**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

---

No. 93-8526
Summary Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GREGORY ODELL TUCKER,

Defendant-Appellant.

---

Appeal from the United States District Court
for the Western District of Texas

(W-93-CR-13-1)

---

(March 28, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:[*]

**BACKGROUND**

Appellant Gregory Tucker and John Wright were indicted for (1) conspiracy to possess with the intent to distribute and conspiracy to distribute "crack" cocaine in violation of 21 U.S.C. § 841(a)(1) and § 846; and (2) possession with the intent to distribute "crack"

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

cocaine in violation of 21 U.S.C. § 841(a)(1). Wright pleaded guilty and testified against Tucker at his trial. A unanimous jury convicted Tucker on both counts after a brief two-day trial. After a hearing, the district court sentenced Tucker to concurrent terms of imprisonment and supervised release and to pay a fine and mandatory assessments. Tucker appeals his conviction and sentence, raising three points of error. Because his first point of error challenges the sufficiency of the evidence to support the jury's verdict, we briefly review the evidence presented at trial.

John Wright testified at Tucker's trial that he lived in Fort Worth, but he was a crack dealer in Waco, Texas. Once or twice a week, he traveled to Waco, where he stayed with Katherine Tucker, appellant's mother, at her residence in the Estella Maxey Housing Complex ("the Complex"). Wright had known Tucker since Tucker was "small." Tucker lived at his girlfriend's residence, which was directly across the street from his mother's residence.

Wright testified that prior to his arrest in December 1992, he sold crack at the Complex for two or three months. He employed "users," including Tucker, to bring customers to him. Wright testified that Tucker would have to bring him "[m]aybe two or three" customers at a time, in exchange for a piece or "crumb" of crack. Tucker would obtain two or three crumbs a day from Wright under this arrangement. Wright also testified that Tucker would bring customers to him four to six times a week.

On December 16, 1992, Tucker and Wright left Waco in Wright's automobile and traveled to Fort Worth, the location of Wright's

source of crack. Wright testified that Tucker had asked to go with him and that he, Wright, agreed because he might need help driving. Once or twice previously, Wright had told Tucker that he was going to Fort Worth for a new supply of crack. He testified that he told Tucker that he was going there "to take care of some business." Tucker admitted that Wright's only source of income was from selling crack. Wright testified that he assumed that Tucker knew the purpose of the trip. Wright said that he left Tucker at a residence in Fort Worth while Wright went to obtain his new supply of crack.

On their way back from Fort Worth on the same day, Tucker asked Wright, "Did you do any good?", to which Wright replied in the affirmative. Tucker later asked Wright for some crack, but Wright refused to give him any. Tucker said to Wright that "he had some friends that wanted to buy [some crack]," and that "when [they] [got] back, . . . he would let them know that [Wright] got some." Tucker would expect to get some crack in return for bringing his friends to Wright.

Officer Billy Kevil of the Waco Police Department testified that he worked as a security officer at the Complex. He testified that he had seen both Tucker and Wright at the Complex on numerous occasions. Kevil had observed "numerous people hanging around in front of both of the apartment complex units," the one where Tucker lived and the one in which Wright stayed when he was in Waco. Kevil also had observed that vehicles "would pull up [in front of

those units], stay for just a few minutes and then leave." To Kevil, who was a police narcotics officer, this was "an indication of drug trafficking."

On December 16, 1992, Officer Kevil received information which resulted in Waco police officers' setting up surveillance for the white Cadillac that Wright owned. Some of the officers spotted the vehicle returning from Fort Worth, followed it, and stopped it at a convenience store. When the officers stopped the Cadillac, Wright was driving and Tucker was a passenger in the front seat. Upon searching the vehicle, Waco police Sergeant Dennis Baier found four plastic bags containing crack, inside a "rolled up" green Army jacket which belonged to Tucker. Chemical analysis showed that the plastic bags contained crack which weighed a total of 110.47 grams. In a pocket of Tucker's jacket, Baier found a .22 caliber handgun wrapped in a toboggan cap.

