bar. Marshall came in and sat next to Wilson. Mario insisted on seeing the money before he would arrange delivery of the cocaine, so Marshall gave Wilson the keys to the burgundy car. Mario and Wilson went out to the parking lot, where Wilson opened the trunk and exhibited the money. Mario then called another undercover agent and instructed him to bring the cocaine. Wilson was arrested after examining the drugs; Marshall was arrested in the restaurant.

Marshall and Wilson were charged in a three-count superseding indictment with conspiracy to possess cocaine with intent to distribute[2] (Count I) and use of firearms during the commission of a drug trafficking offense[3] (Count II). Marshall was also charged with being a convicted felon in possession of a firearm[4] (Count III). Wilson subsequently pled guilty to Counts I and II and testified for the government at Marshall's trial. Marshall was found guilty as to Counts I and II, but acquitted as to Count III.

On appeal, Marshall contends: (1) that the trial judge's response to a jury question during deliberations amounted to an instruction to the jury to convict Marshall as to Count II if they found him guilty on Count I; (2) that the court abused its discretion by refusing to qualify DEA Agent Richard Thompson as an expert witness; (3) that the district court erred when it removed a prospective juror for cause; (4) that the judge should have

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[2] 21 U.S.C. §§841(a)(1), 846.

[3] 18 U.S.C. §924(c)(1).

[4] 18 U.S.C. §922(g)(1).

severed Count III; and (5) that the case should be remanded for resentencing because of the court's failure to comply with 21 U.S.C. §851. We shall discuss each argument in turn.

II. The jury question

The district court correctly instructed the jury that:

> A conspirator is responsible for offenses committed by another conspirator if the conspirator was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy.
>
> Therefore, if you have first found the defendant guilty of the conspiracy charged in Count I, and if you find beyond a reasonable doubt that, during the time the defendant was a member of that conspiracy, another conspirator committed the offense in Count II in furtherance of, or as a foreseeable consequence of, that conspiracy, then you may find that defendant guilty of Count II, even though the defendant may not have participated in any of the acts which constitute the offenses described in Count II.

Tr. vol. II at 146-47. This is known as a "Pinkerton instruction." See Pinkerton v. United States, 328 U.S. 640 (1946). It is applicable to violations of 21 U.S.C. §924(c). See United States v. Raborn,872 F.2d 589, 596 (5th Cir. 1989).

However, in the course of its deliberations, the jury sent the following note to the court: "Assuming Dwayne Marshall is guilty on Count 1, does possession of Al's pistol by Al during the commission of the felony constitutes [sic] guilt by Marshall under Count 2?" The court responded (in writing): "Yes!" Defense counsel objected as follows:

> COUNSEL: Your Honor, if I may, just on the record before this is sent in, I feel compelled to make the same type argument that I made after

the government rested when I requested the involuntary dismissal.

THE COURT: I am not going to listen to argument. You can put in objections for very brief reasons.

COUNSEL: Well, my objection is to the Court's obviously affirmative response to the jurors' question. Obviously, Count II does not charge a conspiracy though Count I does. Count II requires a guilty finding of the conspiracy before they can even consider whether both Al Wilson and Dwayne Marshall possessed both.

THE COURT: Well you apparently didn't listen to the question. "Assuming Dwayne Marshall is guilty in Count I--"

COUNSEL: I understand. The part that I have problems with, Your Honor -- what I have problems with is the fact that the jury and -- the government has argued to the jury and presented facts to the jury that with regard to Count I these guns were a part of the conspiracy. Now my client is being penalized for the same type conclusion and analysis that may have been applied to Count I with regard to the guns. Count II does not involved a conspiracy to possess weapons. It requires that Dwayne Marshall possess both guns. And I would suggest to the Court that under the facts possession is not present and that's what the jury is addressing, the issue that I raised on the close.

THE COURT: Alright. I am going to answer it this way. I have done it and I am also sending to them copies of each count.

COUNSEL: I think what they're asking is did the use of Dwayne Marshall's gun -- I mean the use of Al Wilson's gun by Al Wilson, does that further the conspiracy by Dwayne Marshall. I lost the question so I am kind of confused at this point.

Judge, if I may add one more sentence to this. I just feel that this whole incident in the Raborn case and Pinkerton case both legally and factually are inconsistent with the response to the jury's questions.

Tr. vol. II at 152-54.

