

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-30150
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EUNICE ASPRILLA,

Defendant-Appellant.

Appeals from the United States District Court
For the Eastern District of Louisiana

(CRM#92 345 LLM)

(November 30, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

The facts are found in this Court's opinion in United States v. Asprilla and Piedrahita, No. 93-3057 (5th Cir. Nov. 19, 1993) (unpublished). Succinctly, Byron Cruz, a government informant, arranged to smuggle twenty-five kilograms of cocaine from Columbia

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

into the U.S. After a series of phone calls, he met with Eunice Asprilla and Omar Piedrahita in a motel in New Orleans and arranged to sell them the cocaine. The jury found Piedrahita and Asprilla guilty of conspiracy to possess with intent to distribute cocaine hydrochloride. Both defendants filed timely notices of appeal.

This Court affirmed the judgments of the district court. However, the case was remanded to permit the district court to review in camera notes made by Cruz and to determine in the first instance whether they constituted Jencks Act statements or Brady¹ material.

On remand, the district court examined eight pages of sealed notes and concluded that they were neither Jencks Act or Brady material and, even if they should have been produced, any error was harmless. Again, both defendants filed effective notices of appeal.

Omar Piedrahita filed a motion to dismiss his appeal, and the appeal has been dismissed. Only Eunice Asprilla's appeal is before the Court, and she has adopted Piedrahita's brief.

OPINION

Asprilla asserts that, prior to this Court's disposition of the first appeal, the "district court erroneously enlarged the appellate record to include a copy of the notes, made by the

¹ The Jencks Act, 18 U.S.C. § 3500, requires that the Government produce statements which relate to the subject matter of a witness' testimony after the witness' direct testimony. Impeachment and exculpatory evidence fall within the Brady rule. See Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct 1194, 10 L. Ed. 2d 215 (1963).

Government's witness, Byron Cruz, which had been withheld from introduction at trial." She contends that the notes are improperly before the Court because the district court lacked jurisdiction to enlarge the record and argues that the notes should be stricken from review on appeal.² Asprilla argues that this Court has not yet reviewed the district court's decision to supplement the record because the Court remanded the case to the district court without considering the notes and denied the motion as unnecessary.

Asprilla's argument is without merit. Assuming arguendo that the district court should not have granted the Government's motion to supplement the record, any error was harmless because this Court did not consider the documents. The Court granted the only relief that was available to Asprilla: a remand to the district court to consider the notes in question. In order for the district court to comply with this Court's instructions to examine Cruz's notes, it was necessary for the district court to supplement the record at some point. It would be a waste of judicial resources to require the district court to enter another order to supplement the record after rather than before remand. Asprilla received the relief she requested on direct appeal, and the only avenue that should be available for her now is to seek review of the district court's decision after remand.

² After becoming aware of the contentions of the defendants concerning Cruz's notes, the Government filed a motion to supplement the record with a copy of the notes in the district court. The district court granted the motion and ordered the documents sealed. Piedrahita sought to strike the supplemental record on appeal, and Judge Emilio Garza denied the motion.

Asprilla contends that Cruz's notes constitute Jencks Act material that should have been made available at trial. She argues that the failure to produce the notes at trial is reversible error and urges the Court to vacate the judgment of conviction.

In a very thorough order, the district court examined each of Cruz's notes and, one by one, described their contents. The district court found that almost all of the sealed material consisted of names, addresses, and phone numbers, which do not constitute statements. The papers were not signed and were simply notes made by Cruz concerning what he was to do to carry out the drug deal. Further, the district court found that the evidence was inculpatory in nature, rather than exculpatory, and enhanced the credibility of the witness. Accordingly, it was the district court's conclusion that the sealed materials were neither Jencks Act statements nor Brady material and any error was harmless.

In her brief on appeal, Asprilla focuses on the Government's failure to produce the notes at trial and emphasizes that they were not available to cross-examine Cruz and are not currently available to her because they have been sealed. Asprilla disregards that this Court granted the relief she sought on direct appeal and that the district court examined the materials. She does not address the merits of the district court's order and reasons nor does she identify any error in the district court's legal analysis. She does not challenge the district court's order sealing the

documents. See Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987). This Court "will not raise and discuss legal issues that [Asprilla] has failed to assert." Id.

The judgment of the district court is AFFIRMED.