

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10216

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTHONY SHAWN STEVENS, a/k/a
"Shawn Prince" and BRIAN ANTHONY
DAVIS, a/k/a "Stamma", and RICHARD
WILLIAM SKYERS,

Defendants-Appellants.

Appeal from United States District Court
for the Northern District of Texas
(3;92-CR-365-D)

(May 24, 1995)

Before HIGGINBOTHAM, SMITH and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:*

Co-defendants, Anthony Shawn Stevens, Brian Anthony Davis, and Richard William Skyers, appeal their respective convictions and life sentences for conspiracy to possess cocaine with intent to distribute. Among his various contentions, each defendant challenges his conviction due to either plain error, or to an alleged abuse of discretion by the district court. Each defendant also challenges the district court's application of the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Sentencing Guidelines. Finding no reversible error, we affirm each conviction and sentence.

FACTS AND PROCEDURAL HISTORY

The three defendants were named among sixty-one defendants in a superseding indictment which was filed October 6, 1992. Anthony Shawn Stevens, Brian Anthony Davis, and Richard William Skyers were charged with conspiracy to possess with intent to distribute and distribution of 5 kilograms or more of cocaine and 50 grams or more of crack cocaine, in violation of 21 U.S.C. § 846. The three were tried together before a jury, and each was convicted as charged on October 21, 1993.¹ The district court separately sentenced each defendant to a life term of imprisonment without parole,² and each defendant appeals.

Evidence adduced at trial revealed the following facts. The co-defendants were involved with the Anthony Allen family cocaine distribution organization (The Allen Group). The defendants were members of this group during various times from 1987 through mid-1991. The Allen Group set up several retail centers which distributed "crack" cocaine (cocaine base) in the Dallas, Texas area. These distribution centers were residences, known as "traps," in which Allen Group "workers" lived while they "cooked" and sold the crack. Many Allen Group employees were

¹ In addition, Brian Anthony Davis was charged with and convicted of money laundering. He received a concurrent sentence for this conviction, but does not appeal that conviction or sentence. Thus, this conviction is not discussed herein.

² Stevens and Skyers were sentenced on February 18, 1994, and Davis was sentenced on March 4, 1994.

Jamaican nationals who were recruited from Brooklyn, New York to work with these distribution centers. The traps were named by their addresses. Among the many traps used during the conspiracy were the following: 2614 Merlin, 3215 Elihu, 2518 Cleveland, 2609 Meyers, 3526 Herrling, and 3518 Wendelkin.

Through its complex network of suppliers, the Allen Group obtained cocaine from sources in several major cities in the United States. There were several positions within the Allen Group: sellers ("workers"); money counters; recruiters; on-location managers known as "monitors"; and "runners" who delivered crack to the traps, picked up money from the traps, and in most cases had some level of supervisory authority over the monitors and workers. Money was transported from Dallas to New York City by couriers and by Western Union wire transfers. During April and May 1990, the Merlin trap sold about one kilogram of crack, and grossed approximately \$100,000, per day. Both Stevens and Davis were part of the conspiracy during May of 1990. Skyers was a monitor for the Elihu trap during a two or three month period in 1987; he dropped out of the group for a few years but returned during September through December of 1990 as a runner or courier for the Merlin, Cleveland, and Elihu traps. It was the general practice to have firearms in each trap in order to protect the cocaine and the money.

The jury convicted each of the three defendants as charged, and the district court sentenced each defendant to life imprisonment without parole. Stevens, Davis, and Skyers appeal

their convictions and sentences. Stevens challenges several of the district court's evidentiary rulings and two upward adjustments to his base offense level under the Sentencing Guidelines. Davis contends that the evidence showed multiple conspiracies and was thus insufficient to sustain his conviction on Count One of the superseding indictment. Davis also attacks the district court's evidentiary ruling, as well as the district court's application of the Sentencing Guidelines. Skyers challenges his conviction based upon alleged prosecutorial misconduct during closing argument, and challenges the sufficiency of the evidence to support the calculation of his offense level under the Sentencing Guidelines. Skyers also contends that the variance between offense levels 42 and 43 constitutes cruel and unusual punishment and is therefore unconstitutional. For the following reasons, we find no reversible error as to any of the challenged convictions or sentences.

