

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3273

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SON T. TRAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR-92-504-D1)

(November 30, 1993)

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

PER CURIAM:*

Son Tran appeals his conviction and sentence for conspiracy to distribute crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846 (1988). Finding no error, we affirm.

The government received information from its informant, Ray Fortune, that Kathleen Kanost¹ was distributing crack cocaine. Through Kanost, Fortune made three separate controlled buys at 5111

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

¹ Kanost, a co-defendant with Tran, entered into a plea agreement with the government before trial.

Cannes Street in New Orleans. During two of the buys, a red Camaro owned by Tran was seen parked outside the residence. Pursuant to a search warrant for the residence, law enforcement officials seized several pieces of crack cocaine and a gold medallion which had the name "Sonny Tran" engraved on it.

Tran was charged with conspiracy to distribute crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846. During the trial, Kanost testified that she purchased crack cocaine, on at least one occasion, from a person known to her as "Sonny". Kanost later identified the defendant as "Sonny". Jessie Hampton, a member of a neighborhood association, also testified that he had, on several occasions, observed what appeared to be drug transactions at the door or window of the residence at 5111 Cannes Street. He further testified that he had seen Tran conduct several transactions in front of the residence.

Following the jury's guilty verdict, Tran was sentenced to 145 months of imprisonment, followed by three years of supervised release. Tran filed a timely notice of appeal.

Tran first contends that the district court erred in instructing the jury on the government's burden of proof. After reviewing the record, we conclude that the court correctly instructed the jury that the "[g]overnment has the burden of proving [Tran] guilty beyond a reasonable doubt." We therefore reject his first contention on appeal.²

² Tran's argument that the district court improperly shifted the burden of proof by giving an example of what constitutes a conspiracy, is entirely without merit.

Tran next contends that the evidence was insufficient to support his conviction. In assessing a challenge to the sufficiency of the evidence, we must consider the evidence in the light most favorable to the verdict and must afford the government the benefit of all reasonable inferences and credibility choices.³ The evidence is sufficient if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt based upon the evidence presented at trial.⁴

To prove that Tran conspired to distribute crack cocaine, the government must prove beyond a reasonable doubt that (1) there was a conspiracy to distribute crack cocaine; (2) Tran knew about the conspiracy; and (3) Tran voluntarily joined in the conspiracy.⁵ Based upon the testimony of Kanost and Hampton, as well as the evidence seized by law enforcement officials, a rational trier of fact could have found that Tran knew of and voluntarily participated in the conspiracy to distribute crack cocaine.⁶ We therefore conclude that the evidence was sufficient to support Tran's conviction.

Lastly, Tran contends that the district court erred in finding that he was a leader of the conspiracy for purposes of assessing a four-level increase to his base offense level, pursuant to U.S.S.G.

³ *United States v. Ayala*, 887 F.2d 62, 67 (5th Cir. 1989).

⁴ *Id.*

⁵ *United States v. Hernandez-Palacios*, 838 F.2d 1346, 1348 (5th Cir. 1988).

⁶ Tran does not dispute the existence of a conspiracy to distribute crack cocaine.

§ 3B1.1(a).⁷ According to that section, district courts are directed to increase a defendant's base offense level by four "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." We review the district court's application of the guidelines de novo, and its factual findings for clear error.⁸ Special Agent Wyatt Evans of the Bureau of Alcohol, Tobacco, and Firearms testified that based upon his interviews, "it was common knowledge if you say who is selling drugs at 5111 Cannes Street, who is the boss out there[.] Son Tran was." Based upon this testimony, we cannot conclude that the district court clearly erred in finding Tran to be a leader of the conspiracy. Consequently, we hold that the district court properly applied U.S.S.G. § 3B1.1(a) in assessing a four-level increase.⁹

Accordingly, the defendant's conviction and sentence are AFFIRMED.

⁷ See United States Sentencing Commission, *Guidelines Manual* (Nov. 1992).

⁸ *United States v. Rodriguez*, 897 F.2d 1324, 1325 (5th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 158, 112 L. Ed. 2d 124 (1990).

⁹ Tran also contends for the first time on appeal that he was denied his Sixth Amendment right to the effective assistance of counsel. Claims of ineffective assistance of counsel not raised below generally cannot be resolved on direct appeal. See, e.g., *United States v. Ugalde*, 861 F.2d 802, 804 (5th Cir. 1988), cert. denied, 490 U.S. 1097, 109 S. Ct. 2447, 104 L. Ed. 2d 102 (1989). We therefore decline to consider the issue on this direct appeal.