UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-30408
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MICHAEL E. WILLIAMS and
JHAN GIBBS,

Defendants-Appellants.

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

(91 CR 410 "F" (9)(19))

(June 30, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

A jury convicted Michael Williams and Jhan Gibbs of conspiracy to distribute in excess of five kilograms of cocaine and convicted

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Gibbs of using and carrying a firearm in connection with the conspiracy. The district court granted both Defendants a new trial because it determined (i) that the testimony of government witness Oliver Myles[1] directly contradicted his grand jury testimony; (ii) that Myles had falsely identified cocaine as having been supplied by Williams; and (iii) that the government had withheld Jencks Act[2] material. The new trial also resulted in convictions on both counts.

OPINION

The federal public defender, Williams' appointed counsel, has moved to withdraw pursuant to Anders v. California, 386 U.S. 738, 744 (1967). Anders established standards for an appointed attorney who seeks to withdraw from a direct criminal appeal on the ground that the appeal lacks an arguable issue. After a "conscientious examination" of the case, the attorney must request permission to withdraw and must submit a "brief referring to anything in the record that might arguably support the appeal." Id. at 744. The attorney must isolate "possibly important issues" and must "furnish the court with references to the record and legal authorities to aid it in its appellate function." United States v. Johnson, 527 F.2d 1328, 1329 (5th Cir. 1976). After the defendant has had an opportunity to raise any additional points, the court fully

[1] Myles allegedly headed the drug ring to which Gibbs belonged and Williams supplied cocaine. The ring distributed the drug in New Orleans' St. Thomas housing project.

[2] 18 U.S.C. § 3500 et seq.

examines the record and decides whether the case is frivolous. Anders, 386 U.S. at 744.

The only potential appellate issue identified by counsel's Anders brief is the alleged ineffectiveness of trial counsel for failing to cross-examine government witnesses Myles and Dwayne Sandifer at the second trial concerning conflicts between their trial and grand jury testimony. Counsel suggests that because trial counsel's alleged ineffective representation was not raised in the district court, the record is not sufficient for adequate appellate review, and the issue should be pursued under 28 U.S.C. § 2255. Id. at 8; see United States v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991), cert. denied, 114 S. Ct. 135 (1993).

In his responsive brief to counsel's motion to withdraw, Williams claims that his trial counsel was ineffective for failing to cross-examine Myles and Sandifer and alleges that his trial counsel did not adequately investigate the case. Williams also complains that his trial counsel failed to review or discuss the presentence investigations report (PSR) with him, failed to discuss the facts of the case in depth with him and failed to discuss the inconsistent statements Myles and Sandifer had made during previous proceedings.

This court does not resolve claims of ineffective assistance of counsel on direct appeal unless the claim has been raised before the district court. United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988) (citations omitted). Only when the record is sufficiently developed with

respect to an ineffective-assistance-of-counsel claim will this court determine on direct appeal the merits of the claim. United States v. Rosalez-Orozco, 8 F.3d 198, 199 (5th Cir. 1993); see United States v. Phillips, 664 F.2d 971, 1040 (5th Cir. 1981) (allegations of ineffectiveness were presented to the court prior to sentencing), cert. denied, 457 U.S. 1136 (1982).

As the record stands, this court "can only speculate on the basis" for defense counsel's decision not to cross-examine the witnesses regarding their prior inconsistent statements. See Higdon, 832 F.2d at 314; see also United States v. Armendariz-Mata, 949 F.2d 151, 156 (5th Cir. 1991) (claim that counsel was ineffective for failing to call witness not ripe for review), cert. denied, 112 S. Ct. 2288 (1992). In addition, because the only details regarding the thoroughness of counsel's investigation of Williams' case and discussions about the PSR are in allegations in Williams' pro se brief, the ineffectiveness issue cannot be addressed at this time. See Bounds, 943 F.2d at 544; see also United States v. Fry, 51 F.3d 543, 545 (5th Cir. 1995) (details from the record are required to resolve the ineffective-assistance issue on direct appeal).

Williams argues that the sentencing judge violated FED. R. CRIM. P. 32 because Williams was provided only five days to review the PSR prior to sentencing. Williams also argues that he was denied his right to allocution. Neither issue has arguable merit.

At sentencing, the judge asked whether there was anything about the PSR that should be brought to the court's attention.

Williams' counsel responded, "No, sir." Williams did not respond. When the sentencing judge asked whether Williams had anything to say before sentence was to be imposed, Williams responded, "No, sir." The sentencing judge complied with FED. R. CRIM. P. 32(a)(1)(C) by addressing Williams personally and determining whether Williams wished to make a statement. United States v. Washington, 44 F.3d 1271, 1276 (5th Cir. 1995), cert. denied, 1995 WL 251837 (May 22, 1995).