DISCUSSION

Evidentiary Rulings

1. Testimony of Detective Hotz

On March 26, 1991, Dallas Police Detective Alan D. Hotz arrested Anthony Shawn Stevens and several others at the La Mirage Motel after executing a search warrant. Stevens was arrested in Apartment 23 on the second floor of the motel because he was found to be in possession of a small quantity of marijuana. The government had presented evidence that the Allen Group sold crack cocaine out of the first floor rooms of the motel. No cocaine was found in the second floor motel apartment in which Stevens was

arrested. In his brief, Stevens asserts that the district court erred in allowing Detective Hotz "to testify that based on his experience Stevens was selling drugs at that location and the drugs simply were not discovered." Stevens contends that, because the only other witnesses against him were self-interested felons and co-conspirators, this testimony by a disinterested witness (Detective Hotz) was unique and very prejudicial. He argues that this testimony was inadmissible pursuant to F.R.E. 403 (as prejudicial) and F.R.E. 608 (as character evidence).

In the absence of an abuse of discretion, we take care not to infringe on the district court's "broad discretion over the admissibility of evidence, including its relevance, probative value, and prejudicial nature." See, United States v. Parziale, 947 F.2d 123, 129 (5th Cir. 1991), cert. denied, 503 U.S. 946, 112 S.Ct. 1499, 117 L.Ed.2d 638 (1992); United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (*en banc*), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). The major function of Federal Rule of Evidence 403 is limited to excluding matters of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. See United States v. Pace, 10 F.3d 1106, 1116 (5th Cir. 1993), cert. denied, 114 S.Ct. 2180, 128 L.Ed.2d 899 (1994), quoting United States v. McRae, 598 F.2d 700, 707 (5th Cir. 1989, cert. denied, 444 U.S. 862, 100 S.Ct. 128, 62 L.Ed.2d 83 (1979)). Federal Rule of Evidence 608 generally excludes an attack or support of a witness' credibility "by evidence in the

form of opinion or reputation", or by extrinsic evidence of specific instances of a witness' conduct.

Detective Hotz testified that his experience was that, on other occasions, officers had conducted other searches --some in the same motel as that in which Stevens was arrested-- but did not find cocaine because it had been hidden. Stevens' counsel objected, asserting that this testimony was irrelevant, prejudicial, and speculative. The district court overruled the objection. Detective Hotz stated that subsequent undercover activities revealed hiding places for cocaine which had been missed during these other searches. Detective Hotz did not state an opinion as to whether Stevens was selling drugs. He described his knowledge about occurrences during police searches and undercover activity but did not speculate or opine about its implication as to the March 26, 1991 search of Apartment 23. While possibly implicating the Allen Group because it used the first floor of the motel as a trap, this testimony about other searches and hiding places made no reference to Stevens and included no "opinion" testimony. The testimony was relevant to show Stevens' presence in a motel in which cocaine had been found and in which other apartments were used as an Allen Group trap. This testimony was given during redirect examination and, arguably, was relevant to the cross-examination inquiry about the fact that no cocaine was found in Room 23 during execution of the instant search warrant.

Stevens suggests that he was prejudiced by the fact that Detective Hotz' testimony lends some credibility to the testimony

of the co-conspirators. His real complaint is that Detective Hotz' testimony is more credible than that of the co-conspirators. Given the other evidence presented to the jury regarding the amounts of cocaine involved in the conspiracy, as well as the other testimony about Stevens' involvement, we find no F.R.E. 403 prejudice to Stevens from this testimony.

