

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-7294

UNITED STATES OF AMERICA

Plaintiff-Appellee,

VERSUS

RODNEY CHARLES BENSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-G-91-14)

(April 15, 1994)

Before ALDISERT,¹ REYNALDO G. GARZA, and DUHÉ, Circuit Judges.

PER CURIAM:²

Following conviction and sentence for drug and weapon offenses, Appellant Benson appeals both his conviction and his sentence raising eight separate issues. He contends that the district court erred by denying his motions to suppress evidence found during execution of a search warrant, and his post arrest statements; by subjecting him to double jeopardy; by violating his Batson rights; by trying him on an inadequate indictment; by

¹ Circuit Judge of the Third Circuit sitting by designation.

² 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

convicting him on insufficient evidence; and by improperly computing his criminal history score. Having carefully considered the briefs, the argument of counsel and the record we affirm both the conviction and the sentence.

Appellant argues most strongly that the first count of the indictment did not sufficiently allege the elements of the offense charged and that the evidence was insufficient to support the jury finding that he was a felon in possession of a firearm. The indictment was sufficient for a number of reasons not the least of which is that it specifically described his prior conviction of possession of cocaine in the Texas state court and that this offense was punishable for a term exceeding one year. While the indictment did not say "by imprisonment", the described crime is under Texas law at least a second degree felony punishable by imprisonment for a term exceeding one year. Texas Health and Safety Code Ann. § 481.101-102, 481.115 (West 1992); Texas Penal Code Ann. § 1.07, 12.04, 12.32 (West 1989). The indictment was sufficient.

Likewise the evidence on this issue was sufficient. Appellant stipulated that he was convicted and that the punishment for that conviction was "...for a term exceeding one year". Additionally the court instructed the jury, without objection from the Appellant, that Appellant had been convicted of a felony and that a felony was a crime punishable for a term in excess of one year. From the stipulation, the instruction, and the lack of an objection it was reasonable for the jury to infer that the punishment was by

imprisonment. It is indeed unfortunate that the government did not simply introduce the Pen Packet on Appellant and thereby prevent this problem, but we find both the indictment and the evidence sufficient.

AFFIRMED.