Under Rule 32, a defendant must be provided with the PSR 10 days prior to sentencing. FED. R. CRIM. P. 32(c)(3)(A). Williams argues for the first time on appeal that he was provided with the PSR "about five (5) days before [he] was sentenced." Because Williams did not raise this issue before the district court, he is relegated to the plain-error standard of review. See United States v. Dickie, 775 F.2d 607, 611 (5th Cir. 1985). Under FED. R. CRIM. P. 52(b), this court may correct forfeited errors only when the appellant shows the following factors: (1) there is an error, (2) that is clear or obvious, and (3) that affects his substantial rights. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc) (citing United States v. Olano, 113 S. Ct. 1770, 1776-79 (1993)), cert. denied, 115 S. Ct. 1266 (1995). If these factors are established, the decision to correct the forfeited error is within the sound discretion of the 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.

Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, this court may remedy the error only in the most exceptional case. Calverley, 37 F.3d at 162. The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. Olano, 113 S. Ct. at 1777-79.

First, an appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain, and that it affects substantial rights. Olano, 113 S. Ct. at 1777-78; United States v. Rodriguez, 15 F.3d 408, 414-15 (5th Cir. 1994); FED. R. CRIM. P. 52(b). Plain error is one that is "clear or obvious, and, at a minimum, contemplates an error which was clear under current law at the time of trial." Calverley, 37 F.3d at 162-63 (internal quotation and citation omitted). "[I]n most cases the affecting of substantial rights requires that the error be prejudicial; it must affect the outcome of the proceeding." Id. at 164. This court lacks the authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is `plain' and `affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Olano, 113 S. Ct. at 1778 (quoting FED. R. CRIM. P. 52(b)). As the Court stated in Olano:

> The standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in

> United States v. Atkinson, 297 U.S. 157, 56 S. Ct. 391, 80 L. Ed. 555 (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Olano, 113 S. Ct. at 1779 (quoting Atkinson, 297 U.S. at 160). Thus, this court's discretion to correct an error pursuant to Rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

Williams was provided with the opportunity to raise his objections to the PSR at sentencing, but he failed to do so. The production of the PSR five days prior to sentencing was not plain error.

Although Williams made a motion for judgment of acquittal at the close of the government's case, Williams failed to renew that motion at the close of all of the evidence. Therefore, Williams' sufficiency-of-the-evidence claim is reviewable only to determine whether there was a manifest miscarriage of justice.[3] United States v. Shaw, 920 F.2d 1225, 1230 (5th Cir.), cert. denied, 500 U.S. 926 (1991).[4] "Such a miscarriage 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

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[3] As Gibbs also failed to make a motion for acquittal at the close of all of the evidence, his sufficiency challenges will be reviewed under the same standard.

[4] In a recent panel decision, this court questioned whether the "miscarriage of justice" standard is distinguishable from the "sufficiency of 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.2 (5th Cir. 1994). However, because only the court sitting en banc can reverse precedent, the Appellants' insufficiency claim must be reviewed under the "miscarriage of justice" standard. See United States v. Laury, 49 F.3d 145, 151 (5th Cir. 1995).

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 convict Williams of conspiring to distribute cocaine, the government must prove an agreement between two or more persons to violate the narcotics laws, that Williams knew of the conspiracy, and that he voluntarily participated in it. United States v. Sanchez-Sotelo, 8 F.3d 202, 208 (5th Cir. 1993), cert. denied, 114 S. Ct. 1410 (1994). Once the government establishes an illegal conspiracy, "only slight evidence is needed to connect [Williams to the] conspiracy." United States v. Thomas, 12 F.3d 1350, 1359 (5th Cir.) (internal quotation and citation omitted), cert. denied, 114 S. Ct. 1861, 2119 (1994).

Several of Williams' former co-defendants pleaded guilty and testified for the government. The uncorroborated testimony of an accomplice or coconspirator will support a conviction as long as the testimony is not incredible or insubstantial on its face. United States v. Singer, 970 F.2d 1414, 1419 (5th Cir. 1992). The rule applies even if the accomplice or coconspirator testified pursuant to a plea agreement with the government. United States v. Osum, 943 F.2d 1394, 1405 (5th Cir. 1991). "[T]estimony generally should not be declared incredible as a matter of law unless it asserts facts that the witness physically could not have observed or events that could not have occurred under the laws of nature." Id.

Barras Franklin, the Myles organization's "banker," testified that he paid Williams several times for deliveries of cocaine and that Williams was one of Oliver Myles' sources for cocaine. Oliver Myles identified Williams as a source of cocaine. Myles stated that he sold kilogram quantities of cocaine in the St. Thomas housing project in New Orleans for Williams. Travis Sandifer testified that he received a kilogram of cocaine from Williams and that Williams was a supplier of cocaine for the Metz organization.