We also find that F.R.E. 608 provides no basis of relief because Hotz' testimony was neither Rule 608(a) opinion or reputation evidence about a witness' character, nor was it Rule 608(b) extrinsic evidence of specific instances of a witness' conduct. Accordingly, we find no error in the admission of Detective Hotz' testimony.

Brian Anthony Davis asserts that admission of Detective Hotz' testimony was error because there was no evidence that the search of Room 23 was related to the conspiracy. The record does not indicate that Davis objected to any of Hotz' testimony about the Room 23 search. Error may not be predicated upon a ruling which admits evidence, absent a timely objection. F.R.E. 103(a)(1). Moreover, Davis has failed to show either an affected substantial right or prejudice to him from Hotz' testimony about either the search or Stevens' arrest, and thus has failed to show plain error. Accordingly, we reject Davis' assertion as frivolous.

2. Summary Evidence: Testimony and Chart

Stevens also complains of alleged error arising from evidence presented through Dallas Police Detective Charles Storey. Detective Storey summarized the evidence, based upon the

government's theory of the case, by use of "photograph boards" which displayed a number of photographs that had been identified and introduced as evidence. Two of the boards displayed photographs of people, and two displayed photographs of locations with which various people were alleged to be associated. Stevens contends that the district court erred in allowing Detective Storey to present summary evidence because the evidence adduced at trial was not voluminous or confusing. We review this admission of evidence for abuse of discretion. United States v. Stephens, 779 F.2d 232, 239 (5th Cir. 1985).

We find no abuse of discretion in the district court's decision to admit the summary evidence. Detective Storey's testimony presented nothing untoward; the district court properly advised the jury of its obligation to disregard this summary testimony and charts to the extent that it inaccurately characterized the evidence, as well as to the extent that the underlying evidence was not credible. This three week trial presented to the jury testimony and other evidence about many of the 61 co-conspirators, about the conspiracy's activities in different locations in Texas and in New York, and about the participation of each of the three co-defendants in the conspiracy. We reject this contention as frivolous.

3. Cross-Examination

Stevens contends that the district court both abused its discretion and violated his Sixth Amendment right to confrontation by limiting his cross examination of two of the government's

witnesses. He argues that he was prevented from attacking the credibility of several government witnesses because he was not allowed to ask two witnesses about their knowledge of specific instances of the torture and murder of one person, and the torture of another, both of whom were co-conspirators who had stolen money from the Allen Group. According to Stevens, "[i]t was a theme of co-conspirator testimony that Stevens was demoted for 'messing' with the money as a monitor." He asserts that the excluded testimony would have shown what really happened to people who "messed with money", and would have impeached the credibility of the government witnesses.

The substance of the excluded testimony was stated, outside the presence of the jury, in a proffer by defense counsel. The proffer describes the use of cigarettes to burn skin and knives or other objects to either inflict wounds or to insert into existing wounds, and it involves the torture of two men, one of whom was murdered. The witnesses from whom defense counsel anticipated this testimony invoked their Fifth Amendment right not to testify on this subject. The district court determined that the witnesses could be cross-examined, but not on these specific incidents.

Insofar as the Sixth Amendment right to confrontation is concerned, the district court retains wide latitude to impose reasonable limits on cross examination based on concerns which include harassment, prejudice, confusion of the issues, and interrogation that is repetitive or only marginally relevant.

United States v. Tansley, 986 F.2d 880, 886 (5th Cir. 1993) (citing Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674, 683 (1986)). The relevant inquiry is whether the jury had sufficient information to appraise the witness' motives and bias. Tansley, id..

The jury heard evidence that Stevens was a monitor at the Merlin trap and the Elihu trap and that he did not properly perform the duties of monitor and was demoted to runner. One of his failures was that he "shorted" the Elihu trap runner. The proffered testimony does not indicate whether the tortured men had stolen an amount comparable to the amount that Stevens was "short", or had occupied higher positions than did Stevens. Even if it were an Allen Group rule to use violence or torture as discipline, there was no indication that Stevens' acts or omissions fell within whatever criteria invoked application of that rule. Finally, with regard to the issue of impeachment, the record shows that the jury had ample information from which it could evaluate the defendants' allegations about the government witnesses' bias and motives. Stevens was given a fair opportunity to challenge the witnesses, and to present the theory that he could not have been an Allen Group monitor who was demoted for stealing money because they did not torture or kill him. Thus, we find no abuse of discretion in the district court's decision to exclude this testimony.

