

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8433

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BILLY RAY WHEELLOCK,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-92-CR-128-1)

(April 29, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Billy Ray Wheelock was convicted of conspiring to distribute crack cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1); possession with intent to distribute crack cocaine within 1000 feet of a public elementary school in violation of 21 U.S.C. §§ 841(a)(1), 860(a); distribution of crack cocaine in violation of

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

21 U.S.C. § 841(a)(1); and distribution of crack cocaine within one thousand feet of a public elementary school in violation of 21 U.S.C. §§ 841(a)(1), 860(a), and 18 U.S.C. § 2. Wheelock appeals. We affirm.

I.

Pursuant to a federal arrest warrant, Wheelock was arrested on May 7, 1992, for drug trafficking activities. Wheelock was eventually charged with four counts of a seven count indictment for various drug trafficking offenses. At trial, the government presented evidence from various witnesses outlining Wheelock's drug activities. Specifically, the government presented a videotape of a co-conspirator selling crack cocaine to an undercover officer, two state court convictions against Wheelock for the state equivalent of two of the charges, testimony from co-conspirators detailing Wheelock's involvement in the conspiracy, and the testimony of law enforcement officials concerning Wheelock's drug activities.

Vicki Lockett, co-conspirator and Wheelock's former girlfriend, testified that she sold cocaine for Wheelock for a few months on a daily basis. She further testified that she had personally observed Wheelock "cook" crack cocaine, and that he had previously hidden crack cocaine in her residence.

Buffy Gibson, co-conspirator and another former girlfriend of Wheelock's, testified that she had known Wheelock for seven and one-half years and that Wheelock sold dope for a living. She further testified that she had seen him with large quantities of

crack cocaine and that Wheelock had stored cocaine at her residence. She also testified to having seen him "cook" cocaine.

Eric Jimmerson, a co-conspirator, testified concerning an undercover operation conducted on March 16, 1992. Undercover officers approached Jimmerson and attempted to purchase some crack cocaine. Jimmerson did not have the cocaine himself, but he called Wheelock and was able to purchase the cocaine from him. Jimmerson then sold the cocaine to the undercover agents.

Wheelock was convicted on all counts. The district court sentenced Wheelock to life imprisonment on count one, 290 months imprisonment on counts two and five, and 240 months imprisonment on count three, all to run concurrently. The district court further sentenced Wheelock to ten years supervised release on count one, eight years supervised release on counts two and five, and three years supervised release on count three, all to run concurrently. The district court also ordered Wheelock to pay a \$200 special assessment.

II.

Insufficiency of the evidence

Wheelock contends that there was insufficient evidence to support his convictions. We review the district court's denial of a motion for judgment for acquittal de novo. United States v. Restrepo, 994 F.2d 173, 182 (5th Cir. 1993). The well established standard in this circuit for reviewing a conviction allegedly based on insufficient evidence is whether a reasonable jury could find that the evidence establishes the guilt of the

defendant beyond a reasonable doubt. Id. We view the evidence in the light most favorable to the government to determine whether the government proved all elements of the crimes alleged beyond a reasonable doubt. United States v. Skillern, 947 F.2d 1268, 1273 (5th Cir. 1991), cert. denied, 112 S. Ct. 1509 (1992). Furthermore, the evidence does not have to exclude every reasonable hypothesis of innocence. United States v. Leed, 981 F.2d 202, 205 (5th Cir.), cert. denied, 113 S. Ct. 2971 (1993).

Wheelock asserts that there is insufficient evidence to support his convictions because the government's witnesses are not credible. The jury is the final arbiter of the credibility of witnesses. Restrepo, 994 F.2d at 182. Testimony is incredible as a matter of law only if it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature. United States v. Hoskins, 628 F.2d 295, 297 (5th Cir.), cert. denied, 449 U.S. 987 (1980). After reviewing the record, we conclude that there was sufficient evidence to support Wheelock's convictions.