The record is replete with -- rather than devoid of -- evidence pointing toward Williams' guilt. Williams has not stated an issue of arguable merit regarding the sufficiency of the evidence to support his conviction.

Williams argues that the government knowingly used false testimony to orchestrate his conviction. To obtain reversal on the ground that the government relied on perjured testimony, Williams must show that the contested statements were actually false, that they were material, and that the prosecution knew that they were false. United States v. Blackburn, 9 F.3d 353, 357 (5th Cir. 1993), cert. denied, 115 S. Ct. 102 (1994). In his argument, Williams points to inconsistencies in the testimony of various government witnesses and argues that the jury was denied the chance to judge the credibility of these witnesses because of inadequate cross-examination. As noted above, the quality of defense counsel's cross-examination is not properly before this court.

The discrepancies in testimony examined by Williams concern witness credibility. The jury is the final authority on the

credibility of witnesses. United States v. Lerma, 657 F.2d 786, 789 (5th Cir. 1981), cert. denied, 455 U.S. 921 (1982). The court should intervene and declare evidence incredible as a matter of law only when it is "so unbelievable on its face that it defies physical laws." Id. Even if Williams' contentions could show that the testimony was false, nothing in the record suggests that the government was aware that witnesses were committing perjury. This is not an arguable issue.

Williams has filed a pro se motion to supplement the record on appeal with information that Williams alleges will contradict testimony of government witnesses. This Court "will not ordinarily enlarge the record on appeal to include material not before the district court." United States v. Flores, 887 F.2d 543, 546 (5th Cir. 1989). The material Williams seeks to include in the record pertains to his claim that trial counsel was ineffective. As that claim is not ripe for review on direct appeal, the motion is denied.

A full examination of the record and the transcript for obvious error has disclosed none. See Anders, 386 U.S. at 744. Williams' appeal has no arguable merit and is thus frivolous. Id. Because the appeal is frivolous, it will be dismissed. 5TH CIR. R. 42.2.

Gibbs urges that the evidence is insufficient to support his conviction on either count. The court reviews the evidence "in the light most favorable to the jury verdict, including all reasonable inferences and credibility choices." Pierre, 958 F.2d 1310-11.

The court may consider both the government's evidence and the evidence Gibbs presented in his case-in-chief. United States v. Casilla, 20 F.3d 600, 605 (5th Cir.), cert. denied, 115 S. Ct. 240, 255, 361 (1994).

To convict Gibbs of conspiring to distribute cocaine, the government must prove an agreement between two or more persons to violate the narcotics laws, that Gibbs knew of the conspiracy, and that he voluntarily participated in it. Sanchez-Sotelo, 8 F.3d at 208. Once the government establishes an illegal conspiracy, "only slight evidence is needed to connect [Gibbs to the] conspiracy." Thomas, 12 F.3d at 1359. To convict Gibbs of the firearms offense, the government must prove that Gibbs committed a drug-trafficking offense and that he knowingly used or carried the firearm during and in relation to that crime. See United States v. Willis, 6 F.3d 257, 264 (5th Cir. 1993). The government need not prove that Gibbs used the firearm in an affirmative manner, but only that the weapon had the potential to protect or facilitate the conspiracy and that its presence was related to drug trafficking. Id.; United States v. Featherson, 949 F.2d 770, 776 (5th Cir. 1991), cert. denied, 503 U.S. 1009 (1992).

Several of Gibbs' former co-defendants pleaded guilty and testified for the government. Oliver Myles testified that Gibbs "sold coke and watched over [Myles'] workers" to ensure that nothing happened to them in the St. Thomas housing project. Myles stated that Gibbs initially carried a 9 mm gun, but after co-conspirator Valdis Jackson died, Gibbs acquired Jackson's 10 mm

Glock. Myles identified the Glock seized from the apartment that he and Gibbs shared as belonging to Gibbs. Myles explained that Gibbs sold drugs "fronted" to him by the organization.

Dwayne Sandifer confirmed that Gibbs had carried a gun[5] to protect Myles' drug runners. In 1989 and 1990, Dwayne delivered five kilograms of cocaine to Gibbs for resale. Dwayne stated that Gibbs was known on the street as "Johnny Macatelly." Dwayne's brother, Travis Sandifer, agreed that Gibbs was a member of the St. Thomas drug ring. Gibbs "walked around" the St. Thomas project with his gun "just . . . checking everything out." Travis testified that a man named "Dirt" shot Gibbs during an attempted robbery of the drug runners. While Gibbs was injured, Travis delivered cocaine to Gibbs' brother, "Fu," because Gibbs could not sell the drugs himself.

Barras Franklin, the Myles organization's "banker," testified that he had received cocaine proceeds from Gibbs several times. Franklin stated that Gibbs carried a Glock and that he had seen him with a gun in the project.