Prosecutorial Misconduct

Richard William Skyers challenges as improper three statements made during the government's closing rebuttal argument.

From our review of the record it appears that in a these three instances the government prosecutor's zealousness led him to give a personal commentary about the evidence or about how the jury should act. Skyers correctly observes that, because he did not object to the comments, these statements are reviewed only for plain error.

Under Fed.R.Crim.P. 52(b), this court may correct forfeited errors only when the appellant shows that there is an error that (1) is clear or obvious, and (2) affects his substantial rights. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), cert. denied, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995) (citing United States v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1776-79, 123 L.Ed.2d 508 (1993)). If these factors are established, the decision to correct the forfeited error is within the sound discretion of the reviewing court, and the court will not exercise that discretion unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 113 S.Ct. at 1778.

The jury had heard evidence that all three defendants were involved in the Allen Group's distribution of cocaine. The record shows that error, if any, from the challenged statements was slight and insufficient to cast doubt upon the jury's verdict. Skyers' counsel did not object. Thus, while inappropriate and improper, these statements do not rise to the level of plain error.

Multiple Conspiracies

Brian Anthony Davis contends that the evidence adduced at trial proves several separate and distinct conspiracies, rather than one conspiracy as charged in the superseding indictment. He argues that his substantial rights have been prejudiced "because, under the Sentencing Guidelines, [the appellants'] individual punishments have been increased by reason of conviction of one conspiracy wherein two separate and distinct conspiracies were shown." Thus, Davis suggests that the relevant conduct under the Guidelines would have included a lesser amount of crack cocaine if he had been found a participant in only one of the alleged two conspiracies.

We affirm a jury's finding that the government proved a single conspiracy unless the evidence and all reasonable inferences, examined in the light most favorable to the government, is such that reasonable jurors could not find a single conspiracy beyond a reasonable doubt. United States v. DeVarona, 872 F.2d 114, 118 (5th Cir. 1989).

Davis contends that the evidence shows a separate conspiracy operated by each of two Allen brothers. The evidence shows that in many cases, each brother operated the same trap bi-weekly, so that every other week the same brother was responsible for delivering cocaine to the trap. In this manner, the trap operated continuously unless shut down due to "heat" from the police. The government presented evidence from which reasonable jurors could find, beyond a reasonable doubt, that Davis and his

co-defendants were part of a single, interlocking conspiracy on the part of the Allen Group to distribute crack cocaine in the Dallas area. The jury agreed, and we affirm the jury's finding.

Moreover, we are not persuaded by Davis' argument that his substantial rights were prejudiced because the single conspiracy charge affected his punishment under the Sentencing Guidelines. The Sentencing Guidelines address various factors to be considered by the sentencing court after the merits of the defendant's guilt have been addressed. Davis' argument mixes apples and oranges by suggesting that we should examine whether the evidence of his conviction is sufficient to show one conspiracy where there were several because of the effect upon an alleged substantial right to a lesser punishment under the Sentencing Guidelines.

Challenges to the Guidelines

1. The District Court's Application of the Guidelines

The presentence investigation report for each co-defendant indicated that more than fifteen kilograms of cocaine was part of the individual defendant's relevant conduct. This amount yielded a base offense level of 42. U.S.S.G. § 2D1.1(c)(1).³ Each of the three presentence reports also recommended an upward adjustment for the defendant's role in the conspiracy, and for possession of a weapon. Each of the three co-defendants challenges the U.S.S.G. § 3B1.1 role adjustment. Davis and Skyers each

³ The 1993 Sentencing Guidelines were used by the district court and are used herein, unless otherwise noted.

