UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10936
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD MACK MARTIN,

Defendant-Appellant.

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

(3:92 CR 434 D)

September 5, 1995

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

PER CURIAM:[*]

Donald Mack Martin appeals his conviction of conspiracy to possess and distribute phenylacetic acid knowing and having reasonable cause to believe that it would be used to manufacture methamphetamine, and the denial of his motion for a new trial.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Finding no error, we affirm.

Background

Martin and a coconspirator negotiated with undercover officers for the purchase of phenylacetic acid, with Martin agreeing to provide two pounds of methamphetamine in exchange for thirty pounds of the acid. After receiving the acid, Martin was arrested. Martin was indicted for conspiracy, in violation of 21 U.S.C. § 846, and for the substantive count of possession of phenylacetic acid with the intent to manufacture methamphetamine in violation of 21 U.S.C. § 841(d)(1). A jury returned a verdict of guilty on the conspiracy count and not guilty on the substantive count. Martin timely appealed.

Analysis

Martin contends that the district court erred by entering judgment on the conspiracy count, in view of his acquittal of the substantive offense. There is no logical inconsistency in the two verdicts. The conspiracy count requires knowledge that the acid would be used to manufacture a controlled substance; the substantive count requires proof of actual intent. Further, a conspiracy may be predicated upon an overt act by any of the three coconspirators--not necessarily by Martin.[1] Even if the verdicts herein were logically inconsistent Martin would receive no relief because "a jury may return inconsistent verdicts in a criminal

[1]See **United States v. Fuiman,** 546 F.2d 1155 (5th Cir.), cert. denied, 434 U.S. 856 (1977).

case, even where the inconsistency is the result of mistake or compromise."[2] This assignment of error is without merit.

Martin next maintains that the trial court violated **Fed.R.Evid.** 404(b)[3] by admitting evidence of a 1991 arrest for illegally purchasing chemicals, including phenylacetic acid, with the intent to manufacture controlled substances. We find no abuse of discretion in the trial court's admission of this evidence, which was relevant to the issue of Martin's intent to manufacture methamphetamine and his knowledge that it was illegal to possess phenylacetic acid for such a purpose.[4] Admission of the evidence was not unduly prejudicial, especially in view of the court's limiting instructions.[5] Contrary to Martin's suggestion, the arrest was admissible even though it did not result in an

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[2]**United States v. Rosalez-Orozco,** 8 F.3d 198, 202 (5th Cir. 1993)(quoting **United States v. Williams,** 998 F.2d 258, 262 (5th Cir. 1993)).

[3]**Fed.R.Evid.** 404(b) provides in pertinent part:

> **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[4]**United States v. McCarty,** 36 F.3d 1349 (5th Cir. 1994); **United States v. Beechum,** 582 F.2d 898 (5th Cir. 1978), cert. denied, 440 U.S 920 (1979)(explaining that admissibility under Rule 404(b) is determined by a two-part test, inquiring whether the evidence is relevant to an issue other than the defendant's character and whether its probativeness substantially outweighs any undue prejudice).

[5]**McCarty.**

indictment or formal charge.[6]

Martin also contends that the evidence was insufficient to support the verdict. Because the basis of Martin's complaint is that the phenylacetic acid introduced at trial--by way of photographic evidence--was not proved to be the acid seized at his arrest, this allegation is properly construed as a challenge to the authenticity of the photographs. Martin did not object to their admission. We find no error, much less the required plain error, which would warrant reversal.[7] Once a trial judge makes the preliminary authenticity determination, proof of a connection between physical evidence and a defendant goes to the weight of the evidence.[8] Here, the testimony of the officer provided a sufficient basis for the jury to determine that the photographs of phenylacetic acid was of that acid seized at Martin's arrest.

Finally, the trial court did not err in refusing to grant Martin leave to move for a new trial, as his two motions were not timely filed.[9]

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[6]**United States v. Gonzalez-Lira,** 936 F.2d 184 (5th Cir. 1991).

[7]**United States v. Mojica,** 746 F.2d 242 (5th Cir. 1984)(failure to object to authenticity of photograph limited appellate review to plain error).

[8]**United States v. Shaw,** 920 F.2d 1225 (5th Cir.), cert. denied, 500 U.S. 926 (1991); **United States v. Soto,** 591 F.2d 1091 (5th Cir.), cert. denied, 442 U.S. 930 & 444 U.S. 845 (1979).

[9]**Fed.R.Crim.P.** 33 directs that a motion for a new trial not based on newly discovered evidence be made within 7 days after the verdict or finding of guilty. The instant verdict was entered on May 25, 1994. Martin filed a pro se motion for a new trial on July 25, 1994. On September 9, 1994, Martin, with the assistance of counsel, filed a motion for a new trial and a

For the foregoing reasons, the judgments appealed are AFFIRMED.

request for leave to file a motion for a new trial. Both motions were denied.