At the trial, Wright testified that during a stop on the return trip to Waco, he placed the crack under Tucker's jacket without Tucker's knowledge. Tucker testified that he did not know that Wright even had any crack, and he denied that they discussed crack on the way back to Waco. Tucker testified that he went to Fort Worth to visit some girls he knew. He denied that he had been involved in a conspiracy or agreement with Wright to possess or distribute crack. Tucker testified that he was an addict, but that he paid for his habit with money. However, he admitted having "brought a couple of people" to Wright in December 1992, and that at times Wright "would even throw [him] a little piece of

something."

After their arrests in December 1992, Tucker and Wright were released on bail pending state charges. Wright helped pay the fee for Tucker's bail bond. Wright testified that he resumed dealing in crack because he needed to pay his supplier for the crack which the officers seized in December 1992. During that time, Wright testified, Tucker brought him customers on "[t]wo or three or four" occasions. When Wright and Tucker were rearrested in April 1993, they were in Wright's automobile. Wright testified that he had just collected $50 from a man who sold drugs for him, and that Tucker knew the reason for the debt, having been in the drug dealer's house with Wright.

## DISCUSSION

Sufficiency of Evidence

As indicated above, Tucker challenges in his first point of error the sufficiency of the evidence to support the jury's verdict. "The standard of review for sufficiency of evidence is whether any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." United States v. Martinez, 975 F.2d 159, 160-61 (5th Cir. 1992), cert. denied, 113 S.Ct. 1346 (1993). "In evaluating the sufficiency of the evidence, we consider the evidence in the light most favorable to the government with all reasonable inferences and credibility choices made in support of the verdict." United States v. Ivy, 973 F.2d 1184, 1188 (5th Cir. 1992), cert. denied, 113 S.Ct. 1826 (1993). Neither the jury nor the reviewing court is required to

consider each item of evidence in isolation. See United States v. Magee, 821 F.2d 234, 239 (5th Cir. 1987). Items of evidence which would be inconclusive if they were considered separately may, upon being considered in the aggregate, be seen to constitute proof of guilt beyond a reasonable doubt. See United States v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989). Furthermore, "[i]t is not necessary that the evidence exclude every hypothesis of innocence, and `a jury is free to choose among reasonable constructions of the evidence.'" United States v. Guerra-Marez, 928 F.2d 665, 674 (5th Cir.) (quoting United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc) aff'd, 462 U.S. 356 (1983)), cert. denied, 112 S.Ct. 322, 443 (1991).

The Conspiracy Count

The essential elements of a narcotics conspiracy as proscribed by 18 U.S.C. § 846 are "the existence of an agreement that entails a violation of the narcotics laws, the defendants' knowledge of the agreement, and their voluntary participation in it." United States v. Ayala, 887 F.2d 62, 67 (5th Cir. 1989). The "agreement between the other conspirators and the defendant need not be proved by direct evidence, but may be inferred from concert of action." Magee, 821 F.2d at 239. "[A]n express, explicit agreement is normally not required, and a tacit, mutual agreement with common design, purpose, and understanding will usually suffice." United States v. Prieto-Tejas, 779 F.2d 1098, 1103 (5th Cir. 1986). Furthermore, "[a] conspiracy conviction will not be reversed merely because a defendant did not know each detail of the conspiracy . .

. or played only a minor role in the overall scheme." Id.

The evidence established that on or about December 16, 1992, Tucker conspired with Wright to possess crack with intent to distribute it. This is shown in part by the evidence which supports Tucker's conviction on the possession charge, discussed below. The conspiracy to distribute crack is shown by Wright's testimony that Tucker recruited customers for Wright in exchange for crack which Wright provided to Tucker. Wright testified that he had "to have some degree of trust between [himself] and the person bringing [him] the customers," and that he trusted Tucker to do that. Wright testified that Tucker would bring him "[m]aybe two or three" customers at a time, four to six times a week, in exchange for crack. This, and related evidence, proved the existence of their mutual understanding for the distribution of crack. Although they both denied that there was an *express* agreement, their testimony proves beyond a reasonable doubt that Tucker and Wright had a "tacit, mutual agreement" to distribute crack, in violation of 21 U.S.C. § 846. See Prieto-Tejas, 779 F.2d at 1103.