challenge the sufficiency of the evidence to support the district court's finding that fifteen or more kilograms of crack were attributable to him as relevant conduct under the Sentencing Guidelines. They argue that the evidence presented at the sentencing hearings did not have sufficient indicia of reliability because it was based upon hearsay statements of co-conspirators who either had, or expected, some benefit in the form of more lenient sentencing. They also contend that the government failed to prove the duration of their individual participation in the conspiracy, and that the district court did not make individualized findings with regard to the relevant conduct. Stevens and Skyers also challenge the district court's U.S.S.G. 2D1.1(d)(1) two-level upward adjustment for possession of a weapon. As discussed below, our review of the record, including but not limited to the sentencing transcripts, reveals no error in the district court's findings.

Legal Principles

In the case of jointly undertaken criminal activity, the base offense level is determined on the basis of all reasonably foreseeable acts and omissions of others, in furtherance of the jointly undertaken criminal activity, which occurred during the commission of the offense of conviction. U.S.S.G § 1B1.3(a)(1)(B). The party seeking an upward adjustment in the sentence level must prove facts necessary to support the adjustment by a preponderance of the evidence. United States v. Alfaro, 919 F.2d 962, 965 (5th Cir. 1990). We review a district court's findings of fact about

the quantity of drugs implicated by the crime for clear error. United States v. Rivera, 898 F.2d 442, 445 (5th Cir. 1990). Likewise, we review for clear error a district court's findings of facts which support an offense level increase for possession of a dangerous weapon during a conspiracy. Alfaro at 965. Thus, if the district court's view of the evidence is plausible in light of the entire record, we may not reverse even though convinced that had we been sitting as the trier of fact we would have weighed the evidence differently. See United States v. Rogers, 1 F.3d 341, 342 (5th Cir. 1993).

The district court has broad discretion in its consideration of the reliability of information submitted as to the quantity of drugs involved. United States v. Martinez-Moncivais, 14 F.3d 1030, 1039 (5th Cir.), cert. denied, 115 S.Ct. 72, 130 L.Ed.2d 27 (1994). Credibility determinations in a sentencing hearing "are peculiarly within the province of the trier of fact." United States v. Sarasti, 869 F.2d 805, 806 (5th Cir. 1989). A sentencing court may use the construction of evidence in a presentence report to resolve a factual issue, rather than relying on the defendant's version of the facts. United States v. Beard, 913 F.2d 193, 199 (5th Cir. 1990).

Operative Facts and Analysis

At Stevens' sentencing hearing, the government presented evidence of the following: Stevens entered the conspiracy during the second week of April, 1990. He was a worker and then, for a few weeks, he was a monitor at the Merlin and Elihu traps until

sometime in July of 1990. During that time, trial evidence and co-conspirator statements showed that approximately 32 to 42 kilograms of crack were distributed through those two traps which operated twenty four hours per day. At the Merlin trap, one worker would cover another worker with a gun during the crack cocaine sales. A nine millimeter pistol was among the items seized during a search at the Merlin trap on May 23, 1990. The co-conspirators, whose statements were referred to during the sentencing hearing, were witnesses at the instant trial. The district court increased Stevens' offense level from 42 to 44 due to the firearm adjustment, disregarded the role adjustment, and then reduced the offense level to 43 in accordance with the Guidelines.

At Davis' sentencing hearing, the government presented evidence that based upon trial testimony and co-conspirator statements, Davis participated in the conspiracy between October or November of 1988 and September or October of 1990. He was arrested five times during his participation in the conspiracy. The amount of crack cocaine reasonably foreseeable and attributable to Davis during the time periods when he was *not* incarcerated was more than 23 kilograms. After his initial involvement as a worker, at least by October 1989 Davis was a runner for the Meyers Street location and by April 1990 he was a runner for the Wendelkin and Herrling Street traps. Weapons were made available to the workers at the Wendelkin trap. In addition, Davis was arrested, and identified by photographic lineup, as the person who shot a man in the leg at one

