

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5402
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RODNEY WILLIAMS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(92-60032-15)

(May 25, 1994)

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

PER CURIAM:*

Defendant-Appellant Rodney Williams appeals his bench trial conviction and sentence for aiding and abetting the interstate transportation of narcotics in violation of 18 U.S.C. § 1952, and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 846 and 821(a)(1). He insists that the evidence was insufficient to convict him on either of the two counts for which he was convicted, and that the district court erred in imposing a harsher sentence on him than those imposed on his co-conspirators. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

The third superseding indictment, comprising twenty counts, charged Williams with conspiracy to possess with intent to distribute cocaine (count one), possession with intent to distribute over 50 grams of cocaine base on or about September 11, 1990 (count four), and aiding and abetting the travel in interstate commerce of another (Felix Barnes, Jr.) in order to possess with intent to distribute cocaine on or about December 2, 1991 (count twenty).¹

Following a bench trial, Williams was found guilty on counts one and twenty, but was found not guilty on count four. He was sentenced at the low end of the guideline range to serve 151 months in prison, followed by five years of supervised release, and the district court also imposed a \$100 special assessment. Williams timely appealed.

¹ Several co-defendants not named in the third superseding indictment, but named in the prior indictments, pleaded guilty to various offenses before the third superseding indictment was filed. Barbara Jenkins entered a guilty plea to a different count contained in the third superseding indictment, and Barnes entered a guilty plea to count 20 of the third superseding indictment.

II

ANALYSIS

A. Sufficiency of the Evidence

Williams urges that the evidence adduced was insufficient to convict him. He moved for a judgment of acquittal at the close of the government's evidence, but did not renew this motion following the presentation of all of the evidence. Inasmuch as Williams waived his right to a trial by jury and elected a bench trial, however, his not guilty plea constitutes a motion for acquittal which he was not required to renew in order to preserve his challenge to the sufficiency of the evidence. United States v. Cardenas, 9 F.3d 1139, 1159 (5th Cir. 1993).

When, as here, the defendant was convicted in a bench trial, we review a sufficiency challenge to determine if there is "any substantial evidence" to support the district court's conclusion that the defendant is guilty beyond a reasonable doubt. Id. at 1156. We consider the evidence in the light most favorable to the government, and defer to all reasonable inferences of fact drawn by the district court. Id.

To support a conviction in the instant case for conspiracy under 21 U.S.C. § 846, the government had to prove that (1) there was an agreement between two or more persons to possess the cocaine with the intent to distribute it, (2) Williams knew of the agreement, and (3) Williams participated in the conspiracy voluntarily. United States v. Pierre, 958 F.2d 1304, 1311 (5th Cir.) (en banc), cert. denied, 113 S.Ct. 280 (1992).

Through the testimony of Williams' co-conspirators who had entered guilty pleas, the government established that Williams was a knowing and voluntary member of the conspiracy. The government also established that Williams rented and occupied an apartment on Fondren Street in Houston, Texas, which he shared with a friend, Alton Sonnier, who lived in the apartment intermittently for approximately six months during 1991.

Barbara Jenkins, the wife of Don Paul Jackson, testified that Williams' role in the conspiracy was to set up the transactions for Jackson, who would call Williams from Opelousas and let him know how much cocaine was needed, and when Jackson, Jenkins, or one of the "mules" (Felix Barnes or Anthony Garrick) would arrive in Houston to pick up the drugs. Jackson would pay Williams \$50 to \$100 for each transaction that he set up. Jenkins estimated that she and Jackson dealt with Williams in this manner from late 1990 to late 1991, always dealing in crack cocaine. She also estimated that (1) the total amount involved over that period was between 10 and 15 kilograms of crack cocaine, (2) Williams "brokered" about 80% of the purchases they made, and (3) she (Jenkins) had been to Williams' apartment maybe forty times--each time for a drug transaction.

This testimony was substantiated in large part by the testimony of the other cooperating government witnesses--Jackson, Garrick, and Barnes. Jackson testified that during this period of time he (or Jenkins, Barnes, or Garrick) would go to Williams' apartment about once a week to buy crack. He further testified

that Williams' role was to make sure that the "deal" went "down right," and that Williams was paid for his role. Jackson also stated that he went to Williams' apartment at least twenty times himself to pick up drugs, and sent Barnes at least twenty times.

Barnes testified that he made about ten trips to Houston to buy drugs and that he stayed at Williams' apartment seven or eight times. Barnes confirmed that when he went to Houston, Jackson would call Williams to set up the drug transaction, and Williams would make arrangements with his sources in Houston. Garrick too testified that he had taken two trips to Houston with Jackson and Jenkins to purchase drugs at Williams' apartment.

Brien Kyle, who testified for the government pursuant to a plea agreement, stated that he was one of Williams' sources for drugs in Houston. He stated that he sold drugs to Barnes, Jackson, Jenkins, and another female on some six separate occasions. Each of these transactions occurred in response to an initial call from Williams, and one or two took place at Williams' apartment. Kyle testified that he had no direct knowledge of the extent of Williams' involvement with the drug transactions, but he agreed that Williams could not "have been around and not know what's going on."

