

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4283
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTHONY EARL MITCHELL,
a/k/a Anthony Henderson,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Louisiana
(92-CR-60032-01)

(November 4, 1993)

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

PER CURIAM:*

In this direct criminal appeal, Defendant-Appellant Anthony Earl Mitchell, a/k/a Anthony Henderson, appeals his conviction by a jury for possession of cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A); and for a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

firearms violation during a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1). Mitchell complains on appeal that the district court erred in denying a motion to suppress and a motion for a continuance, and in permitting the jury to hear taped telephone conversations between a confidential informant and Mitchell's co-defendant, Albert Jackson. Mitchell also complains that the evidence was insufficient to sustain his conviction and that he was denied effective assistance of counsel. For the reasons set forth below, we reject each of Mitchell's complaints of reversible error and affirm his conviction.

I

FACTS AND PROCEEDINGS

A confidential informant (CI) made a series of controlled telephone calls to Mitchell and Albert Jackson to arrange a crack cocaine purchase. The CI and Mitchell eventually met at the Quality Inn in Opelousas, Louisiana. After Mitchell, accompanied by his brother, Pooky, came to the CI's room, Mitchell sent Pooky to get the cocaine, but Jackson returned with it. Jackson handed the cocaine to Mitchell who in turn handed it to the CI. The CI then called the adjoining room and gave the prearranged signal to the waiting officers, indicating that the transaction had been completed. Drug Enforcement Administration agent Mark Lusco and U. S. Customs special agent James Richard entered the room and arrested Mitchell and Jackson. They retrieved a purple Crown Royal bag with 186.1 grams of cocaine from a bed in the room. Agent Richard also recovered a loaded revolver from Jackson's hip pocket.

Following their arrests, Mitchell and Jackson retained Attorney Elbert Guillory to represent them. Several days later, on December 3, 1991, various state and federal law enforcement officers sought to question Mitchell. On Guillory's advice, Mitchell waived his Fifth Amendment privilege against self-incrimination and cooperated with the officers. After Mitchell made his statement he learned that Attorney Guillory was related by marriage to Opelousas Police Chief Larry Caillier, one of the officers involved in the interrogation.

In a multi-count, multi-defendant indictment, Mitchell was charged in count XIII with possession of cocaine base with intent to distribute and using a firearm during a drug trafficking offense. Trial counsel Lester Gauthier filed a motion to suppress the statements made on December 3, 1991, arguing that Mitchell's waiver of his Fifth Amendment rights was not voluntary and knowing because Attorney Guillory's assistance was ineffective. Specifically, Gauthier argued that Guillory had a conflict of interest because of his relationship with Chief Caillier, and that Mitchell was not advised of that relationship and would not have consented to the representation had he known of that relationship. Gauthier also argued that Guillory was ineffective because he failed to receive any assurances of leniency before recommending that Mitchell cooperate.

The magistrate judge held a hearing on the motion to suppress and recommended denying it because (1) in the absence of any collusion between Chief Caillier and Guillory, their relationship

did not render Mitchell's waiver involuntary, and (2) there is no authority for the proposition that the failure to get concessions or assurances prior to giving a statement renders counsel's assistance ineffective. The district court adopted the magistrate judge's ruling on the motion to suppress.

Several days before his trial was scheduled to begin Mitchell filed a motion for a continuance. He argued that a continuance was necessary because, despite diligent efforts, counsel had been unable to obtain a transcript of Lieutenant Trahan's testimony during Mitchell's detention hearing in Houston, Texas. Mitchell also argued that he had insufficient time to investigate potential 404(b) witnesses because the government did not disclose the 404(b) witnesses timely. At a hearing held the morning of the trial, however, defense counsel was unable to explain the relevancy of the testimony from the detention hearing or why he had been unable to contact the 404(b) witnesses. That same morning Mitchell moved to have new counsel appointed because he did not feel that Gauthier was adequately prepared for trial. The district court denied both motions.

Mitchell was convicted on both counts and was sentenced to 188 months' imprisonment on count XIII and 60 months' imprisonment on count XIV, to run consecutively, plus five years' supervised release and a \$100 special assessment.

II

ANALYSIS

A. Motion to Suppress

Mitchell argues that the district court improperly denied the motion to suppress his oral statements made during the December 3, 1991, interrogation. He argues that the statements should have been suppressed because Guillory was ineffective. He contends that Guillory was acting under a conflict of interest because of his relationship with Chief Caillier, and that Guillory advised Mitchell to waive his Fifth Amendment rights without adequately investigating the law or facts of the case or obtaining assurances of leniency. Id.