Sentencing Enhancement

In accordance with 21 U.S.C. § 851(a), the government filed two informations notifying Wheelock that upon his convictions for conspiracy to distribute crack cocaine and distributing crack cocaine within 1,000 feet of an elementary school the government would seek to enhance his sentence pursuant to §§ 841(b)(1)(A), (b)(1)(B). Section 841(b)(1)(A) provides that when a person commits a violation involving five kilograms or more of a

substance with a detectable amount of cocaine and such person has "two or more prior convictions for a felony drug offense" which have become final that person "shall be sentenced to a mandatory term of life imprisonment without release" A conviction is final for purposes of § 841(b)(1)(A) when the conviction is no longer subject to examination on direct appeal. See United States v. Morales, 854 F.2d 65, 68 (5th Cir. 1988).

The initial question raised by Wheelock is whether the two prior state court convictions are prior convictions within the meaning of 21 U.S.C. § 841(b)(1)(A). The government utilized two convictions in Bell County, Texas, to enhance Wheelock's sentence. Wheelock was convicted on March 28, 1990, and April 24, 1990, for delivery of cocaine and for possession of cocaine, respectively. Wheelock asserts that the enhancement provision is inapplicable to him because the two state court convictions involve the same transactions and occurrences for which he was convicted in the instant case. Wheelock asserts that the term prior conviction should be interpreted as "prior sentence" is defined in section 4A1.2(a)(1) of the sentencing guidelines: a prior sentence under the sentencing guidelines is one "previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense."

Wheelock did not argue to the district court that the two previous convictions were not prior convictions pursuant to § 841(b)(1)(A). We have stated that issues raised for the first

time on appeal "'are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice.'" United States v. Gracia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990) (quoting Self v. Blackburn, 751 F.2d 789, 793 (5th Cir. 1985)).

In United States v. De Veal, 959 F.2d 536 (5th Cir.), cert. denied, 113 S. Ct. 237 (1992), we examined whether a prior drug trafficking conviction was a prior conviction pursuant to 21 U.S.C. § 960(b)(1). Section 960(b)(1) is also a sentence enhancement provision, and it provides that if a person violates § 960(a) and the requisite amount of narcotics is involved in the offense the defendant is subject to an enhanced sentence provided that the defendant commits the violation after "one or more prior convictions." In De Veal, the question before the court was whether the defendant's earlier conviction for drug trafficking in Kansas was a "prior conviction." Id. at 538. The defendant in De Veal attempted to argue that "her conviction in the state court of Kansas in 1988 for conspiracy to sell cocaine and her present convictions were all one episode of an ongoing conspiracy." Id. We rejected the defendant's arguments and determined that the two convictions constituted two distinct episodes. Id. "'An episode is an incident that is part of a series, but forms a separate unit within the whole. Although related to the entire course of events, an episode is a punctuated occurrence with a limited duration'" Id. at 538 n.1 (quoting United States v. Hughes, 924 F.2d 1354, 1361

(6th Cir. 1991)). In making this determination, we noted that "[t]he time period between the episodes was more than two and a half years; the first episode occurred in January 1988, the second in August 1990." Id. at 538. We further noted that the statutory offenses charged were completely different—conspiracy to sell and distribute in violation of state law versus federal violations of conspiracy to import cocaine, importation of cocaine, and aircraft smuggling—and that the offenses took place at geographically distant places, Kansas and New Orleans. Id. Finally, we noted that De Veal had the opportunity to discontinue her involvement in drug trafficking after her 1988 conviction but declined to do so. Id.

Likewise, in the instant case, the events that constitute the bases for Wheelock's state court convictions and his federal conviction do not represent a single criminal episode. The state court convictions were for distinct events which occurred on July 5, 1989, and December 13, 1989. Moreover, Wheelock had an opportunity to discontinue his criminal activity after his state convictions but declined to do so. Therefore, we do not believe that the district court committed plain error in determining that the two state court convictions were prior convictions under § 841(b)(1)(A).