Williams argues that the government's evidence, based entirely on the testimony of his co-defendants who cooperated with the government after entering guilty pleas, is insufficient because each of these witnesses was testifying pursuant to agreements with the government limiting their sentencing exposure in exchange for

their testimony against Williams. The district court, however, noted its consideration of the circumstances surrounding the testimony of the government's witnesses.

Moreover, "[i]t is well established that a conspiracy conviction may be based upon the uncorroborated testimony of a co-conspirator, even when that testimony is from one who has made a plea bargain with the government, provided that the testimony is not incredible or otherwise insubstantial on its face." United States v. Gadison, 8 F.3d 186, 190 (5th Cir. 1993). The testimony of each of the government's witnesses in the instant case is corroborated, in substantial part, by the testimony of the other witnesses; in addition, none of their testimony is either incredible or insubstantial, and clearly provides sufficient evidence to support Williams' conviction for conspiracy.

Williams also challenges the sufficiency of the government's evidence used to convict him of aiding and abetting another's travel in interstate commerce in order to possess with intent to distribute cocaine. He contends that the evidence does not support the conclusion that he was present at the drug transaction which occurred at his apartment on December 3, 1991, or that he was aware that such a transaction occurred there on that date.

Count twenty charged that Felix Barnes, Jr. and others, all of whom were aided and abetted by Williams and Barbara Jenkins, traveled from Opelousas to Houston for the purpose of possessing with intent to distribute over fifty grams of crack cocaine. To sustain this conviction, the government needed to show that

Williams associated with the criminal venture, participated in the venture, and sought by his actions to make the venture succeed. United States v. Peña, 949 F.2d 751, 755 (5th Cir. 1991).

Jenkins testified that a telephone call was made to Williams on or about December 2, 1991, and that Jackson borrowed Jenkins' car to send Barnes and Garrick from Opelousas to Williams' apartment in Houston to get drugs. This testimony was corroborated by Jackson, who confirmed that he phoned Williams after the Bayou Classic football game in New Orleans to set up the drug deal, and then sent Barnes and Garrick to Houston to make contact with Kyle to buy the drugs.

Barnes' testimony is substantially similar: On December 2, 1991, he and Garrick, at Jackson's behest, traveled to Williams' apartment in a car provided by Jackson and Jenkins. They were sent to make contact with Kyle at Williams' apartment to buy drugs. Barnes testified that, although Williams was not present when they arrived, Alton Sonnier was, and he contacted Williams. The drugs could not be delivered until the next morning, so Barnes and Garrick spent the night at Williams' apartment. Sonnier called Williams, and Kyle arrived soon thereafter with the drugs. Later that day, Barnes and Garrick were arrested while trying to leave the apartment complex with the drugs.

Garrick testified that, in early December 1991, after the Bayou Classic, he and Barnes were sent by Jackson in Jenkins' automobile to Williams' apartment to buy drugs. Garrick stated that Williams was there when they arrived, but that he (Williams)

was not present during the transaction the next day, and that Sonnier was not there when they arrived, but was in the apartment the next morning.

Sonnier testified that he was not present when Barnes and Garrick arrived, but saw them sleeping on the couch when he returned from work early the following morning and, after he went out for a short time that morning, he returned to find the police in his apartment. Although the testimony of Barnes, Garrick, and Sonnier differs regarding when Sonnier and Williams were present at the apartment, their testimony, along with that of Jackson and Jenkins, coincides on several key points: Jackson contacted Williams to set up a drug transaction between Barnes, Garrick, and Kyle, and sent Barnes and Garrick to Williams' apartment to conduct the transaction. As this testimony implicates Williams in this particular transaction, the record provides substantial evidence to support the district court's finding that Williams was guilty beyond a reasonable doubt.

B. Imposition of Harsher Sentence

Williams also challenges his sentence of 151 months in prison, contending that the district court ignored the Introduction to the Sentencing Guidelines (which noted the Congressional goal of establishing more uniformity in sentencing) when sentencing him to substantially more prison time than the others named in the indictments. He urges that the case be remanded to allow the district court to depart downward and impose a sentence similar to those imposed on others named in the indictments.

A downward departure from the guidelines is authorized only for circumstances not adequately taken into consideration when the guidelines were promulgated. United States v. Sparks, 2 F.3d 574, 589 (5th Cir. 1993), cert. denied, 114 S.Ct. 899 (1994). In United States v. Ives, No. 92-1259 (5th Cir. Feb. 16, 1993) (unpublished; copy attached), we held that disparity in sentences between co-defendants "simply cannot be deemed an aggravating or mitigating circumstance. As such, it is not a proper basis for departure, either upward or downward." Id. at 5. Therefore, as Williams does not challenge the district court's application of the guidelines, and as we have previously rejected his sole contention on this point, his complaint regarding his sentence is unavailing.

For the foregoing reasons, Williams' conviction and sentence are
AFFIRMED.