IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5011

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD KING, JR., and
ANTONIA BERRY, a/k/a "TONY",

Defendants-Appellants.

Appeal from United States District Court
for the Eastern District of Texas
(1:92-CR93-6)

(April 10, 1995)

Before JONES, DUHÉ and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:[*]

Codefendants Edward King and Antonia Berry were convicted by jury of narcotics offenses. Berry appeals his conviction, asserting that his right to counsel was violated because his counsel was not licensed to practice law. Berry also challenges the district court's application of the sentencing guidelines, and the constitutionality of the guideline which distinguishes cocaine powder from crack cocaine. King contends that his conviction should be reversed because (1) his counsel was ineffective; (2) the trial court

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

erred in refusing to instruct the jury on multiple conspiracies; (3) the evidence was insufficient; and (4) the trial court commented on the evidence. King also challenges the U.S.S.G § 3B1.1(b) upward adjustment for leader/organizer role because the trial court specifically found that he was not a manager or supervisor. We affirm both convictions and Berry's sentence. However, we vacate King's sentence and remand for resentencing.

FACTS

Edward King and Antonia Berry were indicted along with four other co-defendants after a Drug Enforcement Administration (DEA) investigation of an extensive cocaine enterprise which operated in various locations between Moss Point, Mississippi, parts of Alabama, and Houston, Texas and which was responsible for the distribution of over one-thousand kilograms of crack. The two count superseding indictment charged both King and Berry, and the four co-defendants, with conspiracy to possess and distribute cocaine (Count One); only Berry was charged with possession of cocaine with intent to distribute (Count Two). Three of the codefendants pled guilty before trial; one pled during the March 23, 1993 to April 8, 1993 trial.

At trial, evidence of the following was presented to the jury: Roderick Jenkins was stopped while in possession of three kilograms of cocaine. DEA Special Agents began an investigation in which Jenkins cooperated. Jenkins implicated King as the person from whom he obtained numerous kilograms of cocaine. Berry was identified as the person who orchestrated the purchase of cocaine from several suppliers and handled the chain of distribution through others. Bob Cunningham, one of the four co-defendants who pled guilty, also described Berry as an organizer of the conspiracy and King as one of

its cocaine suppliers. The conspiracy involved several suppliers and distributors in Mississippi, Alabama, Florida, and Texas. According to the Government, the twelve volume trial transcript "underscores both the massive scope of Berry's organization and the Government's effort to mount a coherent attack on what had evolved into a nefarious cocaine hydra."

The jury returned a guilty verdict as to both King and Berry on Count One, and as to Berry on Count Two. On June 25, 1993, Berry was sentenced to a life term of imprisonment on Count One, and 20 years of concurrent imprisonment on Count Two, as well as a $75,000 fine. Berry appeals his convictions and sentences. On that same date, King was sentenced to 324 months imprisonment, to be followed by five years of supervised release, and to pay a fine of $50,000. King appeals his conviction and sentence. We affirm both convictions and affirm Berry's sentences.[1] Because we find an improper adjustment to King's offense level, we vacate his sentence and remand for resentencing.

DISCUSSION

We shall first address Berry's challenges to his conviction and sentences, then address those raised by King.

APPELLANT ANTONIA BERRY

Ineffective Assistance of Counsel

[1] Berry filed three motions with this court: two motions for bond pending appeal, and a motion to have his court appointed attorney withdrawn. We have reviewed his motions and the response of his counsel. Given our disposition of the case herein, the motions are denied as moot.

Berry's sole challenge to his conviction is that he was denied effective assistance of counsel because his trial counsel had been previously and indefinitely suspended from the practice of law.