We find no cases specifying the appropriate standard for analyzing an ineffective assistance of counsel claim based on counsel's advice on waiving Fifth Amendment rights. We are satisfied, however, that Mitchell would not be entitled to any greater protection than that afforded in the Sixth Amendment context, in which the defendant must demonstrate both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 74 (1984).

Mitchell did not include a transcript of the hearing on the motion to suppress in the appellate record so we cannot review the basis of the district court's factual findings. See Fed. R. App. P. 10(b)(2), 11; Richardson v. Henry, 902 F.2d 414, 415 (5th Cir.), cert. denied, 498 U.S. 901 (1990); see also Coats

v. Pierre, 890 F.2d 728, 731 (5th Cir. 1989) (failure to provide the necessary transcripts limits this court's review), cert. denied, 498 U.S. 821 (1990). The district court found that the relationship between Guillory and Caillier did not present a conflict of interest and that Guillory's advice to cooperate with law enforcement authorities was reasonable under the circumstances. Mitchell has not borne his burden of demonstrating that Guillory's representation was ineffective.

To the extent that Mitchell argues for the first time on appeal that Guillory was ineffective because he also represented Mitchell's co-defendant, Jackson, we need not and therefore do not address the issue. An issue raised for the first time on appeal will not be addressed unless it involves a purely legal issue and failure to consider it will result in manifest injustice. United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). The record contains no information to show whether Mitchell was informed of the potential conflict of interest in Guillory's representation of both defendants, or whether Mitchell voluntarily waived this conflict. See United States v. Arzola-Amaya, 867 F.2d 1504, 1515 (5th Cir.) (a defendant may waive a conflict of interest), cert. denied, 493 U.S. 933 (1989). This claim is not a purely legal issue, so we shall not address it.

Additionally, even if we were to assume arguendo that Guillory's representation was ineffective, any error by the district court in denying the motion to suppress was harmless error. An otherwise valid conviction will not be reversed "if the

reviewing court may confidentially say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." United States v. Moody, 903 F.2d 321, 329 (5th Cir. 1990) (internal quotations and citations omitted). A constitutional error is harmless if the government shows that the error did not contribute to the verdict. United States v. Vizcarra-Porras, 889 F.2d 1435, 1439 (5th Cir. 1989), cert. denied, 495 U.S. 940 (1990).

Although the district court denied Mitchell's motion to suppress, the government never introduced the transcript of his December 3, 1991, statement into evidence. The only evidence that the government adduced regarding that statement was through the testimony of Lieutenant Trahan who said that Mitchell had denied that the cocaine belonged to him; that Mitchell listed his telephone number as 835-0651, which matched the number the CI had called to arrange the transaction; that Mitchell admitted talking to the CI on the telephone; and that Mitchell stated that the CI called to request 1-1/2 to 2 "keys" of cocaine.

Given the substantial evidence at trial that the CI made a series of telephone calls to Mitchell and Jackson to arrange the cocaine transaction; that Mitchell met the CI at the Quality Inn in Opelousas, Louisiana; that Mitchell sent his brother, Pooky, to get the cocaine; that Jackson returned with a purple Crown Royal bag containing the cocaine and gave it to Mitchell who in turn gave it to the CI; that DEA agent Lusco and Customs agent Richard had searched the hotel room and the CI before Mitchell arrived and found no contraband; that when the CI gave the prearranged signal

the agents entered the room in which Mitchell and Jackson were present; that a purple Crown Royal bag with 186.1 grams of cocaine base was on the bed; and that the average rock of crack cocaine contains one-tenth to two-tenths of a gram of cocaine, and the average user uses one to two rocks at a time, any error in denying the motion to suppress was harmless error beyond a reasonable doubt.

B. Motion for Continuance

Mitchell also argues that the district court improperly denied his motion for a continuance. We review the district court's denial of a motion for a continuance for an abuse of discretion. United States v. Brito-Hernandez, 996 F.2d 80, 83 (5th Cir. 1993). To obtain a reversal the defendant must demonstrate "serious prejudice." Id.