While it is true that the court's charge correctly stated the law, its one-word answer to the jury's subsequent question may well have had the effect of negating the more detailed instruction that preceded it. In effect, the court instructed the jury to find Marshall guilty of Count II without regard to whether Wilson's possession of the gun was in furtherance of the conspiracy or a foreseeable consequence thereof. This amounted to an impermissible directed verdict on an element of the offense. See United States v. Johnson, 718 F.2d 1317, 1320-21 (5th Cir. 1983)(en banc). And although defense counsel's objection may be fairly characterized as confused -- if not insufficient -- even a total failure to object would not prevent reversal under these circumstances. See United States v. Flitcraft, 803 F.2d 184, 187 (5th Cir. 1986).

III. Refusal to qualify defendant's expert

At a hearing on a motion to suppress, the government conceded that although there had been some discussion among the agents concerning fingerprint testing of the gun found in the trunk of Marshall's car, no fingerprinting was in fact done. DEA Agent Richard Thompson testified for the government at trial as an expert "not only in the field of narcotics and the relationship between narcotics and weapons but also in the techniques and trends involved in illicit drug trafficking." Tr. vol. II at 65. Defense counsel attempted to cross examine Thompson concerning proper investigative techniques involving fingerprints, apparently seeking to establish that fingerprint testing should have been performed.

Thompson testified that he had no expertise in this area. The court declined to permit futher questioning along these lines, as Thompson's direct testimony did not concern fingerprinting, and he had not been tendered as an expert on this subject.

Shortly thereafter, Agent Thompson was called as a witness for the defense. Counsel attempted to qualify him as an expert in "the proper techniques for investigating crimes, namely narcotics crimes and specifically as those relate to surveillance and fingerprints and other items that are available to law enforcement agencies." Id. at 86. The government objected. Defense counsel explained to the court at sidebar that his purpose was "to show that certain police investigations should contain certain procedures." Id. at 87. Marshall contends that the court's refusal to permit Thompson to testify as a defense expert was an abuse of discretion. We disagree. Marshall introduced evidence that no fingerprints were taken, that fingerprints could have been taken, and that the agents had in fact discussed taking fingerprints. At best Thompson's testimony would have been merely cumulative.

IV. Removal of a prospective juror for cause

Marshall claims that the district court erred when it removed a prospective juror for cause, and that this in effect gave the government an additional peremptory challenge. During voir dire, the court asked the venire whether anyone had a family member who was involved in or convicted of drug trafficking. Prospective

juror number 14 replied that her brother-in-law was imprisoned for a drug offense. The following exchange took place:

THE COURT: Would that influence your verdict?

NO. 14: No, I don't think so.

THE COURT: Now I don't want to sound hypertechnical but when you say, "I don't think so" that indicates to me there might be possibly a doubt in your mind. And, of course, you're the only one who can tell me what is going on in your mind. Do you mean literally that it would not?

NO. 14: No.

THE COURT: No, what, Ma'am?

NO. 14: I don't know if I could.

THE COURT: You don't know if you could give the man a fair trial? You know he has been accused of drug trafficking. This jury is going to decide whether or not he is guilty. He has not been found guilty. What we're looking for are jurors who can be fair and impartial and decide the case as to whether he is guilty or innocent based solely on the evidence that will be heard during the course of the trial.

NO. 14: Um humph. (Indicating an affirmative response)

THE COURT: Now do you think you could do that?

NO. 14: Yes.

THE COURT: Beg your pardon?

NO. 14: I could.

THE COURT: Do you have any doubt in your mind about it?

NO. 14: I don't know.

THE COURT: Beg your pardon?

NO. 14: I don't know if I could. I really don't.

Tr. vol. I at 17-18. The court excused the prospective juror for cause over defense counsel's objection.

A trial judge's finding of actual bias by a juror is reviewed for "manifest abuse of discretion." See United States v. Mendoza-Burciaga, 981 F.2d 192, 197-98 (5th Cir. 1992), cert. denied, ___ U.S. ___, 114 S. Ct. 356 (1993). Clearly this prospective juror could properly be viewed as doubting her ability to serve fairly and impartially. We find no error.

V. Refusal to sever Count III

Marshall filed a pretrial motion seeking to have Count III (possession of a gun by a convicted felon) severed pursuant to Federal Rule of Criminal Procedure 14. It is unclear whether the court specifically ruled on the motion;[5] however, when the indictment and stipulation of prior conviction were read to the jury, any mention of the nature of his prior conviction was redacted. On appeal, Marshall claims to have been prejudiced by the jury's awareness of his prior felony conviction.