Operative Facts

Hubert Johnson, Berry's trial counsel, petitioned the Texas district court for permission to represent Berry in this case. He certified that he was a member, in good standing, of the New Jersey Bar and a member of the Federal District Court Bar and the Third Circuit Court of Appeals. After trial, Berry learned that Johnson had been incarcerated in Tennessee and charged with the murder of his girlfriend and, upon further inquiry, learned that Johnson had been suspended from the practice of law in New Jersey. An evidentiary hearing was had regarding whether Johnson was licensed and in good standing in New Jersey during his representation of Berry in this case. Johnson was not present for the hearing. The only testimony came from Berry, and several documents regarding Johnson's suspension case and motion for reinstatement were filed into evidence. The documents indicated that Johnson had been licensed in New Jersey, but had been suspended from the practice of law. One of these documents was a United States District Court of New Jersey docket of Johnson's case which shows that he had been restored to the practice of law. The evidence revealed that Johnson could have obtained a certificate of good standing in April 1993 when he petitioned the court for permission to represent Berry. In its memorandum, the district court correctly observed that, although Johnson "totally failed to reveal" any facet of his disciplinary sanctions imposed by the Supreme Court of New Jersey, he had been

restored to the rolls of the United States District Court for the District of New Jersey prior to his appearance before the Texas district court. The district court concluded that "[h]e was not totally unlicensed, although whatever license he had was not unsullied nor clean as a hound's tooth." This conclusion is supported by the record.

Analysis

Berry asserts that the fact that Johnson was not licensed and that he perpetrated a fraud upon Berry and the court in order to represent Berry constitutes a *per se* violation of Berry's Sixth Amendment right to counsel.[2]

The issue of whether the absence of a current, untainted license for a criminal defense attorney to practice law at the time of trial constitutes a per se violation of a defendant's right to counsel is *res nova*. Our colleagues of the Second Circuit Court of Appeals have found two instances in which a *per se* violation of the right to counsel occurs independently of the test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The first instance is when, unknown to the defendant, defense counsel was at the time of trial not duly licensed to practice law because of

[2] Berry also argues that Johnson's advice that Berry would now serve thirty-six months imprisonment if convicted, rather than spending the rest of his life in prison, demonstrates that Johnson's performance was deficient and that a different result would have obtained if Berry had been properly advised. We do not address this argument, however, because at the hearing on Johnson's status, in brief to this court, and during oral argument, Berry conceded that Johnson's performance did not violate the deficiency/prejudice test in Strickland v. Washington, 466 U.S. 668, 687 (1984).

a failure ever to meet the substantive requirements for the practice of law; the second is when the defense counsel was implicated in the defendant's crimes. Bellamy v. Cogdell, 974 F.2d 302, 306 (2nd Cir. 1992), cert. denied, 113 S.Ct. 1383, 122 L.Ed.2d 759 (1993). The first scenario involves representation by a person who was *never* a licensed attorney. The second scenario is inapplicable herein, as there is no indication that Johnson was implicated in Berry's offenses.

Due to Johnson's "not totally unlicensed" status, the instant facts do not square with the *per se* rule in Bellamy. Upon careful examination of the record, we hold that there was no per se violation of Berry's Sixth Amendment right to counsel. Berry concedes that there has been no Strickland v. Washington violation of his right to counsel, and the instant facts do not fit within the per se rule evolving in the Second Circuit. Berry likewise does not assert, and the record does not reflect, any deficiency in the representation he received from his trial counsel. In the absence of such a deficiency or of prejudice to Berry arising from Johnson's trial performance, we decline to create a *per se* rule. Accordingly, Berry's ineffective assistance of counsel claim fails.

Sentencing Guidelines

Berry argues the following errors in his sentence: 1) the amount of drugs attributed to him, 2) the court did not require the Government to meet its burden of proof regarding sentencing enhancements, 3) the U.S.S.G. § 3B1.1(a) four level increase for his leader/organizer role, and 4) the 3C1.1 two level increase for obstruction of justice. Berry also challenges the constitutionality

of the applicable statutes and sentencing guidelines on the basis that their discrimination between crack cocaine and powder cocaine results in a disparity in the sentences imposed upon black defendants as compared to other defendants.