Trial counsel requested the continuance so that he could obtain a copy of Lieutenant Trahan's testimony at the Houston detention hearing, and so that he could interview potential 404(b) witnesses. Yet counsel was unable to explain the relevancy of the detention hearing testimony, and Mitchell admittedly has not indicated the relevancy of the transcript on appeal. Additionally, the district court did not permit the government to call any 404(b) witnesses. Mitchell cannot demonstrate "serious prejudice" arising from the denial of the motion for a continuance.

C. Federal Rule of Evidence 801(d)(2)(E)

Mitchell next argues that the district court erred by permitting the jury to hear the recordings of telephone

conversations between the CI and Jackson. He contends that the recordings were hearsay and therefore inadmissible.

The recordings were originally admitted into evidence without objection. Defense counsel, however, objected to the recordings as hearsay when the government attempted to play them to the jury. In response, the government argued that the recordings were not inadmissible hearsay because they were a co-conspirator's statement. The district court ruled that it was required to permit the government to play the recordings because they had already been admitted into evidence without objection.

We review the district court's rulings on admission of evidence for an abuse of discretion. United States v. Triplett, 922 F.2d 1174, 1180 (5th Cir.), cert. denied, 111 S.Ct. 2245 (1991). Under Fed. R. Evid. 801(d)(2)(E) a statement made by a co-conspirator during and in furtherance of a conspiracy is not inadmissible hearsay. United States v. McConnel, 988 F.2d 530, 533 (5th Cir. 1993). To fit within this exception, the statement must have been made "(1) by a coconspirator of a party, (2) during the course of the conspiracy, and (3) in furtherance of the conspiracy." Id. "Even if a defendant has not been indicted for conspiracy, statements made by a nontestifying coconspirator are admissible if there is independent evidence of a concert of action in which the defendant was a participant." Triplett, 922 F.2d at 1181 (internal quotations and citations omitted). The offering party must establish the existence of the conspiracy by a preponderance of the evidence, and the trial court may consider the

hearsay statements along with the other evidence to determine whether the conspiracy existed and whether the defendant participated in it. Id.

Although Mitchell was not tried on a conspiracy count, the government established the necessary predicate facts to establish "a concert of action" between Mitchell and Jackson: they were arrested together at the Quality Inn after the CI gave the prearranged signal to indicate that the transaction had been completed, and the CI testified that Jackson handed the cocaine to Mitchell who then handed it to the CI. This evidence established the existence of the conspiracy by a preponderance of the evidence, so the statements were not inadmissible under Rule 801(d)(2)(E).

D. Sufficiency of the Evidence

Mitchell argues that there is insufficient evidence to support his convictions. He failed, however, to make a motion for acquittal either at the close of the prosecution's evidence or at the close of all the evidence. Therefore, the sufficiency-of-the-evidence claim is reviewable only to determine whether there was a manifest miscarriage of justice. United States v. Shaw, 920 F.2d 1225, 1230 (5th Cir.), cert. denied, 111 S.Ct. 2038 (1991).

To establish an offense under § 841(a)(1), the government must show knowing possession with intent to distribute. United States v. Munoz, 957 F.2d 171, 174 (5th Cir.), cert. denied, 113 S.Ct. 332 (1992). Intent to distribute may be inferred from the possession of a large quantity of drugs. United States v. Elwood, 993 F.2d 1146, 1150 n.11 (5th Cir. 1993). As previously noted, the evidence

established that Mitchell met the CI at the Quality Inn and gave him 186.1 grams of cocaine base in a purple Crown Royal bag. An officer, qualified as an expert, testified that an average user used one to two rocks of cocaine at a time and each rock contains one-tenth to two-tenths of a gram of cocaine. This evidence is sufficient to support Mitchell's conviction on count XIII.

To establish an offense under 18 U.S.C. § 924(c)(1) the government must show that Mitchell used or carried a firearm during a drug trafficking crime. United States v. Ivy, 973 F.2d 1184, 1189 (5th Cir. 1992), cert. denied, 113 S.Ct. 1826 (1993). To convict under this section the government need not prove that Mitchell had actual possession of the firearm or that he used it in an affirmative manner. Id. The evidence must show only that "the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking." Id. (internal quotations omitted).

The evidence established that customs agent Richard recovered a loaded revolver from Jackson's hip pocket; that Richard removed the revolver, unloaded it, and threw it on the bed; that Opelousas police officer David Zerangue retrieved the revolver and five .38 caliber rounds from the bed; and that Zerangue tested the revolver and determined that it was in working condition. Mitchell does not contend that he is not responsible for Jackson's possession of the firearm. This evidence is sufficient to support Mitchell's conviction for using or carrying a firearm during the commission of a drug trafficking crime.

