UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-40072
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

HUBERT WAYNE ANDERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(6:93-CR45(1))

(August 30, 1994)

Before JOLLY, DUHÉ, and STEWART, Circuit Judges.

PER CURIAM:[1]

A jury convicted Appellant, Hubert Wayne Anderson, of nine counts of using, or causing another to use, an interstate commerce facility in the commission of a murder for hire. The district court sentenced Appellant to concurrent life terms on each count, a fine, and the mandatory special assessments. Appellant alleges five district court errors: overruling Appellant's motion to dismiss the indictment; erroneously charging the jury; overruling

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appellant's motion to suppress; failure to dismiss despite insufficient evidence; and the imposition of a fine despite Appellant's indigent status. We have thoroughly reviewed the record and considered the briefs and are convinced that the district court committed no reversible error.

Appellant argues that, because the indictment charged him separately under 18 U.S.C. §§ 2 and 1958 yet failed to allege the requisite willful mental state of section 2, it did not give him notice of each element of the crime charged and the indictment is, therefore, defective. 18 U.S.C. § 2 is an alternative charge in any count, whether explicit or implicit. United States v. Walker, 621 F.2d 163, 166 (5th Cir. 1980) (citing United States v. Bullock, 451 F.2d 884, 888 (5th Cir. 1971), cert. denied, 450 U.S. 1000 (1981). Section 2 does not define a separate crime and its appearance in the indictment did not charge Anderson with an additional crime of which he should have received notice. See Walker, 621 F.2d at 166. Therefore, Appellant received notice that he was being charged with violating 18 U.S.C. § 1958 on nine separate occasions. The indictment was not defective.

Next Appellant makes various arguments that the jury charge was inadequate because it failed to inform the jurors of the appropriate mens rea.[2] The charge, as a whole, correctly stated the law and clearly instructed the jurors as to the law applicable

[2] Appellant also argues that Counts 2 through 9 should not have been submitted to the jury because the government failed to place him on notice of the offense charged him under 18 U.S.C. § 2. Our previous discussion disposes of that argument.

to the factual issues before them. The government did not present evidence that Appellant committed the charged violations of § 1958 under the aiding and abetting theory of 18 U.S.C. § 2, therefore, the court was not required to discuss any elements of that theory.

In the district court Appellant moved to suppress evidence obtained in the warrantless search of his wallet contending that the search was unnecessary since he was handcuffed and surrounded by police officers at the time. Nothing in the record supports his contention that he was handcuffed. When the police entered his room he was undressed and his clothes were nearby. They were searched before being returned to him and we do not find that inappropriate. In this Court Appellant alleges for the first time that the scope of the search was inappropriate. Having forfeited the alleged error by failing to object on that ground in the district court, we may remedy the error only in the most exceptional case. United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). We apply the two part analysis of United States v. Olano, 113 S.Ct. 1770, 1777-79 (1993) to decide whether the case is exceptional. It is not. This search was made pursuant to Appellant's arrest at which time "the police may search the arrestee's person and 'the area within his immediate control)) construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.'" United States v. Johnson, 16 F.3d 69, 71-72 (5th Cir.), on rehearing, 18 F.3d 293 (5th Cir. 1994). No error was committed.

Appellant makes separate arguments of insufficiency of the

evidence as to each count of the indictment. In its brief, the government has dismissed this issue and has referred this Court to no specific areas of the record to contravene Appellant's argument of evidence insufficiency. Despite this, we have carefully reviewed the record and are convinced that the evidence was adequate on each count. We mention in particular only the allegations relevant to Count 4 which charges that Appellant caused State Farm Insurance Company in Bloomington, Illinois to mail, on or about June 29, 1992 documents to Kenneth Patrick in Bowie County, Texas with the intent that the murder of Kenneth Patrick would be committed. Appellant argues that there is no evidence that any documents were mailed by State Farm from Bloomington, Illinois to Kenneth Patrick. This is incorrect. Government Exhibit 2F is a letter dated June 29, 1992 from Jackie Patton, underwriter in the health department of State Farm Mutual Automobile Insurance Company in its home offices in Bloomington, Illinois addressed to Kenneth Patrick in Wake Village, Texas which, the record shows, is in Bowie County.

Finally the Appellant contends that it was error to impose a fine upon him because he is indigent. A sentencing court is not prohibited from imposing a fine on an indigent defendant. United States v. Altamirano, 11 F.3d 52, 53 (5th Cir. 1993). The government demonstrated Anderson's earning potential by indicating that he could earn money in the federal prison work program, UNICOR. The district court directed that half of Appellant's earnings in that program go toward payment of the fine. We find no

error.

AFFIRMED.