UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 93-8869 & 93-8870
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JESUS RAFAEL ARZATE,

Defendant-Appellant.

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

(P-93-CR-77-2 & P-93-CR-089-2)

(January 23, 1995)

Before WISDOM, JOLLY and JONES, Circuit Judges.

PER CURIAM:*

In this appeal, a criminal defendant, Jesus Rafeal Arzate, challenges the district court's consolidation of two indictments for trial and also the enhancement of his sentence based on a finding that he was an organizer of the conspiracy at issue. Since we find that both challenges are without merit, we AFFIRM.

I.

In August 1993, Jesus Rafeal Arzate, the defendant/appellant,

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* Local Rule 47.5.1 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Pursuant to that Rule, the Court has determined that this opinion should not be published.

was charged in two grand jury indictments[1] with conspiracy to import marijuana, importation of marijuana, conspiracy to possess with intent to distribute marijuana, and possession with intent to distribute marijuana. Each indictment centered around an incident in which the police were able to connect the defendant with shipments of marijuana smuggled into Texas from Mexico.

Over the objections of the defendant, the district court ordered the two indictments consolidated for trial. The jury found the defendant guilty on all eight counts and he was sentenced to 168 months imprisonment, five years of supervised release, and a $200 special assessment.

Indictment I[2]

The events which culminated in the first indictment began when Roberto White, seeking help in smuggling marijuana into Odessa, Texas, got in touch with a government informant. White was looking for an older couple to pose as vacationers and drive a Recreational Vehicle (RV) containing the marijuana through the border checkpoints. The informant, Wilkerson, communicated with the Drug Enforcement Agency (DEA) and arranged to accompany an undercover agent of the DEA to meet the conspirators and arrange for the transportion of the drugs.[3]

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[1] The defendant was charged along with Luis Antonio Arzate and Manuel Arzate in the second indictment and with only Luis Antonio Arzate in the first indictment.

[2] Indictment I refers throughout the opinion to Cause Number P-93-CR-77.

[3] The DEA had no available female agents so it was arranged that Wilkerson and a male member of the Texas Department of Public Safety, Jim Greenle, would act as substitutes for the older couple requested, meet with White, and offer to drive the RV,

On May 31, 1992, after some initial instructions from White, Wilkerson and Greenle drove to the agreed upon location and the RV was loaded with duffle bags filled with marijuana. The defendant, Arzate, and his co-conspirators were present at the loading site. Greenle was given $300 for travelling expenses and according to White, this money came from the defendant.

Greenle, Wilkerson, and White all testified against the defendant at trial. Both Greenle and Wilkerson identified the defendant as one of the men who was present at the loading site and who assisted in placing the drugs in the RV. White testified to the initial plans made with the defendant and his brother, Luis Antonio Arzate, regarding the manner and timeframe of the smuggling operation. According to White, it was the defendant's idea to use an older couple in an RV to increase safety in transporting the drugs. White also testified that "it was their deal," meaning the marijuana belonged to the defendant and his brother. The plan, after crossing the border, was for White and the defendant to meet the load first in Odessa, and then in Dallas, its ultimate destination. White's testimony was supported by the testimony of his assistant, Jacinto Hernandez.

Based on this testimony and the almost 100 pounds of marijuana placed in the RV, the defendant and his co-conspirator, Luis Antonio Arzate, were indicted for four counts of related drug offenses. Both were convicted on all four counts.

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posing as father and son vacationers.

Indictment II[4]

The second indictment centered around a second shipment of marijuana from Mexico recovered by the United States Border Patrol after they received a tip. The marijuana was found in a vehicle stopped near Alpine, Texas carrying three individuals, including Elizardo Benavides-Corrales. Although the defendant was not in the vehicle, it was easily traced back to Manual Arzate, his brother. Benavides testified that he met with both the defendant and his brother and co-defendant, Luis Antonio Arzate, in Mexico. According to Benavides, they met and made plans to have four backpackers carry the drugs across the border. The plan was for the defendant to supply the backpackers with the drugs from his brother's ranch and drop them off near the border. Benavides then picked up the backpackers in a car provided by Manual Arzate and was travelling through Texas when the car was stopped by the border police. Benavides's testimony was supported by the testimony of Manuel Galindo-Garcia who contended that the defendant and Luis Antonio Arzate had recruited him and others to transport the drugs across the border while posing as backpackers. Luis Antonio Arzate and the defendant were convicted. The jury acquitted Manuel Arzate.

Currently, the defendant alleges that two errors were committed during the trial and sentencing process. First, the defendant alleges that the two indictments should not have been

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[4] Indictment II refers throughout the opinion to Cause Number P-93-CR-89.

consolidated for trial and that, as a result of consolidation with the other defendants, his defense was prejudiced. Second, the defendant argues that the trial court improperly enhanced his sentence.

II.

A. *Rule 8(b) Misjoinder*

The defendant alleges the two indictments were misjoined by the district court. Under Federal Rule of Criminal Procedure 13,[5] the district court is authorized to join two indictments. Federal Rule of Criminal Procedure 8(b) also allows for the joinder of defendants.[6] That rule provides in pertinent part:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

The purpose of Rule 8(b) is to balance considerations of judicial

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[5] We do not analyze separately the propriety of consolidating the indictments for trial under Rule 13 "because joint trial of separate indictments under Rule 13 is proper when joinder of counts in a single indictment would have been proper under Rule 8." *U.S. v. Morris*, 647 F.2d 568, 570 n.1 (5th Cir. 1981); see also, *U.S. v. Bova*, 493 F.2d 33, 35 (5th Cir. 1974). Thus, the focus of our analysis is whether joinder was proper under Rule 8.

