IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10398
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRENCE R. ROCHESTER, III,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:93-CV-951-R(3:91-CR-372-R)
- - - - - - - - - -
(July 22, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

Terrence Ricardo Rochester, III, moves this Court for leave to proceed in forma pauperis (IFP) on appeal. To proceed IFP on appeal, Rochester must show that he is a pauper and that he will present a nonfrivolous appellate issue. Carson v. Polley, 689 F.2d 562, 586 (5th Cir. 1982).

Rochester argues that the indictment is insufficient. This Court reviews the sufficiency of an indictment de novo. United States v. Nevers, 7 F.3d 59, 62 (5th Cir. 1993), cert. denied,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

114 S.Ct. 1124 (1994). When a challenge to the sufficiency of an indictment is presented for the first time on collateral review, as in this case, this Court can consider the challenge "only in exceptional circumstances." United States v. Prince, 868 F.2d 1379, 1384 (5th Cir.), cert. denied, 493 U.S. 932 (1989). An indictment is constitutionally sufficient if it: "1) enumerates each prima facie element of the charged offense, 2) notifies the defendant of the charges against him, and 3) provides the defendant with a double jeopardy defense against future prosecutions." Id.

An indictment that tracks the statutory language is generally sufficient. United States v. Arlen, 947 F.2d 139, 145 (5th Cir. 1991) (internal quotations and citation omitted), cert. denied, 112 S.Ct. 1480 (1992). The indictment tracked the statutory language and provided a cite to the appropriate statute. See 21 U.S.C. § 841(a)(1). The first element was satisfied.

The second element is met if the indictment describes the specific facts and circumstances surrounding the offense in such a manner as to inform the defendant of the particular offense charged. Nevers, 7 F.3d at 63. To the extent that Rochester argues that the indictment is insufficient because it failed to identify the co-conspirators, a defendant can be convicted of a conspiracy without any of the co-conspirators being named in the indictment. See United States v. Landry, 903 F.2d 334, 338 (5th Cir. 1990).

Although Rochester correctly asserts that a confidential informant or government agent could not be a co-conspirator, and a conspiracy cannot exist between a defendant and a confidential informant or a government agent, see United States v. Manotas-Mejia, 824 F.2d 360, 365 (5th Cir.), cert. denied, 484 U.S. 957 (1987), as noted by the district court, Rochester offers no evidence that the individual to whom he distributed crack cocaine on October 16, 1991, was a confidential informant at that time. The second element was satisfied.

To the extent that Rochester argues that the indictment fails to provide him with a double jeopardy defense, he bases that argument on the fact that the indictment did not identify any co-conspirators. An indictment need not identify co-conspirators. Landry, 903 F.2d at 338. The third element was satisfied.

To the extent that Rochester's IFP motion could be construed as raising a sufficiency-of-the-evidence argument, such an argument is to no avail. Rochester pleaded guilty and thus waived his challenge. See Nobles v. Beto, 439 F.2d 1001, 1002 n.1 (5th Cir. 1971).

Because Rochester's motion for IFP presents no issue of arguable merit and is thus frivolous, see Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983), IFP is DENIED. Because the appeal is frivolous, it is DISMISSED. See 5th Cir. R. 42.2.

LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS DENIED; APPEAL DISMISSED.