of the Allen Group's traps in December 1988.⁴ The district court found the government presented evidence with sufficient indicia of reliability to show that (1) more than 15 kilograms of crack cocaine was attributable to Davis under U.S.S.G. § 1B1.3(a)(1)(B) and thus Davis' base offense level at 42; (2) this level should be increased by two to 44 either because Davis had possessed a weapon in December of 1988 in the course and scope of the conspiracy, or because the trap workers' possession of firearms was within Davis' reasonable foreseeability; and (3) Davis was a manager under U.S.S.G. § 3B1.1(c), thus warranting a two-level upward adjustment to level 46. The district court then reduced the offense level to 43, in accordance with the sentencing table.

At Skyers' sentencing hearing, the government presented evidence that based upon trial testimony and co-conspirator statements, Skyers monitored the Elihu trap in August 1987 and was a runner for Elihu and other traps between August and November of 1990. Within those time periods, the traps with which Skyers was associated distributed 17 to 26 kilograms of crack cocaine. In addition to their delivery and pick-up duties, the runners conveyed managerial instructions to the monitors and workers. Skyers was given a firearm by a co-conspirator during his participation in the conspiracy and was arrested in possession of a nine millimeter gun during the existence of the conspiracy. The district court

⁴ Davis' counsel also elicited testimony on cross-examination at the sentencing hearing that Davis was arrested in an apartment which was not used as a "trap", and that the firearm was not found with him or in the apartment.

accepted the presentence investigation report's calculation of 42 as the base offense level, along with the two level upward adjustment due to the weapon. The district court noted that, if it were to reach the question of Skyers' role in the conspiracy, it would add the § 3B1.1 upward adjustment for the role of manager or supervisor. However, because the adjusted level exceeded the maximum of 43, the district court did not reach the role issue.

Davis and Skyers each objected to the district court's finding that more than 15 kilograms of crack were reasonably foreseeable quantities of the drug within the scope of his jointly undertaken criminal activity. Stevens and Skyers each objected to the district court's two-level weapons adjustment. All three objected to the role adjustment, but Davis' sentence was the only one which included the U.S.S.G. § 3B1.1 adjustment. In a separate, individualized sentencing hearing for each defendant, the government presented information regarding the adjustments to the base offense level. Aside from attacking the co-conspirator's credibility, not one of the defendants presented any evidence that the information could not be relied upon because it was materially untrue, inaccurate, or reliable. Each defendant had an opportunity to confront and cross-examine the detective about the sources of his information, as well as about his calculations and assumptions. The district court found that the government's evidence was derived from a source which had sufficient indicia of reliability. We agree and find no clear error in any one of the district court's determinations of the reasonably foreseeable amount attributable to

either Davis or Skyers, in the weapons adjustment to either Stevens or Skyers' sentence, or in the role adjustment to Davis' sentence.⁵

Finding no error in the district court's application of the Guidelines, each of the three life sentences is affirmed.

2. Constitutionality of the Level 43 Mandatory Sentence

Skyers contends that the variance between offense levels 42 and 43 constitutes cruel and unusual punishment and is therefore unconstitutional. The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment. In evaluating a sentence under the Eighth Amendment, we determine only whether the sentence was within constitutional limits. United States v. Sullivan, 895 F.2d 1030, 1032 (5th Cir. 1990), cert. denied, 498 U.S. 877, 111 S.Ct. 207, 112 L.Ed.2d 168 (1990). The Supreme Court has upheld the constitutionality of the Sentencing Guidelines. Mistretta v. United States, 488 U.S. 361, 109 S.Ct. 647 (1989). The district court complied with the Sentencing Guidelines in imposing Skyers' sentence thus, the sentence was within constitutional limits.

CONCLUSION

For the foregoing reasons, we AFFIRM each defendant's conviction and sentence.

⁵ Stevens and Skyers may not complain of the role adjustment because they did not receive this adjustment.