[6] When joining multiple defendants rather than multiple counts against one defendant this Court has held that Rule 8(b) exclusively controls. *United States v. Bova*, 493 F.2d 33, 35 (5th Cir. 1974); *United States v. Park*, 531 F.2d 754 (5th Cir. 1976). Oddly, both the defendant and the United States focus the arguments in their briefs on Rule 8(a) which is not applicable to this case.

economy against the possibility of prejudice.[7] With these factors in mind, we must determine whether all of the counts charged were part of the same series of acts or transactions. In cases where a set of conspiracies is the focus of prosecution, the question is whether the conspiracies are "substantially interrelated by their facts and participants"[8] and whether the conspiracies constitute parts of "a single criminal enterprise."[9]

In this case, there were two drug shipments planned and organized by the defendant and his two co-conspirators, the drugs apparently came from the same source, a ranch in Mexico, and the shipments were both moved from Mexico to Texas. The participants, however, were not identical and the organizers of the enterprise recruited different sets of individuals to import each shipment of marijuana. Also, each smuggling operation was conducted separately at different times and locations. Thus, it was not unreasonable to argue that the two transactions at issue or not related enough to be joined under Rule 8(b).

This Court, however, has held that "separate conspiracies may be joined if they are part of the same series of acts or

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[7] *United States v. Maggitt*, 784 F.2d 590, 595 (5th Cir. 1986).

[8] *U.S. v. Toro*, 840 F.2d 1221, 1238 (5th Cir. 1988) (holding that counts against five defendants regarding two substantially related conspiracies could be joined under Rule 8(b)).

[9] *United States v. Merida*, 765 F.2d 1205, 1219 (5th Cir. 1985) (holding that a series of transactions by a group associated for the purpose of producing "illicit profits from the importation, manufacture, and distribution of controlled substances" could be properly joined under Rule 8(b)).

transactions."[10] Thus, when, as here, there is a common management team seeking a common goal, each of the acts need not involve the exact same participants or be carried out in the exact same manner. In *U.S. v. Toro*, several counts against five defendants were joined even though both a conspiracy to import drugs and a conspiracy to possess with intent to distribute were alleged.[11] Each conspiracy had different participants but the organizers of each were aware of the acts intended by the members of the other conspiracy.[12] This Court held that all counts were properly joined since the conspiracies were so closely related.

Similarly, in *United States v. Merida*, several counts against six defendants were considered properly joined since "[a]ll the diverse transactions were part of a single criminal enterprise designed to produce illicit profits from the importation, manufacture, and distribution of controlled substances."[13]

The conspiracies alleged here are analogous to the sets of conspiracies alleged in both the *Toro* and *Merida* cases. Both smuggling operations here were planned and financed by the defendant and his co-conspirator, Luis Antonio Arzate. Both were intended to bring the defendants money from the illegal importation and distribution of the drugs they were producing in Mexico. Accordingly, they are two legs of one body and are properly joined

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[10] *Toro*, 840 F.2d at 1238.

[11] Id. at 1238-1239.

[12] Id.

[13] 765 F.2d 1205, 1218-1219 (5th Cir. 1985).

under Rule 8(b).

Even assuming that the co-defendants and counts were improperly joined under Rule 8, the defendant still bears the burden of showing that the misjoinder was not harmless error. In *U.S. v. Lane*, the U.S. Supreme Court decided that "we do not read Rule 8 to mean that prejudice results *whenever* its requirements have not been satisfied."[14] Rather, the Supreme Court has held that reversal is only necessitated by a misjoinder which "results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict."[15] The Supreme Court cataloged the relevant considerations in making this determination: (1) overwhelming evidence of guilt; (2) jury instructions offered by the trial court to advise the jury on the segregation of evidence; and (3) the likelihood that the misjoinder resulted in the admission of prejudicial evidence not otherwise admissible against a particular defendant.

In this case, all three factors counsel against reversal. First, several eyewitnesses testified against the defendant on all eight counts. At least one of these witnesses was an agent of the DEA. The only defense evidence offered by the defendant was his own denial of involvement and allegations that some of the government witnesses lacked credibility. The credibility of witnesses, including the defendant, is a question for the jury and we cannot reject on credibility grounds evidence accepted by the

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[14] 474 U.S. 438, 449 (1986) (emphasis in original).

[15] Id. at 449.

jury at trial.

Also, the trial court adequately instructed the jury on how to separate the evidence pertaining to each defendant and to each count.[16] Since Manuel Arzate was acquitted of the counts against him in indictment II, the backpacking operation, we can assume that the jury understood and applied those instructions.

Finally, the defendant has made no suggestion that any evidence presented at trial against his co-defendants is not also admissible against him. In fact, many of the witnesses who connected the defendant's co-defendants to the crimes also linked the defendant to the smuggling operations.

Thus, we conclude that the defendant's claim of misjoinder is without merit. Even assuming, however, that the cases against the three defendants were misjoined, we can offer the defendant no relief since, in this case, such misjoinder was harmless error.

B. *Sentence Enhancement*

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[16] The trial court judge gave many standard instructions about reasonable doubt and judging the credibility of witnesses. The judge also instructed the jury that:

> A separate crime is charged against one or more of the defendants in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. Also, the case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime or any other defendant. You must give separate consideration to the evidence.

The defendant argues that, although his acts "arguably qualify him for a three point enhancement as a manager or supervisor under [Sentencing Guideline] 3B1.1(b)," the trial court erred when it enhanced his sentence by four points. In fact, the defendant's sentence was enhanced by only two points based on a finding in the pre-sentencing report that the defendant was an organizer or leader of criminal activity.

Because of this error by the defendant, we cannot have an understanding of his objections to the sentencing.

III.

We reject both of the defendant's allegations of error and AFFIRM the judgment of the district court.