

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-40075
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ARTHUR L. WILLIAMS,

AARON BRUCE WILLIAMS, & GARLAND ANDREW STEWART,¹

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana
(1:93-CR-10012)

(March 1, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:²

Aaron Bruce Williams and Arthur L. Williams challenge their drug distribution and conspiracy convictions. We affirm.

I.

¹ Stewart's appeal was dismissed after we granted his counsel's motion to withdraw pursuant to **Anders v. California**, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

²Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Aaron Bruce Williams and Arthur Lee Williams were indicted, along with eight other defendants, on eleven counts of conspiring to distribute and possess 500 grams or more of cocaine in violation of 21 U.S.C. § 841 and § 846. Aaron Williams was separately indicted on four additional counts of distributing cocaine and one count of structuring a cash transaction in violation of 31 U.S.C. § 5324(3). Arthur Williams was also separately indicted on two counts of aiding and abetting the possession with the intent to distribute cocaine. A jury convicted Aaron Williams and Arthur Williams on all counts. Both defendants timely appeal.

II.

A.

The defendants first argue that the district court abused its discretion by allowing the government to introduce audiotapes of conversations between Aaron Williams' brother and an undercover police officer even though the government failed to lay the proper evidentiary foundation for the recordings. They also challenge the introduction of audiotapes containing conversations between Arthur Williams and a co-defendant who agreed to cooperate with the government. The defendants contend that the district court erred by admitting the audiotapes because the government failed to establish either the fidelity of the recording equipment or the competency of the operator.

The defendants' argument is unpersuasive. When seeking to introduce a recorded conversation into evidence, the government bears the burden of establishing that the recording is an "accurate reproduction of relevant sounds previously audited by a witness."

United States v. Stone, 960 F.2d 426, 436 (5th Cir. 1992)(quoting **United States v. Biggins**, 551 F.2d 64, 66 (5th Cir. 1977)). Our review of the record persuades us that the government introduced sufficient evidence to establish the accuracy and reliability of the audiotapes. The undercover officer and informant present during the recorded conversations testified and confirmed the accuracy of the recordings. **See United States v. Hughes**, 658 F.2d 317, 322 (5th Cir.), **cert. denied**, 455 U.S. 922 (1982). These witnesses also identified the voices on the recording. Moreover, the defendants fail to point to any evidence that the audiotapes contained material deletions, additions, or alterations. **See Stone**, 960 F.2d at 436. We conclude, therefore, that the district court did not abuse its discretion by admitting the tapes.

B.

The defendants argue next that the district court violated the Confrontation Clause of the Sixth Amendment and abused its discretion by limiting their cross-examination of a government witness. Specifically, they argue that the court prevented them from effectively cross-examining Michael Johnson, a co-defendant who agreed to cooperate with the government. During cross-examination, the defendants sought to impeach Johnson's testimony by showing that the government promised him lenient treatment in exchange for his testimony. At several points during the cross-examination, the court ruled that the defendants' questions were irrelevant and instructed them to limit their examination to matters bearing on Johnson's testimony and credibility. The defendants contend that the court's actions violated their

constitutional right to confront Johnson and attack his credibility.

While the scope of cross-examination is generally within the district court's discretion, the Confrontation Clause requires that, at a minimum, defendants be "permitted to expose to the jury the facts from which the jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." **United States v. Restivo**, 8 F.3d 274, 278 (5th Cir.), **cert. denied**, ___ U.S. ___, 115 S. Ct. 54 (1994). To demonstrate that the district court abused its discretion by limiting cross-examination, the defendants must show that "the limitations imposed upon his counsel's cross-examination were clearly prejudicial." **Id.**

Our review of the record persuades us that the district court gave the defendants sufficient latitude to probe relevant issues during Johnson's cross-examination. For example, the court allowed the defendants to question Johnson about his ties to numerous drug transactions and whether he reported his drug-related income on his federal income tax returns. The court also allowed the defendants to question Johnson about the promises made to him by the government in exchange for his testimony. The court did not, however, allow the defendants to question Johnson about where he lived or how much crack cocaine he had sold within the past year. In view of the significant latitude the court afforded the defendants during cross-examination, the court did not violate the Confrontation Clause or abuse its discretion by ruling that these

questions were irrelevant. **See United States v. Rocha**, 916 F.2d 219, 242 (5th Cir.), **cert. denied**, 500 U.S. 934 (1991).

