UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-20666
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOSE FERNANDO VIDEA, a/k/a Tito,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR H 93 0217 4)

(August 30, 1995)

Before DAVIS, BARKSDALE and DeMOSS, Circuit Judges.

PER CURIAM:[1]

BACKGROUND

The Houston High Intensity Drug Trafficking Area Task Force investigated cocaine trafficking in the Houston area by the Colombian Medellin Cartel and determined that Roman Suarez (Suarez)

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

was a key member of the organization in Texas and was responsible for the smuggling, transportation, storage, and distribution of cocaine shipments in the United States.

Juan Francisco Videa (Juan) was responsible for storing the cocaine once it arrived in Houston. Suarez and Juan developed a procedure for Juan to retrieve the cocaine once it had arrived in Houston. The drivers would page Suarez, or one of Suarez's associates, to inform Suarez of their anticipated time of arrival. Suarez would then page Juan so that Juan, or one of his associates, could register at the La Quinta motel where the cocaine would be delivered. The cocaine was generally delivered to one of two La Quinta motels. Juan and his people rented rooms at the motel so that they were available to pick up the cocaine immediately after the drivers arrived. When the drivers arrived, they would register at the motel to wait while Juan and his associates emptied the trucks at the stash houses. Between August 1988 and August 1991 seven loads of cocaine was transported to Houston in this manner.

Jose Fernando Videa, a/k/a "Tito," (Videa) is Juan's brother. He was registered at the La Quinta motels on several occasions near the time when cocaine shipments arrived. Videa was charged in an eight-count indictment with one count of conspiracy to possess with intent to distribute cocaine and two counts of aiding and abetting the possession with intent to distribute cocaine. He was convicted of the conspiracy count and acquitted of the two substantive counts.

The probation officer preparing the PSR recommended holding Videa responsible for the 100 kilograms of cocaine that arrived in August 1988 and 200 kilograms of cocaine that arrived in September 1990. Videa objected to this recommendation because he was acquitted of the two substantive counts involving these shipments, and there was insufficient evidence to support the finding. The district court overruled his objection. Videa was sentenced to 235 months imprisonment, five years supervised release, and a $50 special assessment.

OPINION

Sufficiency of the Evidence

Videa argues that there is insufficient evidence to support his conviction on the conspiracy count. He failed to move for a judgment of acquittal at the close of all evidence, and neither the pleadings in the record nor the docket sheet reflect that Videa filed any timely post-trial motions for acquittal.[2] Therefore, the sufficiency of the evidence claim is reviewable only to determine whether there was a manifest miscarriage of justice. **United States v. Laury**, 49 F.3d 145, 151 (5th Cir.), petition for cert. filed, (June 21, 1995) (No. 94-9810).[3] "Such a miscarriage of justice

[2] Videa made an oral motion for judgment of acquittal at the sentencing hearing, and this motion was denied. This motion was untimely, see Fed. R. Crim. P. 29(c) (motion for acquittal must be made within seven days after the jury is discharged), and, therefore, failed to preserve the issue for appeal.

[3] In a recent decision, this Court questioned whether the "miscarriage of justice" standard is distinguishable from the "sufficiency of the evidence" standard employed if a defendant does make a motion for acquittal at the conclusion of the trial. See **United States v. Pennington**, 20 F.3d 593, 597 n.1 (5th Cir. 1994).

would exist only if the record is devoid of evidence pointing to guilt, or . . . because the evidence on a key element of the offense was so tenuous that a conviction would be shocking." **United States v. Pierre**, 958 F.2d 1304, 1310 (5th Cir.) (en banc) (internal quotations and citations omitted), cert. denied, 113 S. Ct. 280 (1992).

To establish a conspiracy under § 846 the government must prove (1) the existence of an agreement between two or more persons to violate the narcotics laws, (2) that the defendant knew of the agreement, and (3) that he voluntarily participated in the agreement. **United States v. Maltos**, 985 F.2d 743, 746 (5th Cir. 1992). The elements of conspiracy may be proved by circumstantial evidence alone. **United States v. Rojas-Martinez**, 968 F.2d 415, 421 (5th Cir.), cert. denied, 113 S. Ct. 828 (1992), 113 S. Ct. 995 (1993). Mere presence at the crime scene or close association with conspirators, standing alone, however, is insufficient to support an inference of participation in the conspiracy. **United States v. Carrillo-Morales**, 27 F.3d 1054, 1065 (5th Cir. 1994), cert. denied, 115 S. Ct. 1163 (1995). The government cannot prove a conspiracy merely by presenting evidence placing a defendant in "a climate of activity that reeks of something foul." **Id**. (internal quotations and citation omitted).

