UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8483
Summary Calendar

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee.

VERSUS

EDWARD LEE McINTOSH,

Defendant-Appellant,

Appeal from the United States District Court
For the Western District of Texas
(P-92-CR-98-1)

(September 16, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges:

PER CURIAM:[*]

Background

Edward Lee McIntosh was indicted for conspiring to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846, possession with intent to distribute cocaine in violation of 21 U.S.C. § 821(a)(1), and two counts of possession of a firearm in connection with a drug trafficking offense in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

violation of 18 U.S.C. § 924(c)(1).[1] The indictment was issued after McIntosh was arrested at the permanent immigration checkpoint at Sierra Blanca, Texas. McIntosh and his passenger, Theodore Gardner Walker, were arrested after Customs drug-sniffing dog alerted to their vehicle at the secondary inspection area. A search of the trunk revealed a piece of luggage containing over 20 pounds of cocaine.

The dog and her handler had been summoned when border patrol agents at the secondary inspection site discovered a loaded Mossberg 12-gauge shotgun lying atop some luggage in the trunk of the car being driven by McIntosh. McIntosh had opened the trunk of the car at the request of one of the border patrol agents.

McIntosh pleaded not guilty and the case proceeded to trial, after which the jury found McIntosh guilty of all four of the counts alleged in the indictment. Id. at 91-96. McIntosh was sentenced to concurrent 120-month terms of imprisonment for the conspiracy and possession counts, and a mandatory consecutive 60-month term of imprisonment for possession of a firearm during a drug trafficking offense. The district court also imposed a total of five years of supervised release, and a $150 special assessment. McIntosh timely appealed.

Opinion

McIntosh challenges the sufficiency of the Government's evidence used to convict him of conspiring to possess with intent to distribute cocaine. We will review the evidence in the light

[1] Following McIntosh's conviction, the Government dismissed one of the two firearm counts, count 4, from the indictment.

most favorable to the verdict. U.S.A. v. El-Zoubi, 993 F.2d 442, 445 (5th Cir. 1993).

Ordinarily, we will affirm a conviction "if a rational trier of fact could have found that the evidence establishes the essential elements of the offense beyond a reasonable doubt." Because McIntosh did not move for a judgment of acquittal at the close of all of the evidence, however, this Court "may set aside the conviction only if affirmance would result in a `manifest miscarriage of justice.'" El-Zoubi, 993 F.2d at 445 (citation omitted). The conviction thus may be reversed "only if the record is devoid of evidence pointing to guilt." Id. (internal quotation and citation omitted).

To establish McIntosh's guilt for conspiracy to possess with intent to distribute cocaine, the Government is required to prove that there was an agreement between two or more persons to possess cocaine with the intent to distribute it, that McIntosh knew of the agreement, and that McIntosh participated in the conspiracy voluntarily. U.S.A. v. Pierre, 958 F.2d 1304, 1311 (5th Cir.) (en banc), cert. denied, 113 S. Ct. 280 (1992). It is not necessary that the Government establish an overt agreement -- a tacit agreement will suffice to support a conviction for conspiracy. U.S. v. Greenwood, 974 F.2d 1449, 1457 (5th Cir. 1992), cert. denied, 113 S. Ct. 2354 (1993). Moreover, a person may be guilty of conspiracy even if he is only a minor

participant, and he need not know all of the overall details. Id.

McIntosh contends that there was no evidence that he had entered into an agreement with another person or persons. In particular, he argues that Walker was the only co-conspirator named in count one of the indictment, but that there was no evidence that Walker knew of the contents of the bag, or that he had any of his own belongings situated in the trunk along with the bag containing the cocaine, or that he evinced any of the nervousness or other behavioral patterns associated with narcotics traffickers. As such, argues McIntosh, the Government failed to establish that McIntosh was part of a conspiracy.

The indictment, however, is not limited to an allegation that McIntosh and Walker were the only members of the conspiracy. Count one of the indictment specifically alleges that McIntosh and Walker conspired "together and with each other and with other persons to the grand jury unknown." In U.S.A. v. Landry, 903 F.2d 334, 338 (5th Cir. 1990), this Court stated that, "a person can be convicted of conspiring with persons whose names are unknown so long as the . . . evidence supports their existence." (internal quotations and citations omitted). Therefore, McIntosh's conviction is not dependent upon a finding that Walker was a member of the conspiracy.

The evidence clearly points to the existence of "persons to the grand jury unknown," and supports a finding that McIntosh was

involved with such people. According to McIntosh's own testimony, he was given the bag containing the cocaine by a person he refused to name. McIntosh refused to testify as to this person's identity because he feared that his family would then be vulnerable to retaliation. This unnamed person, whom McIntosh had known for two years, gave McIntosh the bag in Phoenix. McIntosh was then supposed to drive the bag from Phoenix to Arkansas, where he was to deliver it to another person. He could not identify this third party, but he testified that this person would somehow find him through the phone book because he was staying at his uncle's home. He also testified that he did not know what was in the bag.

These facts establish that McIntosh took possession of a bag filled with over 20 pounds of cocaine from a man he knew -- a man he considered dangerous enough that he would not name him in court for fear that the man would retaliate against McIntosh's family. They establish that McIntosh was to transport this bag to Arkansas where it was to be picked up by a stranger who would somehow find McIntosh. There is no question, then, that people other than McIntosh were involved. See Landry, 903 F.2d at 338.

As for McIntosh's assertions that he was unaware of anything illicit connected with his trip to Arkansas, the jury chose to disbelieve him, concluding that he was a knowing part of the conspiracy. This constitutes a credibility determination well within the jury's province. U.S.A. v. Straach, 987 F.2d 232, 239

(5th Cir. 1993) ("The jury was entitled to assess the credibility of the witnesses and to disbelieve [McIntosh's] feigned innocence...."). Once the jury rejected McIntosh's version, it was entitled to accept the Government's version without having to eliminate every other possible construction of the evidence. U.S.A. v. Maseratti, 1 F.3d 330, 337 (5th Cir. 1993), cert. denied, 114 S. Ct. 1096 (1994), and cert. denied, 114 S. Ct. 1552 (1994).

Therefore, as the record is not devoid of evidence pointing to McIntosh's guilt, see El-Zoubi, 993 F.2d at 445, McIntosh's conviction is AFFIRMED.