C.

The defendants argue next that the district judge violated their due process rights by making biased and prejudicial statements in front of the jury. The defendants' allegations center on the court's remarks during the defendants' cross-examination of Michael Johnson. At one point, the court admonished the defendants to "get on to the point you are trying to make, let's get to something that is material to this cross-examination." At another point during the cross-examination, the court commented that "it's about time because we are going to move on to something else." The defendants contend that these statements created the impression that the judge was biased in favor of the government.

The defendants' argument is without merit. A district court's actions during trial do not violate the Constitution unless the court's actions, when viewed as a whole, would lead the jury to a predisposition of guilt by "improperly confusing the functions of judge and prosecutor." **United States v. Bermea**, 30 F.3d 1539, 1569 (5th Cir. 1994). The court's interventions must be "quantitatively and qualitatively substantial" to violate due process. **Id.**

The defendants fail to show that the court's actions in this case predisposed the jury to find the defendants guilty. The district judge's tone, although direct, was not hostile. The judge's admonishing remarks were also distributed equally between the defense counsel and the prosecutor. Moreover, the judge instructed the jury that any comments made by the court to the

lawyers during trial should not be viewed as the court's attempt to side with either the defense or the government. Therefore, the district judge's comments during Johnson's cross-examination did not violate the defendants' due process rights.

D.

Finally, Arthur Williams argues that his convictions on two counts of aiding and abetting and his conviction of conspiracy to distribute cocaine violate the Double Jeopardy Clause. Williams first argues that his conviction on the two aiding and abetting counts violates the Double Jeopardy Clause because both counts arose from the same drug transaction. Counts 9 and 10 of Williams' indictment charged him with aiding and abetting possession with the intent to distribute cocaine on two separate occasions. Count 9 alleged that, on August 21, 1992, Williams delivered a bag of money to a co-defendant in payment for drugs purchased by another co-defendant. Count 10 alleged similar conduct occurring on September 2, 1992. According to Williams, these allegations involve the same continuing drug transaction.

Williams' argument is unpersuasive. To establish a violation of the Double Jeopardy Clause, Williams bears the burden of showing that the two aiding and abetting convictions are, in law and in fact, the same offense. **United States v. Register**, 931 F.2d 308, 312 (5th Cir. 1991). Williams fails to satisfy this burden. At trial, Williams testified that he delivered a bag of money to a co-defendant on August 21, 1992 in payment for drugs purchased by Michael Johnson. He also testified that he delivered another \$3,000 to the same co-defendant on September 2, 1992 in payment for

cocaine that he himself bought from the co-defendant. Williams own testimony thus reveals that his aiding and abetting convictions resulted from two separate offenses.

Williams also argues that the Double Jeopardy Clause bars his conviction on both the aiding and abetting and conspiracy counts because the counts arose from the same underlying incidents. Williams' argument is without merit. In **United States v. Felix**, ___ U.S. ___, 112 S.Ct. 1377, 1384 (1992), the Supreme Court held that a substantive crime and a conspiracy to commit that crime are not the same offense for purposes of the Double Jeopardy Clause even if they are based on the same underlying incidents.³

AFFIRMED.

³ In his reply brief, Williams contends for the first time that his conspiracy and aiding and abetting convictions are lesser included offenses and, consequently, his convictions on both counts are barred under **Blockburger v. United States**, 284 U.S. 299 (1932). Arguments raised for the first time in a party's reply brief are waived. **United States v. Miller**, 952 F.2d 866, 874 (5th Cir.), **cert. denied**, ___ U.S. ___, 112 S.Ct. 3029 (1992). Even if Williams preserved his argument, however, conspiracy and aiding and abetting are not lesser included offenses. **United States v. Payan**, 992 F.2d 1387, 1392 (5th Cir. 1993).