Wheelock further argues that the district court erred in utilizing these state court convictions to enhance his sentence because the government did not prove that these convictions were final. Wheelock asserts that because the government was the

party seeking an enhancement it had the burden to prove that the two prior convictions were final. Normally, if a defendant does not challenge the use of a prior conviction before he is sentenced, he is foreclosed from challenging the conviction used to enhance his sentence. 21 U.S.C. § 851(b). However, § 851(b) provides that the district court "shall inform [the defendant] that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence." In the present case, it does not appear that the district court complied with the procedures set forth in § 851(b).

In United States v. Garcia, this court discussed the ramifications of a district court's failure to comply with § 851(b). 954 F.2d 273 (5th Cir. 1992). We held that the district court's failure to comply with § 851(b) was harmless error because Garcia affirmed the existence of the prior convictions and because Garcia failed to comply with the statutory prerequisite to challenging a prior conviction. Id. at 276-78. Section 851(c) directs a defendant who claims the invalidity of any prior conviction to "file a written response to the information" and to serve a copy on the United States attorney. Id. at 277. In Garcia, there was no indication in the record that Garcia ever complied with the mechanism for notifying the district court of the substance of his challenge. Id. at 277. Moreover, in Garcia, we noted that Garcia never argued what

challenge he would have raised if the district court had properly followed the procedures set forth in § 851(b). Id. at 277-78.

Likewise, in this case, Wheelock admitted during cross-examination at the sentencing hearing that he was the same Billy Wheelock that had been convicted of the two drug charges listed in the government's information. Further, there is no indication in the record that Wheelock ever utilized § 851(c) to notify the district court of a challenge to the use of the previous state court convictions to enhance his sentence. Finally, the only argument that Wheelock asserts on appeal concerning the use of the state court convictions to enhance his sentence is that the government did not satisfy its burden of proof because it failed to affirmatively prove that the convictions were final. Wheelock does not show or even allege that the convictions were not final. See United States v. Fragoso, 978 F.2d 896, 902 (5th Cir. 1992) (holding that the defendant's failure to comply with § 851(c) coupled with the defendant's failure to argue on appeal what proper challenge he would have raised below rendered the district court's failure to comply with § 851(b) harmless), cert. denied, 113 S. Ct. 1664 (1993). Therefore, we uphold the sentence imposed by the district court.

Prosecutorial Vindictiveness

Wheelock asserts that the district court should have dismissed the conspiracy count and the sentencing enhancement provisions because of prosecutorial vindictiveness. Wheelock asserts that the government unconstitutionally attempted to

punish him for exercising his constitutional right to plead not guilty.

Wheelock was originally indicted for distributing crack cocaine. The government told Wheelock that if he did not plead guilty to that count the government would seek an enhanced sentence. Wheelock refused to plead guilty, and the government filed an information seeking an enhanced sentence. The government then told Wheelock that if he did not plead guilty to distributing crack cocaine the government would dismiss the case and reindict him. Once again Wheelock refused to plead guilty, and the government carried out its threat by dismissing the original case and reindicting Wheelock to four counts of a seven count indictment. The government then told Wheelock to plead guilty to the new indictment or face a new enhancement. Wheelock choose not to plead guilty, and the government filed the new informations.

The Supreme Court's decision in Bordenkircher v. Hayes, 434 U.S. 357 (1978), controls the disposition of this issue. In Bordenkircher, the Supreme Court addressed the issue of whether the Due Process Clause of the Fourteenth Amendment is violated when a prosecutor carries out a threat made during plea negotiations to reindict the defendant on more serious charges if the defendant does not plead guilty to the offense that he is originally charged with. The Court determined that it is constitutionally impermissible for "an agent of the State to pursue a course of action whose objective is to penalize a

person's reliance on his legal rights But in the 'give-and-take' of plea bargaining there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." Id. at 363. During the sentencing hearing, Wheelock testified that at all stages of the various plea negotiations between him and the government he was free to accept or reject the government's offers. The prosecutor testified that these offers were made to Wheelock in the hopes of saving the time and expense involved in trying the case. The enhancements and additional charges that the government filed against Wheelock following a warning made during plea negotiations clearly do not involve prosecutorial vindictiveness. Wheelock's claim is meritless.

III.

For the foregoing reasons, we AFFIRM the district court's judgments of conviction and sentence.