Under Federal Rule of Criminal Procedure 8, two or more offenses may be charged in the same indictment if they are "of the same or similar character or are based on the same act or transaction." Fed. R. Crim. P. 8(a). Initial joinder is favored. See United States v. Fortenberry, 914 F.2d 671, 675 (5th Cir. 1990), cert. denied, 499 U.S. 930 (1991). Relief from prejudicial

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[5] Indeed, Marshall may well have waived this issue by informing the court that he had no other motions.

joinder under Rule 14 is "committed to the discretion of the trial court, and reversal is warranted only if the defendant can show clear prejudice from the trial court's refusal to sever." See United States v. Robichaux, 995 F.2d 565, 569 (5th Cir.), cert. denied, ___ U.S. ___, 114 S. Ct. 322 (1993). "Clear prejudice" results when a jury is unable to apply the evidence separately to the proper offenses, or where a jury uses evidence of one crime to infer criminal disposition to commit another. See Fortenberry, 914 F.2d at 675. A defendant "bears the heavy burden of showing specific and compelling prejudice." See United States v. Winn, 948 F.2d 145, 161 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1599 (1992).

That burden has not been met here. First, the fact that Marshall was acquitted on Count III indicates that the jury was able to apply the evidence separately. Second, since the court redacted all reference to the nature of Marshall's prior conviction, we cannot say that the jury inferred that he was predisposed to commit a narcotics offense. To hold otherwise under these circumstances would be to require severance every time a convicted felon is charged in a multi-count indictment which includes a charge of possession of a firearm. This we decline to do.

VI. Failure to comply with 21 U.S.C. §851

Marshall claims that his case should be remanded for resentencing because the record does not reflect that he was served

with a copy of the enhancement information filed by the government, as required by 21 U.S.C. §851,[6] and because the district court failed to question him at sentencing concerning his prior conviction. Marshall does not contend that he was unaware that the government would seek to have him sentenced as a career offender. The notice requirement of §851 applies to persons convicted of an offense under Title 21 when the government seeks to have a defendant sentenced as a recidivist to an enhanced maximum penalty. See United States v. Marshall, 910 F.2d 1241, 1244-45 (5th Cir. 1990), cert. denied, 498 U.S. 1092 (1991). The statute does not apply if the defendant is sentenced under the Sentencing Guidelines to an increased sentence within the statutory range. See id. at 1245. While this court has held that strict compliance with the filing requirement of §851 is necessary to support an enhanced sentence, see United States v. Nolan, 495 F.2d 529, 533 (5th Cir.), cert. denied, 419 U.S. 966 (1974), there is no reversible error where, although the service requirement of the statute is not met, a defendant is fully aware of the government's intent to seek such

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[6] The statute provides, in relevant part:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

21 U.S.C. §851(a)(1).

a sentence. See United States v. Cevallos, 538 F.2d 1122, 1125-26 (5th Cir. 1976).

In this case, the Presentence Report noted that the government had filed an enhancement information pursuant to §851 in order to establish a prior conviction (Marshall's 1985 conviction for distribution of cocaine and marijuana), and that although the Guidelines range for Marshall's offense level and criminal history would have been 151 to 188 months, the statutory mandatory minimum brought Marshall's Guideline sentence to 20 years, or 240 months. We hold, therefore, that the district court's failure strictly to comply with §851 was harmless, because (1) the increased sentence was authorized by the Guidelines and is within the statutory range; and (2) Marshall had actual knowledge that he was to be sentenced under §851.

Marshall's contention that the trial court erred because it did not question him concerning his prior conviction, as required by §851(b), must also be rejected. Although there was no specific mention of his 1985 conviction, the court did ask Marshall whether the information contained in the Presentence Report -- in which the prior conviction was noted -- was correct. Marshall replied that it was.[7] Again, the court's failure to comply with §851 was harmless error.

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[7] Marshall does not -- and indeed, cannot -- challenge the validity of the earlier conviction. See 21 U.S.C. §851(e).

The conviction on Count II (the firearms count) is REVERSED, and the case is remanded for a new trial on that count (if sought by the government). In all other respects the judgment of the district court is AFFIRMED.