Calculation of the Amount of Cocaine; The Government's Burden to Present Evidence

Berry contends that the district court's calculation was based on insufficient evidence to establish that he could have foreseen the quantities of cocaine and based on unreliable co-conspirator statements. He contends that Jenkins' testimony formed the basis for much of the quantity attributed to him and this testimony was unreliable. Berry does not argue that any particular part of Jenkins' testimony, or any part of the presentence report (PSR), was untrue on this issue. The sentencing court could rely upon the PSR and trial testimony regarding the amount of cocaine. *See* United States v. Puig-Infante, 19 F.3d 929, 943-44 (5th Cir. 1994), cert. denied, 115 S.Ct. 180, 130 L.Ed.2d 114 (1994). Accordingly, we find no error in the calculation of this amount.

Berry also contends that, in the face of his objections to the PSR, the government was required to present evidence in order to prove entitlement to the enhancements. This contention borders on the frivolous. In this circuit a presentence report generally bears sufficient indicia of reliability to be considered as evidence by the district court in resolving disputed facts, and a district court may adopt facts contained in the PSR without further inquiry if the facts have an adequate evidentiary basis and the defendant does not present rebuttal evidence. United States v. Montoya-Ortiz, 7 F.3d 1171,

1180 (5th Cir. 1993); Puig-Infante, 19 F.3d at 943; United States v. Shipley, 963 F.2d 56, 59 (5th Cir. 1992), cert. denied, 113 S.Ct. 348, 121 L.Ed.2d 263 (1992) (The district court may rely on information contained in the PSR in making its factual determination for sentencing, as long as the information has some minimum indicium of reliability). The defendant bears the burden of showing that the information in the PSR relied on by the district court is materially untrue. Puig-Infante 19 F.3d at 943. Because Berry has not made such a showing, we summarily reject these arguments.

21 U.S.C. §§ 841 and 846, U.S.S.G. § 2D1.1 -- Unconstitutional?

In his challenge to the constitutionality of the sentence, Berry contends that the application of 21 U.S.C. §§ 841 and 846 and U.S.S.G. § 2D1.1 has had a disproportionate impact on young African American males, and therefore violates their constitutional rights to equal protection of the laws and due process of law. We have already specifically addressed and rejected these contentions, and we decline to revisit them herein. *See* United States v. Watson, 953 F.2d 895, 897 (5th Cir. 1992), cert. denied, 112 S.Ct. 1989, 118 L.Ed.2d 586 (1992); United States v. Thomas, 932 F.2d 1085, 1090 (5th Cir.), cert. denied, 502 U.S. 1038, 112 S.Ct. 887, 116 L.Ed.2d 791 (1991); United States v. Galloway, 951 F.2d 64, 65 (5th Cir. 1992).

Adjustments under § 3B1.1 (Leader/Organizer) and § 3C1.1 (Obstruction of Justice)

Berry contends that there was no showing and no determination that he had control over the actions of four other persons involved in the offense, as required by § 3B1.1, and that therefore the four level enhancement pursuant to this section was

error.[3] Berry also challenges the § 3C1.1 two level adjustment for obstruction of justice, Berry asserts that he did not obstruct justice in any way.

Absent some other reduction in his offense level, even if this court were to grant Berry's requested reductions as to these two adjustments, the six level decrease would reduce his offense level from 48 to 42, at which level the sentence he received is still within the guidelines range. U.S.S.G. Ch.5, Pt.A. For reasons discussed above, we find no other basis upon which Berry's offense level may be reduced. Accordingly, his sentence is within the guidelines range with or without the six level decrease which Berry seeks through these two arguments. We review a sentence which is within the guidelines range only to determine whether the guidelines were correctly applied. *See* United States v. Bullard, 13 F.3d 154 (5th Cir. 1994) and United States v. Soliman, 954 F.2d 1012, 1013 (5th Cir. 1992). Even if we were to assume, *arguendo*, that the guidelines were incorrectly applied as to these two adjustments, Berry's sentence would still be within the guidelines range and we could provide him no relief. For this reason, we address neither of these two issues.