E. Ineffective Assistance of Counsel

Finally, Mitchell argues that he was denied effective assistance of counsel. Generally a defendant cannot raise an ineffective assistance of counsel claim on direct appeal unless it has been raised in the district court. United States v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991), cert. denied (U.S., Oct. 4, 1993) (No. 92-8999). We will address the claim, however, if the record provides substantial details about the attorney's conduct. On the morning of his trial Mitchell moved for new appointed counsel because he believed that Gauthier was not prepared for trial and was not adequately representing him. Therefore, the record contains sufficient facts to permit our addressing some of Mitchell's claims on appeal.

To prevail on his ineffective assistance of counsel claim, Mitchell must demonstrate that his attorney's performance was deficient and that the deficient performance prejudiced his defense. Strickland, 466 U.S. at 687. Counsel's performance is not deficient if it is reasonable under "prevailing professional norms." Id. at 688. There is a strong presumption that counsel exercised reasonable professional judgment, and counsel's performance is judged on the facts known to counsel at the time. United States v. Smith, 915 F.2d 959, 963 (5th Cir. 1990). To establish Strickland prejudice Mitchell must show that counsel's errors were so serious as to render the trial unreliable and fundamentally unfair. Lockhart v. Fretwell, _____ U.S. _____, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993).

1. Trial Preparation

Mitchell argues that Gauthier was inadequately prepared for trial because he failed to 1) obtain the transcript from the Houston detention hearing; 2) make an opening statement; 3) call Jackson to testify after a side-bar conference from which Mitchell was excluded; 4) contact 404(b) witnesses; and 5) point out specific objectional references in the recorded telephone conversations. As previously noted, Mitchell has never indicated the relevancy of the transcripts from the Houston hearing; the government was not permitted to introduce any 404(b) witnesses; and the recordings of the telephone conversations were admissible under Rule 801(d)(2)(E). Mitchell cannot demonstrate Strickland prejudice for these alleged errors.

Mitchell also argues that Gauthier's representation was inadequate due to his failure to make an opening statement. The decision whether to make an opening statement falls within the zone of trial strategy. Murray v. Maggio, 736 F.2d 279, 283 (5th Cir. 1984) (28 U.S.C. § 2254 case). Similarly, complaints concerning uncalled witnesses are disfavored because the presentation of evidence is a matter of trial strategy and allegations of what a witness would have testified are largely speculative. McCoy v. Cabana, 794 F.2d 177, 183 (5th Cir. 1986) (§ 2254 case). Mitchell does not indicate what testimony Jackson would have provided or how this testimony would have assisted his defense. To the contrary, Mitchell has indicated that Jackson provided inculpatory evidence against Mitchell during Jackson's December 3, 1991, interview.

Finally, as to the allegation that he was excluded from the side-bar conference, the district court informed Mitchell at the beginning of the trial that he could be present during all side-bar conferences. Mitchell has not shown that his absence was not of his own choosing.

2. Admission of the Recordings of Telephone Conversations

Mitchell also argues that Gauthier's representation was ineffective due to his failure to object timely to 1) the admission of the recordings of the conversations between the CI and Jackson; 2) the government's failure to lay a proper predicate for the admission of the recordings; and 3) the use of transcripts of the recordings as a jury aid. As discussed above, the recordings were not improperly admitted, so counsel cannot be ineffective for failing to object to their admission. See United States v. Stone, 960 F.2d 426, 438 (5th Cir. 1992). Additionally, Gauthier did object to the use of the transcripts, but his objection was overruled. These allegations too fail to establish ineffective assistance of counsel.

3. Motion to Suppress

Finally, Mitchell argues that Gauthier's presentation of the motion to suppress was ineffective because he failed to include the issue of a conflict of interest grounded in Guillory's representation of both Mitchell and Jackson when they gave their statements on December 3, 1991. He also argues that Guillory was ineffective because he was operating under an actual conflict of interest as a result of the dual representation. Mitchell did not

present this claim to the district court and therefore the record is not sufficiently developed to permit review. We decline to address this claim but without prejudice to Mitchell's raising it under 28 U.S.C. § 2255. See Stone, 960 F.2d at 438 and n.11.

For the foregoing reasons, Mitchell's conviction is
AFFIRMED.