

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 93-7578  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MELVIN GRAYER,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Mississippi  
(1:93-CR20BrR)

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(May 30, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:<sup>1</sup>

Appellant Grayer appeals his conviction and sentence for theft of personal property within the jurisdiction of the United States of America. 18 U.S.C. § 661. We affirm.

In October 1990, Appellant was observed stealing Sean Poling's 1964 Ford pickup truck from the fenced in parking lot of the Naval Construction Battalion Center in Gulfport, Mississippi. He was arrested by Gulfport police, advised of his rights by an FBI agent, and confessed.

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<sup>1</sup> 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Following his arrest, Appellant was charged by Mississippi authorities with two counts of grand larceny as a result of his theft of Frank Conway's 1967 Ford pickup and Colby McClelland's 1982 motorcycle from the same government lot. He was sentenced on February 4, 1991 to two consecutive five year terms in the Mississippi Department of Corrections.

In 1993, Appellant was charged by the Federal Government in a three count indictment with stealing from government jurisdiction two motorcycles (Counts 1 and 2) and Poling's 1964 pickup truck.

Appellant first contends that his rights to a speedy trial were violated because he was arrested on October 20, 1990 and indictment against him was not handed down until April 21, 1993. He also claims that more than seventy days elapsed from his indictment to his trial. The appropriate time for prosecution under the Speedy Trial Act did not, however, begin with Appellant's arrest on October 20, 1990.<sup>2</sup> The Speedy Trial Act is triggered only by federal action. That arrest was by state authorities on state charges. No federal charges were brought until April 21, 1993 when the indictment was returned. Federal arrest did not occur until May 25, 1993. While it is true that more than seventy days elapsed between Appellant's initial court appearance on June 7, 1993 and his trial, the discovery order issued by the district court excluded thirty days following that appearance from the seventy day computation under 18 U.S.C. § 3161(h)(8)(a). He was,

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<sup>2</sup> United States v. Charles, 883 F.2d 355, 356 (5th Cir. 1989), cert. denied, 493 U.S. 1033 (1990).

therefore, tried timely.

To the extent that Appellant's complaint can be considered an argument that the due process clause of the Fifth Amendment was violated by the lapse of time between the offense and the indictment, Appellant has shown no prejudice whatsoever resulting from such a delay. There can, therefore, have been no due process violation.

Next, Appellant contends that he was subjected to double jeopardy because he was prosecuted both by the State of Mississippi and by the United States for theft of Mr. Poling's 1964 pickup truck. However, the record does not show that he was subjected to a state prosecution for the theft of that vehicle. The pickup truck involved in the state prosecution was a different vehicle.

Appellant attacks his sentence contending that the district court erred in imposing a two point increase in his offense level for more than minimal planning. It is undisputed that he entered the military base, then entered a secured parking area by cutting a hole in the fence, and then drove the truck out through the hole in the fence. This took considerably more planning than it would to have stolen the truck from curbside. The district court was not in error in finding more than minimal planning. See United States v. Barndt, 913 F.2d 201, 204 (5th Cir. 1990).

Grayer argues that the district court erred in denying him a two level reduction for acceptance of responsibility since he admitted to stealing the truck. He relies on the guideline commentary to the effect that conviction by trial does not

automatically preclude a defendant from consideration for such a reduction. Section 3E1.1 Comment (note 2). The district court denied the reduction because Appellant did not take the witness stand and accept responsibility. Further, Appellant disputed the amount of planning involved in stealing the truck and thus has not met his burden of showing that the district court committed reversible error in denying him a two level reduction for acceptance of responsibility.

AFFIRMED.