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[3] We note that, in order for § 3B1.1 to apply, there must be five or more persons involved in the conspiracy and Berry must have been the leader or organizer of *at least one* of the co-conspirators rather than of all four. United States v. Okoli, 20 F.3d 615 (5th Cir. 1994) (applying the 1993 amendment --which provides that the defendant need only lead or organize one of the remaining four participants-- as an "instruction" from the Sentencing Commission on how to interpret the § 3B1.1 commentary for a sentence which was imposed prior to the amendment's effective date.)

APPELLANT EDWARD KING, JR.

Fifth and Sixth Amendment Arguments

King argues that his Fifth Amendment right to Due Process and his Sixth Amendment right to counsel were violated because his counsel failed to object to three portions of the prosecution's closing argument. In the first, the prosecutor blamed King and Berry for creating the "drug infested neighborhood" in which Berry lived. The next statement orally painted a picture of faceless and nameless victims who, if present, could wrap around the courthouse a thousand times over. Finally, the prosecutor urged the jury to do its part in stopping drug trafficking. King contends that the first two statements went beyond the evidence, and that the third statement diverted the jury's attention from the evidence and cast doubt upon the verdict.[4]

Under Fed.R.Crim.P. 52(b), this court may correct forfeited errors only when the appellant shows that there is an error that (1) is clear or obvious, and (2) affects his substantial rights. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc) (citing United States v. Olano, ___ U.S. ___, 113 S. Ct. 1770, 1776-79, 123 L. Ed. 2d 508 (1993)), cert. denied, 115 S.Ct. 1266 (1995). If these factors are established, the decision to correct the forfeited error is within the sound discretion of the court, and the

[4] For a description of the three factors we consider in deciding whether to reverse the defendant's conviction due to improper prosecutorial argument, see United States v. Casel, 995 F.2d 1299, 1308 (5th Cir. 1993), cert. denied, 114 S.Ct. 1308, 127 L.Ed.2d 659 (1994), and United States v. Willis, 6 F.3d 257, 264 (5th Cir. 1993).

court will not exercise that discretion unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 113 S.Ct. at 1778.

The jury had heard evidence that both defendants were involved in the distribution of hundreds of kilograms of cocaine. The evidence of King's guilt was so overwhelming that any diversion of the jury's attention away from the evidence (1) was minimal, (2) did not deprive King of a fair trial, and (3) did not cast doubt upon the jury's verdict. Viewed under the plain error standard of review, we find no violation of Berry's right to Due Process; these comments provide no basis for reversal.

On his claim of ineffective assistance of counsel, King both concedes that an objection to the argument would have only focused attention on the statements and contends that his counsel was ineffective because there was no objection. In so doing, King places his counsel in a "Catch-22" situation in which King views both the presence or absence of objections to these statements as prejudicial to him. King has not shown that his counsel's failure to object amounted to any more than a choice of trial strategy; he has not shown any error as required by the first prong of Olano, much less any effect upon his right to counsel or any miscarriage of justice. This argument is frivolous.

Charge on Multiple Conspiracies

King complains that the district court refused to charge the jury on multiple conspiracies. The district court's refusal to deliver a requested instruction constitutes reversible error "only if the instruction: (1) is substantially correct; (2) was not

substantially covered in the charge that was given to the jury; and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to present a given defense. United States v. Burroughs, 876 F.2d 366, 369 (5th Cir. 1989) (emphasis added; citations and internal quotations omitted).

We have reviewed both the requested but denied jury charge, and the charge actually given to the jury. The mandate to acquit either defendant, if the jury determined he was not a member of the charged conspiracy, was substantially covered by the charge actually given to the jury. Thus, one of the three requisites for reversal is absent. We reject this argument.