The Possession Count

The elements of the offense of possessing a controlled substance with intent to distribute it are the (1) knowing (2) possession of the controlled substance by the defendant (3) with intent to distribute. United States v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992), cert. denied, 113 S.Ct. 1291 (1993). The

"[i]ntent to distribute a controlled substance may generally be inferred solely from possession of a large amount of the substance." Prieto-Tejas, 779 F.2d at 1101, quoted in Ojebode, 957 F.2d at 1223. Possession of a contraband substance may be either actual or constructive, United States v. Lindell, 881 F.2d 1313, 1322 (5th Cir. 1989), cert. denied, 493 U.S. 1087 (1990), 496 U.S. 926 (1990), and it may be proved by either direct or circumstantial evidence. United States v. Vergara, 687 F.2d 57, 61 (5th Cir. 1982). "Constructive possession is the knowing exercise of, or the knowing power or right to exercise, dominion and control over the proscribed substance." United States v. Marx, 635 F.2d 436, 440 (5th Cir. Unit B 1981).

Officer Baier testified that he found the crack in Tucker's jacket, which was located in the front seat of the vehicle in which Tucker was a passenger. Although both Wright and Tucker denied that the crack belonged to Tucker, Wright's testimony showed that Tucker knew that Wright went to Fort Worth to obtain crack, some of which Tucker intended to obtain for his personal use when he brought customers to Wright. Although Tucker testified that the handgun he possessed was for his own protection relative to another matter, the jury could reasonably infer that he brought it with him on the trip to protect the crack which Wright obtained in Fort Worth. Thus, the jury was entitled to find, based on the evidence, that Tucker constructively possessed the crack found in his jacket. See United States v. Marx, 635 F.2d at 440.

This evidence is also sufficient to support Tucker's

conviction based on the rule that each conspirator can be convicted of substantive offenses committed in furtherance of the conspiracy while he is a member of the conspiracy. A party to a conspiracy may be convicted of a substantive offense in this manner even if that party did not participate in the substantive offense or even know that it occurred. Pinkerton v. U.S., 328 U.S. 640, 647, 66 S.Ct. 1180, 90 L.Ed.2d 1489 (1946); see United States v. Basey, 816 F.2d 980, 997 (5th Cir. 1987). At Tucker's trial, the court gave the required Pinkerton instruction to the jury. See Basey, 816 F.2d at 998. Tucker's first point of error is denied.

Evidence of Tucker's Drug Usage

Tucker contends that the district court abused its discretion by admitting evidence that he was a crack addict and that he received crack in exchange for providing customers to Wright. Tucker argues that the admission of this evidence violated Federal Rule of Evidence 403 because its "probative value [was] substantially outweighed by the danger of unfair prejudice." He also asserts that admission of this evidence violated Federal Rule of Evidence 404(b) because it proved only that "he was an unsavory character and a `crack' addict," whose "only intent was to get `crack' cocaine from Mr. Wright to support his habit." Tucker's only objection at trial, which was overruled, was to evidence of drug dealing both before and after December 16, 1992, as irrelevant and "highly prejudicial."

Tucker's argument lacks merit because "[e]vidence of an uncharged offense arising out of the *same* transactions as the

offenses charged in the indictment is not extrinsic evidence within the meaning of Rule 404(b), and is therefore not barred by the rule." United States v. Maceo, 947 F.2d 1191, 1199 (5th Cir. 1991), cert. denied, 112 S.Ct. 1510 (1992). The evidence of Tucker's personal use of crack and his receiving crack in exchange for providing Wright with customers also was not "extrinsic" because it was "inextricably intertwined with the evidence used to prove the crime charged, [and was] admissible so that the jury [could] evaluate all of the circumstances under which the defendant acted," including Tucker's intent. United States v. Randall, 887 F.2d 1262, 1268 (5th Cir. 1989). Furthermore, the admission of such evidence, which was offered by the Government, was not reversible error because Tucker based his defense on it. His defense was that he did not conspire with Wright or participate in Wright's possession of the crack found in the Army jacket, but that he was only an addict who bought or received crack from his dealer, Wright. Tucker's second point of error is denied.

The Amount of Cocaine For Which Tucker was Accountable

Tucker contends that the district court's calculation of the quantity of crack cocaine attributable to him was clearly erroneous. He argues that the court should not have relied on the hearsay statements of a confidential informant ("CI"), because they lacked sufficient indicia of reliability.

The presentence report ("PSR") states that on November 11, 1992, an unnamed CI provided information that Tucker was one of the

main crack dealers at the Complex, a "middle man" for Wright. After Wright's arrest, he admitted to police "that Tucker was one of his main middle men."

