UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5308
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JERRY MALONE
CLIFTON JOEY CARRIER, JR.,

Defendants-Appellants.

No. 93-5337
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JERRY MALONE,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Louisiana
(91-CR-60059-02)

(April 8, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

---

[1] 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

Jerry Malone and Clifton Joey Carrier, Jr., appeal from the denial of their motions to dismiss, on double jeopardy grounds, the indictment charging them with using and carrying firearms in relation to a drug trafficking offense.[2] We **AFFIRM**.

I.

Carrier and Malone were indicted in May 1992 for using and carrying firearms in relation to a drug trafficking offense (conspiracy to possess with intent to distribute approximately 289 marijuana plants), in violation of 18 U.S.C. § 924(c)(1) and (2).[3] Malone had pleaded guilty in state court to a charge of cultivation of marijuana. Prior to trial, Malone filed a motion in limine, in which Carrier joined, to prevent the Government from making any comment on the sentence he received for that state conviction. The Government did not oppose the motion.

Malone testified at trial. At the close of direct examination, his counsel asked him about his state guilty plea. Malone responded that he was innocent of the charge and had not conspired with Kelley or Carrier to cultivate marijuana. The following colloquy with his counsel ensued:

---

should not be published.

[2] The denial of a motion to dismiss based on double jeopardy is appealable under 28 U.S.C. § 1291. ***Abney v. United States***, 431 U.S. 651, 662-63 [97 S. Ct. 2034] (1977); ***United States v. Weeks***, 870 F.2d 267, 269 (5th Cir.), *cert. denied*, 493 U.S. 827 (1989).

[3] Michael Kelley also was charged in the same indictment, but was tried and convicted separately from Carrier and Malone. His conviction was affirmed on appeal. ***United States v. Kelley***, No. 92-5303 (5th Cir. July 29, 1993) (unpublished).

> Q. And you have told this jury the full extent of your activities and knowledge regarding the marijuana?
>
> A. Yes, sir.
>
> Q. I do not want you to tell the jury what sentence, because it's--it's irrelevant.
>
> A. Yes, sir.
>
> ....
>
> Q. Were you sentenced in state court to the charge of cultivation of marijuana?
>
> A. Yes, sir, I was.
>
> Q. Have you completed that sentence?
>
> A. Yes, sir, I have.

At the end of the Government's cross-examination of Malone, the prosecutor asked him:

> Q. Your counsel asked you whether you were sentenced. You said you were and you served your sentence; is that right?
>
> A. Yes, sir.
>
> Q. You got probation, didn't you?

Defense counsel requested a bench conference and moved for a mistrial because the prosecutor had violated the terms of the motion in limine. The prosecutor countered that defense counsel had "brought it up, he asked the question of whether a sentence and the sentence was served. If the jury knows that he had a sentence and that he served the sentence, the jury deserves to know what that sentence[] was". The district court disagreed, and granted the mistrial.

Malone and Carrier moved to dismiss the indictment on double jeopardy grounds, asserting that the prosecutor intended to provoke a mistrial by questioning Malone about the sentence. After a hearing, the motions were denied, the court finding that the prosecutor had not acted with that intention.

II.

"Only where the governmental conduct in question is intended to `goad' the defendant into moving for a mistrial may a defendant raise the bar of Double Jeopardy to a second trial ...." ***United States v. Singleterry***, 683 F.2d 122, 123 (5th Cir.) (brackets and internal quotation marks omitted), *cert. denied*, 459 U.S. 1021 (1982) (quoting ***Oregon v. Kennedy***, 456 U.S. 667, 676 (1982)). Our review of the denial of the motions to dismiss is *de novo*, but the district court's underlying factual findings, including the finding that the prosecutor did not intend to provoke a mistrial, must be accepted unless they are clearly erroneous. ***United States v. Deshaw***, 974 F.2d 667, 669 (5th Cir. 1992); ***Singleterry***, 683 F.2d at 124-25. Findings of fact are not clearly erroneous if they are "plausible in light of the record viewed in its entirety". ***Anderson v. City of Bessemer City***, 470 U.S. 564, 574 (1985). And, obviously credibility determinations are "peculiarly within the province of the district court". ***Kendall v. Block***, 821 F.2d 1142, 1146 (5th Cir. 1987).

The district court gave the following reasons for its finding:

> I heard no evidence to indicate that [the prosecutor] acted in a way in which he wanted to provoke a mistrial. In fact, the record, itself, reflects that the question of Mr. Malone by

> [defense counsel] was brought right up to the brink, certainly within the line ....
>
> ... I think [the prosecutor] was excited at the time he asked the question. He stated for the record at the time that he felt that [defense counsel] had opened the door, that's why he asked the question. I certainly feel that the door was not opened. The request for a mistrial was made by both attorneys for both defendants. There w[ere] some alternatives that could have been asked, such as an admonition of [the prosecutor] and an admonition to the jury to disregard that type of question. Although it was agreed by [the prosecutor], if I am not mistaken, right before trial that that portion of it would be stricken, that is the sentence portion, it was after some discussion that was had. I thought it was irrelevant because of the closeness of the case, but I ... certainly think that an admonition to the jury ... would have sufficed .... I thought it would have. You requested the mistrial, clearly understanding that in the normal situation a request for a mistrial by defense counsel doesn't give you the right to dismiss. I don't see any prosecutorial misconduct by [the prosecutor]. I don't think he intended to do that .... I saw his actions. I saw his demeanor. I saw his reactions. I don't think [the prosecutor] was trying to provoke a mistrial. I think he was trying to try his case. I think he made a mistake. I granted the mistrial so that we will try the case another day with a different jury where that statement won't happen again.
>
> This was a very heated trial by attorneys who got excited during the trial. I expect advocates to get excited. I didn't expect that to happen. If I thought for a moment [the prosecutor] did something inappropriately and that he intended to provoke this mistrial, I would dismiss it in a second. I don't think he did, gentlemen. I've told you that before. I saw it and I saw what happened. I think he was wrong and I granted you a mistrial.

The district court's assessment was not implausible, and is entitled to deference because it is based on the court's personal observation of the events in question. Therefore, the finding that

the prosecutor did not intend to provoke a mistrial is not clearly erroneous.

III.

Accordingly, the denial of the motions to dismiss is

AFFIRMED.