Sufficiency of the Evidence

King's challenge to the sufficiency of the evidence is that the general language in the indictment might apply to many of the separate conspiracies on which evidence was adduced, therefore the evidence did not allow the jury to find King's membership in a single agreement.

The indictment states that the six charged codefendants conspired to distribute "5 kilograms or more of cocaine". King does not contend that the government failed to prove any element of the charged offense--only that the indictment alleges "one" conspiracy and that the jury could not find the "one" of which he was a member. King has not argued that the evidence is insufficient. Moreover, our review of the record shows more than sufficient proof of each element, under the Jackson v. Virginia standard,[5] from which the jury

[5] For a discussion of the standard applicable to determine whether evidence is sufficient to support a conviction, see Jackson

could reasonably convict King. This challenge to King's conviction has no merit.

Comment on the Evidence by the District Court?

When the Government asked witness Cunningham about how Angelle, an out-of-court declarant, told him about Berry's arrest, Berry's defense counsel (Johnson) objected on the basis of hearsay. The Government responded that Angelle is clearly a co-conspirator; the court stated "Yeah. I'm going to overrule that objection". King complains that the Government's forceful statement, followed by judicial approval, amounted to an instruction to find the defendants guilty.[6] We reject this argument as frivolous.

The § 3B1.1(b) Adjustment (Manager/Supervisor)

King asserts that the U.S.S.G. § 3B1.1(b) adjustment was a legally incorrect conclusion as to the applicability of the guidelines. He asserts that it was an abuse of discretion to equate his role as "source" with that of "manager or supervisor" because the district court made the factual determination that he was not a manager or supervisor.[7] For the following reasons, we agree that the

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v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) and United States v. Pennington, 20 F.3d 593, 597 (5th Cir. 1994).

[6] King concedes that the ruling on the objection was not subject to challenge.

[7] The Government concedes that, under United States v. Okoli, 20 F.3d 615 (5th Cir. 1994), the district court's factual finding that King did not manage or supervise anyone does not support a § 3B1.1 role adjustment; the Government "respectfully suggests that the case be remanded to the trial court so that the trial court can correct King's role adjustment and consider whether or not an upward departure is otherwise warranted."

conclusion that these two roles are equivalent is incorrect as a matter of law.

To qualify for an adjustment under U.S.S.G. § 3B1.1, the defendant must have been the manager or supervisor of one or more other participants. U.S.S.G. § 3B1.1 commentary n.2, *added by* U.S.S.G. app. C., amend. 500 (effective Nov. 1, 1993).[8] An upward departure may be warranted for a defendant who exercised management responsibility over the property, assets, or activities of a criminal organization but who did not organize, lead, manage, or supervise another participant. Id.

King's 324 month sentence is outside the range which would have been recommended by the Guidelines absent the § 3B1.1 upward adjustment. At sentencing, the district court adopted the PSR, which states that "there is nothing that suggests the defendant managed or supervised anyone," and stated the following:

> The defendant's role was a major source of the supply and added to the extensiveness of Berry's drug distribution network.
>
> He has profited what I consider to be immensely from his activities, and *his role as a source of cocaine can certainly be equated to that of a manager or supervisor* of an otherwise extensive criminal enterprise.

The sentencing court erred in applying the § 3B1.1(b) adjustment under these circumstances. We hold that the role of "source", alone, is not equivalent to the role of "manager" or "supervisor" for the

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[8] Although the defendants were sentenced in June of 1993, we may consider this new note because it clarifies § 3B1.1 and is not intended as a substantive change. See United States v. Gross, 26 F.3d 552, 555 (5th Cir. 1994), *cited in* United States v. Ronning, No. 93-9121 (5th Cir. March 3, 1995).

purposes of U.S.S.G. § 3B1.1. Accordingly, we remand the case for King's resentencing.

CONCLUSION

For the foregoing reasons, we AFFIRM Berry's conviction and sentence. We AFFIRM King's conviction, VACATE his sentence, and REMAND for resentencing.