The CI stated "that he had personally seen Tucker in possession of `crack' cocaine on numerous occasions since approximately June, 1992, and had heard Tucker talk about dealing in one-ounce amounts of `crack' cocaine." The CI reported that he had purchased crack from Wright. He stated that on November 5, 1992, in Wright's apartment at the Complex, he "saw Wright with a small paper sack containing approximately 100 rocks of suspected `crack' cocaine"; the CI estimated the total amount of cocaine in the bag to be between one and one-and-a-half ounces.

On November 12, 1992, the CI saw Wright remove a paper sack from under the hood of his Cadillac and carry the sack into his apartment. The PSR states that Wright "told the CI that he had just returned from his supplier in Fort Worth." The PSR erroneously states that "[t]he Ci saw the contents of the sack and believed it to be `crack' cocaine." The CI estimated that the sack contained about nine ounces of crack. The case agent, Officer Gary Harrison of the Waco Police Department, who was assigned to a DEA Task Force in Waco, estimated conservatively that the sack contained from three to four ounces of crack.

Officer Harrison provided $100 to the CI with which to buy crack from Wright, on November 20, 1992. The CI bought 1.4 grams of crack from Wright with this money. "Tucker had made arrangements for the CI to make this purchase and was present when

the purchase occurred [in Tucker's apartment]." The CI "identif[ied] three other apartments in the complex which were `crack' houses supplied by Wright."

At Tucker's sentencing hearing, Officer Harrison testified concerning the PSR information stated above. Harrison also testified that the CI had worked for him for about six years, during which time the CI had on numerous occasions provided information concerning drug activities. This information had always proved to be accurate. Harrison stated that he did not wish to disclose the CI's identity because the CI was still providing such information to him.

Based on the information provided by the CI as related by the case agent, the probation officer found that the total amount of crack attributable to Tucker was 223.87 grams. This consisted of one ounce (28.35 grams) on November 5, 1992, three ounces (85.05 grams) on November 12, 1992, and the 110.47 grams seized on December 16, 1992.

Because the amount of crack was at least 150 but less than 500 grams, Tucker's base offense level was 34. U.S.S.G. § 2D1.1(c) (Drug Quantity Table). The probation officer added two levels because "a dangerous weapon was possessed during commission of the offense." Id. § 2D1.1(b)(1). With a total offense level of 36 and a criminal history category of I, Tucker's guideline range for imprisonment was from 188 to 235 months. U.S.S.G. Ch. 5, Part A (Sentencing Table). The district court, adopting the PSR, sentenced Tucker to serve 188 months.

This Court "will uphold the district court's sentence so long as it results from a correct application of the guidelines to factual findings which are not clearly erroneous." United States v. Sarasti, 869 F.2d 805, 806 (5th Cir. 1989). Accordingly, "[s]pecific factual findings about the quantity of drugs to be used in setting the base offense level are reviewed on appeal only for clear error." United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991).

"[A] presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the sentencing guidelines." United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990). A defendant has "the burden of showing that [information in the PSR] upon which the district court relied in sentencing was materially untrue." United States v. Flores, 875 F.2d 1110, 1113 (5th Cir. 1989). However, his "[u]nsworn assertions do not bear sufficient indicia of reliability to support [their] probable accuracy, and, therefore, should not generally be considered by the trial court in making its factual findings." Alfaro, 919 F.2d at 966 & n.16 (footnotes and quotation marks omitted).

Except for the erroneous statement in the PSR that the CI saw the contents of Wright's paper sack on November 12, 1992, no evidence was produced at Tucker's sentencing hearing to controvert the district court's findings concerning drug quantity. The finding that 85.05 grams of crack was attributable to Tucker on the basis of the November 12 incident was not clearly erroneous; it was

supported by the CI's report that Wright told him he had just returned from his Fort Worth supplier, and that Wright took the sack from under the hood of his car. The finding also is supported by Wright's uncontradicted trial testimony that he was getting three to four ounces of crack a week from his Fort Worth source. The PSR, Officer Harrison's testimony, and Wright's other trial testimony amply supported the attribution of 223.07 grams of crack to Tucker for sentencing purposes. Tucker's final point of error is denied.

We therefore AFFIRM Tucker's conviction and sentence.