Although the district court granted a new trial on the ground that Myles' allegedly dubious testimony had been "material" to Gibbs' first conviction, counsel failed to challenge Myles when he gave similar testimony at the second trial. Gibbs argues that Myles' testimony was "wholly unreliable," and he challenges the

[5] Sandifer identified the Glock introduced into evidence as belonging to Gibbs, but he erroneously stated that it was an 9 mm instead of a 10 mm weapon.

testimony of the other conspirators as unworthy of belief.

Myles' testimony is sufficient to support Gibbs' conviction because it is not incredible as a matter of law. United States v. Lindell, 881 F.2d 1313, 1322 (5th Cir. 1989) (testimony will be found "incredible" as a matter of law only if it is "so unbelievable on its face that it defies physical laws"), cert. denied, 493 U.S. 1087 and 496 U.S. 926 (1990). It was within the province of the jury as the fact finder to determine the credibility of the witnesses and to choose among reasonable constructions of evidence. United States v. Garza, 990 F.2d 171, 173 (5th Cir.), cert. denied, 114 S. Ct. 332 (1993).

Thus, the jury could have found beyond a reasonable doubt that Gibbs was guilty of conspiracy to distribute cocaine and that he used a firearm to facilitate the drug-trafficking offense. Sanchez-Sotelo, 8 F.3d at 208; Featherson, 949 F.2d at 776.

Gibbs argues that the district court erred by admitting evidence that he had twice been injured in shootings. Gibbs argues that the admission of this evidence violated FED. R. EVID. 404(b). Id.

Rule 404(b) provides in relevant part, that "[e]vidence 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."

The government introduced wiretap evidence which indicated that "Dirt" shot Gibbs in May 1991.[6] Gibbs objected that there was no evidence that the shooting was drug-related and that the fact that he had been shot was inflammatory. The district court overruled the objection. Travis Sandifer later testified that "Dirt" shot Gibbs while "Dirt" was attempting to steal drugs from members of the gang.

Evidence of the first shooting was not excludable under Rule 404(b) because it was relevant to Gibbs' participation in the drug conspiracy. "Evidence that is inextricably intertwined with the evidence used to prove a crime charged is not extrinsic evidence under Rule 404(b). Such evidence is considered intrinsic and is admissible so that the jury may evaluate all the circumstances under which the defendant acted." United States v. Royal, 972 F.2d 643, 647 (5th Cir. 1992), cert. denied, 113 S. Ct. 1258 (1993) (internal quotations and citations omitted).

The government also introduced evidence indicating that, in August 1991, Gibbs was shot in a drive-by shooting. The government argued that this shooting was relevant because it provided a further reason for Gibbs to be armed at all times. The district court overruled Gibbs' objection and admitted the evidence. Dwayne Sandifer testified that he, Myles, Gibbs, two men named Lotty-Dotty and Ford, and others were at a gas station when "[s]ome guys come pass by shooting." Lotty-Dotty was killed and Gibbs and Ford were

[6] Gibbs denied that Dirt shot him and testified that he had been injured in an accidental shooting at a bar.

injured. Although the Glock was in Gibbs' car, no one from the Myles gang returned fire. Myles testified that this shooting had nothing to do with drugs and that it had resulted from a case of mistaken identity.

The decision whether to admit evidence under Rule 404(b) is reviewed under a heightened abuse-of-discretion standard. United States v. Carrillo, 981 F.2d 772, 774 (5th Cir. 1993), cert. denied, 115 S. Ct. 261 (1994). Before admitting extrinsic evidence under Rule 404(b), the court first determines that the evidence is relevant to an issue other than the defendant's character. Id. (citing United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979)). The evidence must also possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of FED. R. EVID. 403. Id.

If the district court's admission of extrinsic evidence is erroneous, "[the] error is harmless if the reviewing court is sure, after viewing the entire record, that the error did not influence the jury or had a very slight effect on its verdict." United States v. Heller, 625 F.2d 594, 599 (5th Cir. 1980); see also United States v. Palmer, 37 F.3d 1080, 1087 (5th Cir. 1994).

Evidence is not relevant unless it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. The evidence of the

second shooting should have been excluded because it was irrelevant. United States v. Hays, 872 F.2d 582, 586 (5th Cir. 1989); FED. R. EVID. 402. However, the error was harmless because the entirety of the evidence makes it clear that the fact that Gibbs was the victim of a drive-by shooting unrelated to the charged offense is unlikely to have influenced the jury or to have had an effect on its verdict. Heller, 625 F.2d at 599.

The motion of Williams' appointed counsel to withdraw is GRANTED, and Williams' appeal is DISMISSED as frivolous. Williams' motion to supplement the record on appeal is DENIED. Gibbs' convictions are AFFIRMED.