

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8637
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRIAN FISH,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(SA-92-CR-109(9))

(May 17, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Brian Fish was convicted of money laundering, possession with intent to distribute marijuana, and conspiracy to possess with intent to distribute marijuana; 18 U.S.C. § 1956(a)(1)(A)(i), 21 U.S.C. §§ 841(a)(1) and 846, and sentenced to 120 months imprisonment and 5 years of supervised release. At Fish's trial, Gerardo Oscar "Jerry" Cantu testified that he acted as a marijuana

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

broker for an organization moving marijuana from the Rio Grande valley to San Antonio, Texas, and that one of the buyers he contacted was Brian Fish. Cantu and Fish met on June 7, 1988, and arranged for Fish to purchase quantities of marijuana.

Cantu testified that transactions with Fish followed a pattern. Fish would fly to San Antonio from Florida, and Fish's driver would make the trip by car. Cantu would meet Fish at the San Antonio airport. The car would be loaded at a stash house at 1604 Loop in San Antonio. Fish paid \$20,000 up front as a downpayment for the marijuana and was given credit for the balance. On June 7, Fish bought about 97 to 112 pounds of marijuana. On June 13, Fish, his driver, Cantu, and Apolonia Carrasco met and stayed together at a motel in San Antonio. At this meeting, Fish paid a \$20,000 downpayment, received about 150 pounds of marijuana, and paid the \$45,000 to \$47,000 balance due from the June 7 transaction.

Cantu testified that on June 26 Fish purchased about 200 pounds of marijuana and paid him about \$77,000, which covered a downpayment and the balance due from the previous transaction. On July 11, Fish purchased about 250 pounds of marijuana and paid Cantu a total of about \$110,000. Cantu testified that Fish bought 250 pounds of marijuana on July 22 or 26 and that Fish paid a total of \$142,500. On August 5 or 6, Fish made another 250-pound purchase and paid Cantu a total of \$130,000. On about August 14, Fish bought 80 pounds of marijuana and paid Cantu a \$20,000

downpayment and \$142,500 for the previous load. Sometime between September 3 and September 7, Fish purchased 150 pounds of marijuana and paid \$32,000 of an outstanding balance. On this delivery, about 100 pounds of the marijuana was lost or "ripped off," and Cantu had to pay the suppliers \$68,000 out of his own pocket to cover the loss. Cantu was unable to recover the full amount of the loss from Fish, and, although Fish and Cantu met in San Antonio to discuss a deal on November 14, 1988, they did not complete any further marijuana transactions.

I

Fish argues there was insufficient evidence to support his conviction for money laundering. To establish a violation of 18 U.S.C. § 1956(a)(1), the government must prove that the defendant "(1) knowingly conducted a financial transaction (2) that involved the proceeds of an unlawful activity (3) with the intent to promote or further that unlawful activity." U.S. v. Thomas, 12 F.3d 1350, 1360 (5th Cir. 1994) (citation and footnote omitted). The term "transaction" includes the "transfer, delivery or other disposition" of these proceeds. 18 U.S.C. § 1956(c)(3). Fish concedes that the government proved that he transferred large sums of cash in the promotion of an illegal purchase of marijuana; however, Fish argues that the government did not prove that the large sums he used to purchase marijuana were the proceeds of some unlawful activity.

Cantu testified that Fish bought the marijuana pursuant to a credit agreement. Fish paid \$20,000 up front and was expected to pay the balance when he picked up his next shipment. The credit arrangement worked without incident until some of the marijuana was lost or "ripped off." Once that occurred, Fish was unable to pay the balance due on the last shipment, Cantu had to cover the \$68,000 loss with his own money, and Fish then attempted to pay off Cantu with \$12,500 and a nine-karat bracelet, which Cantu valued at about \$5,000. The structure of the credit arrangement and the fact that the partial loss of a marijuana shipment caused Fish to be unable to pay off the balance of a shipment comprise sufficient evidence for a rational trier of fact to infer that Fish sold the marijuana and paid off the balance due with proceeds of his sales.

II

The challenged instruction is as follows:

A conspirator need not join a conspiracy at its inception. Rather, he may join it at any point during its existence. Every person who joins an ongoing conspiracy is considered to adopt and be bound by the prior acts and statements made or committed by the other conspirators even though they were made prior to their entrance into the conspiracy.

Fish, citing to U.S. v. Carreon, 11 F.3d 1225, 1235-36 (5th Cir. 1994), argues that the scope of a defendant's conspiratorial agreement is temporally limited to that which the defendant could reasonably foresee. In Carreon the court was dealing with the application of U.S.S.G. § 1B1.3 and was not implying a temporal

limit on the law of conspiracy beyond the context of sentencing. Carreon, 11 F.3d at 1235-1236.

"A conviction will not be reversed for lack of evidence that the defendant was acquainted with or knew all of the coconspirators, or lack of evidence that he knew each detail of the conspiracy, or because he became a member of the conspiracy after its inception, or played only a minor role in the overall scheme." U.S. v. Garcia, 917 F.2d 1370, 1376 (5th Cir. 1990) (internal quotation and citation omitted). The challenged paragraph of the jury instruction accurately reflects the law and facts of Fish's case and is a correct statement of law.

Fish argues that the court's charge prevented the jury from finding the existence of a multiple conspiracy and that the charge amounted to the court's instructing the jury to find Fish guilty. The challenged instruction only addressed the issue of a defendant's culpability with regard to when that defendant becomes involved in a conspiracy. Nothing in that charge precludes a finding of multiple conspiracies, encroaches upon the fact-finding province of the jury, or mandates a guilty verdict. Fish's challenge to the instruction is without merit.

III

Fish argues that a prejudicial variance existed between the single conspiracy charged in the indictment and evidence of multiple conspiracies proved at trial. If an indictment alleges a conspiracy count as a single conspiracy, but the government proves

multiple conspiracies and a defendant's involvement in at least one of them, there is no variance affecting that defendant's substantial rights. See Thomas, 12 F.3d at 1358. Fish was charged with knowingly conspiring to possess with the intent to distribute in excess of 1,000 kilograms of marijuana. The government proved that Fish conspired with others in conducting at least eight transactions involving approximately 1,440 pounds (654 kilograms) of marijuana and about \$700,000. At the very least, the government proved multiple conspiracies and Fish's involvement in one of them. Accordingly, Fish has failed to show that a prejudicial variance occurred.

IV

Fish argues that the district court failed to make adequate findings as to how the drug quantities were calculated. Fish states that the probation officer concluded that at least 1,000 but not more than 3,000 kilograms of marijuana were attributable to Fish. This is incorrect. The probation officer determined that Fish's relevant conduct involved 654 kilograms of marijuana and \$700,500. Presentence report (PSR) ¶ 22. The sentencing judge adopted the findings of the probation officer. This finding is supported by Cantu's testimony at trial. The sentencing judge did not clearly err in calculating the quantity of marijuana attributable to Fish.

V

Fish states that he should have received a reduction in sentence for playing a minor role in the offense. The probation officer found that Fish's role in the offense did not require a downward adjustment. PSR, 33. The sentencing judge also found that Fish was not a minor or minimal participant. The evidence at trial indicated that, over the course of at least eight transactions, Fish purchased 654 kilograms of marijuana for about \$700,500 and arranged for the movement of the marijuana from Texas to Florida. The sentencing judge did not clearly err in denying Fish a minor-participant's reduction in offense level.

VI

For the reasons stated herein, the convictions and sentence of Brian Fish are

A F F I R M E D.