UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-7737
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DAVID SORRELLS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(G-93-CV-563 (G-89-CR-13-2))

(January 25, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:[1]

Appellant, David Sorrells, was indicted with his adopted son, Mark Sorrells, for conspiracy and aiding and abetting each other in an attempt to manufacture methamphetamine, and in using a firearm in connection with a drug offense. Mark entered a guilty plea. Appellant was tried and convicted and his conviction was affirmed. He brought this proceeding under 18 U.S.C. § 2255 and the district court denied relief. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appellant raises a lengthy litany of issues which can be grouped into three distinct areas: ineffective assistance of counsel, sufficiency of the evidence, and prosecutorial misconduct. We have carefully reviewed the record and find no issue of merit.

We examine claims of ineffective assistance of trial counsel under the familiar standards of Strickland v. Washington, 466 U.S. 668 (1984); and Lockhart v. Fretwell, 113 S.Ct. 838 (1993). We note that § 2255 relief is reserved only for transgressions of constitutional rights, and for a narrow range of issues that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992).

First Appellant contends that trial counsel was ineffective for failing to interview and/or call the following persons to testify: Mark Sorrells, Mark New, Elaine Gondesen, Joseph Presnall, Terry Harris and Linda Segler Sorrells. Appellant presented to the district court statements from Mark Sorrells, Mark New and Elaine Gondesen stating what their testimony would have been. Assuming the accuracy of those statements, that testimony would not have changed the result of the trial. Mark Sorrells purported testimony was contradicted by the testimony of Ayala, Rice, and by Appellant himself. The purported testimony of Mark New and Elaine Gondesen would have been cumulative. Stokes v. Procunier, 744 F.2d 475, 482 n.3 (5th Cir. 1984).

We have only Appellant's unsupported allegations as to the purported testimony of Joseph Presnall, Terry Harris and Linda

Segler Sorrells (since we do not consider the Presnall data that was not submitted to the district court) and that is insufficient in law. United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984).

Appellant's contention that counsel should have raised a hearsay objection to Palestino's testimony that Mark Sorrells told him how he intended to finance the purchase of chemicals fails because Mark Sorrells was a co-conspirator with Appellant and his statement to Palestino was made in furtherance of the conspiracy. His testimony, therefore, was not prohibited by the hearsay rule. United States v. Arce, 997 F.2d 1123, 1128 (5th Cir. 1993).

Additionally, Sorrells argues that counsel should have raised a hearsay objection to Palestino's testimony that Ayala told Sorrells that Palestino and Tandy had the necessary chemicals and were prepared to deliver them. This testimony is hearsay. However, Appellant has not shown that this testimony prejudiced his defense. He has not shown a reasonable probability that the jury would have acquitted him had it not heard this hearsay testimony. The same is true for the contention that counsel should have objected to Palestino's testimony that Officer Tandy checked the handgun and discovered that it was loaded. There was already testimony from Ayala that he saw Mark Sorrells load the handgun. No prejudice was shown.

Appellant's claim that counsel should have objected to the poor quality of the audio tape evidence is foreclosed because that was the issue raised in direct appeal.

Next, Appellant argues that counsel should have objected to Palestino's testimony regarding the manufacture of amphetamine because Palestino was not an expert. Careful review of the evidence shows, however, that it was not opinion testimony. He simply described the methamphetamine manufacturing process which was well-known to him. Likewise, the claim that counsel failed to object to the leading nature of a question to Palestino does not establish that the same information would not have been produced had the objection been raised and the question rephrased.

Sorrells contends that counsel's failure to cross-examine Ayala about the handgun constitutes ineffective assistance. However, the record makes clear that counsel cross-examined Ayala at length concerning his history as a paid informant and obtained concessions that Ayala did not specifically discuss methamphetamine with the Appellant, and that Appellant was not present at any meetings with the witness where methamphetamine was discussed. We find nothing inadequate about the cross-examination.

The remainder of the issues raised concerning cross-examination are without merit.

Appellant claims that his counsel offered an absurd argument to support his motion for a judgment of acquittal. Appellant misapprehends the argument that counsel made. Counsel did not suggest that the jury should find Appellant guilty on all counts save one. Rather he suggested only that the jury should consider the charges and the evidence separately.

Appellant also argues that the government's evidence was insufficient to convict him either of conspiracy or possession of the weapon. We will affirm a jury verdict so long as there is evidence sufficient to allow a reasonable jury to find a defendant guilty beyond a reasonable doubt. We review the evidence and the inferences from that evidence in the light most favorable to the verdict. United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd, 462 U.S. 356 (1983). Our review of the record convinces us that the Government's evidence was more than adequate.

Sorrells claims that prosecutorial misconduct occurred when, in closing argument, the prosecutor referred to Mark Sorrells as a five time ex-convict (evidence not before the jury) and directed the jurors to listen to the audio tapes which had been placed in evidence. No objection was made to these statements at trial. As a result, we examine only for plain error. United States v. Olano, 113 S.Ct. 1770, 1777-79 (1993); United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). The remark concerning the number of times Mark Sorrells had been convicted was not plain error because Appellant himself testified that shortly after adopting Mark he had received a telephone call from Mark's parole officer during which he discovered that Mark had served time in a federal prison. Nor is the prosecutor's suggestion that jurors listen to the tapes that were in evidence an obvious or plain error on its face. The fact of their poor quality however may have made the prosecutor's suggestion that the tapes would corroborate the witness Ayala

questionable. However, in light of the evidence against Appellant the prosecutor's remark did not deprive him of due process.

Likewise, the prosecutor's remark concerning the witness Palestino was responsive to defense counsel's argument and was not error.

The remaining issues raised by Sorrells are without merit.

AFFIRMED.