Suarez testified that in February 1989 85 kilograms of cocaine for which Juan was responsible disappeared. Suarez and Juan had

---

However, because only the court sitting en banc can reverse precedent, Videa's insufficiency claim must be reviewed under the "miscarriage of justice" standard. **Laury**, 49 F.3d at 151 n.15.

several meetings regarding the missing cocaine, and Videa was present and involved in the conversations during at least two of these meetings. Suarez also testified that Juan and Videa went to Chicago to find the missing cocaine, but the cocaine was never recovered.[4]

Rhonda Ellen Schmidlin (Schmidlin), Steve Vellon's[5] (Vellon) girlfriend, testified she and Vellon went to a McDonald's parking lot to meet Videa after Vellon received a page. Vellon and Videa exchanged bags. Although Schmidlin did not know what was inside the bag Vellon gave Videa, there was a substantial amount of cash in the bag Videa gave Vellon. Schmidlin also testified that Videa told her not to tell anyone where Vellon was during the period Vellon and Juan were in Colombia.

Asher Hadad, the man who sold Juan his autobody shop, testified that Videa "threatened" him after Hadad testified at Juan's trial. Finally, there was evidence that Videa was registered at the La Quinta motel from August 21-22, 1988, and that a load of cocaine was delivered to Houston in August 1988. There was no evidence, however, establishing that the August 1988 cocaine shipment arrived during that two-day period.

---

[4] This Court notes that the district court did not hold Videa responsible for this cocaine because there was no evidence to suggest that Videa participated in the distribution or storage of this cocaine. Additionally, Francisco Villarreal Sanchez, a codefendant, testified that in September 1993 Suarez told him that he did not know Videa.

[5] Steve Vellon, Videa's codefendant, was an associate of Juan.

It is a close question whether the evidence establishing Videa's voluntary participation in the conspiracy is "so tenuous that a conviction would be shocking". However, from the evidence it can be inferred that Videa was aware of his brother's cocaine-trafficking activities and that he was involved in these activities. Therefore, because Videa's sufficiency-of-the-evidence claim must be reviewed only for a "manifest miscarriage of justice," we conclude that his conviction will be affirmed.

Sentencing Issues

Videa challenges the district court's findings regarding the quantity of cocaine attributed to him. The district court's finding regarding the quantity of drugs attributable to the defendant is reviewed for clear error. **United States v. Tremelling**, 43 F.3d 148, 150 (5th Cir.), cert. denied, 115 S. Ct. 1990 (1995). "In making factual findings pursuant to the sentencing guidelines, a district court need only be convinced by a preponderance of the evidence." **United States v. McKinney**, 53 F.3d 664, 677 (5th Cir. 1995). The district court may consider any relevant evidence to make the determination as long as the evidence has a sufficient indicium of reliability, and the district court has significant discretion in evaluating the reliability of the evidence. **United States v. Young**, 981 F.2d 180, 185 (5th Cir. 1992), cert. denied, 113 S. Ct. 2454, 2983 (1993). The PSR generally bears sufficient indicia of reliability to permit the district court to rely on it at sentencing. **United States v. Gracia**, 983 F.2d 625, 629 (5th Cir. 1993). The defendant bears the

burden of demonstrating that the PSR is inaccurate, and in the absence of rebuttal evidence the district court may properly rely on it. **Id**. at 630. The district court is free to disregard the defendant's unsworn statements that the PSR is unreliable. **Id**. at 630 n.22.

The information in the PSR indicated that Videa was present at the La Quinta motel during the delivery of 300 kilograms of cocaine. Although Videa disputed this finding, he offered no evidence to establish that the information was unreliable and, therefore, the district court could properly rely on the information to sentence Videa. Videa's sentence will be affirmed.

Videa also argues that the district court should not be permitted to consider facts underlying the two substantive counts for which he was acquitted under relevant conduct. This Court has held that the district court may base a defendant's sentence on conduct for which the defendant was acquitted because the government need establish the sentencing facts only by a preponderance of the evidence. **United States v. Carreon**, 11 F.3d 1225, 1241 (5th Cir. 1994). This argument is without merit.

AFFIRMED