UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40534
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FREDERICK WITHERSPOON,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Louisiana
(3:93 CR 30033)

(March 20, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant Frederick Witherspoon (Witherspoon) appeals his convictions, following a jury trial, of 1 count of possession with intent to distribute 1753 grams of cocaine base in violation of 21 U.S.C. § 841(a)(1) and 1 count of conspiracy to possess with intent to distribute the same quantity of cocaine base

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. In this appeal, Witherspoon contends that he was denied the counsel of his choice in violation of the Sixth Amendment, that the district court failed to conduct *de novo* review of the magistrate judge's report recommending denial of his motion to suppress, that the district court erroneously denied his motion to suppress, that the evidence was insufficient to support his convictions, that the district court erred in denying his motion to dismiss based on selective prosecution and denial of equal protection, that the district court erred in denying his motions seeking discovery and the services of an expert witness to aid in his motion to dismiss, and that he was entitled to an evidentiary hearing on his motion to dismiss and his discovery motions. We affirm.

Facts and Proceedings Below

At approximately 8:00 a.m. on December 5, 1992, Monroe, Louisiana police detective Eugene Ellis (Ellis), a member of the Metro Narcotics Unit, received a tip from a Dallas, Texas law enforcement officer that two black men suspected of possessing narcotics would be arriving at the Monroe Regional Airport aboard an American Eagle flight from Dallas at 9:50 a.m. The Dallas officer also provided Ellis with baggage claim numbers for three pieces of checked luggage. After receiving this information, Ellis recruited several other officers and went to the airport to await the arrival of the designated flight from Dallas. At the Monroe airport, Ellis confirmed that the baggage claim numbers he received from the Dallas officer matched luggage that was on the plane arriving from Dallas.

After the flight arrived from Dallas, Ellis and the other officers observed the passengers deplane. Ellis testified that there were only seven passengers on the plane and that only two of the seven were black. The officers observed these two men, later identified as Witherspoon and co-defendant Michael Bell (Bell), walking into the terminal lobby. Ellis testified that Witherspoon had several items of carry-on luggage and that Bell was carrying a camera bag. Ellis noticed that Bell and Witherspoon separated in the lobby, and he thought that they were nervous based on their erratic movements and the fact that they maintained eye contact. Meanwhile, Ellis had arranged for the three pieces of checked luggage to be removed from the plane and sniffed by a narcotics dog prior to being placed on the conveyor belt for pick-up. While the narcotics dog was sniffing the checked luggage, the officers decided to approach the suspects and interview them. As the officers approached Bell, he ran out of the terminal, got into an automobile driven by another man,[1] and fled.

James Purvis (Purvis), an investigator with the Metro Narcotics Unit, approached Witherspoon, identified himself, and asked him to come to the security office. Witherspoon agreed. In the security office, Purvis told him that they were conducting an investigation and that he was not under arrest but would be read his *Miranda* rights for his own protection. Witherspoon denied that he was travelling with any narcotics and gave Purvis consent to

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[1] The government maintained that the driver was co-defendant George Ray Lee (Lee). Lee's defense at trial was that he was not the driver of the automobile. The jury convicted Witherspoon but acquitted Lee.

search all of his luggage. As Purvis started searching his carry-on luggage, Witherspoon told him that there was a small amount of marihuana in one of his carry-on bags. Witherspoon admitted that the carry-on luggage belonged to him. After the discovery of the marihuana, Witherspoon was placed under arrest. At this point, Witherspoon revoked permission to search the three pieces of checked luggage, stating that the luggage did not belong to him and that the officers would have to get Bell's permission to search it. At the suppression hearing, Witherspoon again denied ownership of the checked luggage but testified that Bell had agreed to put one of Witherspoon's suits in his suitcase.

The drug dog did not alert to the three pieces of checked luggage outside the terminal. When the checked luggage was brought inside for another attempt, the drug dog indicated an interest in one piece of luggage but did not go into full alert. After the discovery of the marihuana, the three pieces of checked luggage were placed on the airport x-ray machine, and Ellis testified that he noticed four irregularly shaped objects consistent with the type of packaging used to conceal crack cocaine. Witherspoon was then transported to the Ouachita Parish jail to be booked for possession of marihuana.

The three pieces of checked luggage were taken to the Metro Narcotics Unit main office and sniffed by another drug dog. This dog fully alerted to the piece of luggage containing the four irregularly shaped objects. At this point, the officers obtained a search warrant for the three pieces of checked luggage. When the officers opened the suitcase to which the drug dog had alerted,

they discovered 1753 grams of crack cocaine sprinkled with soap powder and wrapped in plastic bags. The suitcase in which the cocaine was found had two identification labels. The first tag, a handwritten American Airlines label that passengers place on their luggage, contained the name Fred Witherspoon and listed a Los Angeles, California address. The second tag, a baggage claim label used by airlines for identification purposes, listed the owner's name as Fred Weatherspoon.

At an August 6, 1993 detention hearing, at which Witherspoon was represented by counsel (Peter Edwards), FBI agent Billy Chesser (Chesser) testified that he attempted to speak to Witherspoon at the Ouachita Parish jail on December 7, 1992. Chesser testified that he asked Witherspoon if he wanted to make a statement, and that when Witherspoon declined, he departed without saying anything else to him. Chesser stated that he did not recall whether Witherspoon was represented by counsel when he attempted to obtain a statement from him on December 7, 1992. At some point, attorney Lavalle B. Salomon (Salomon) was retained to represent Witherspoon. After his arrest but before his indictment, Witherspoon repeatedly contacted Chesser and Ellis asking for an opportunity to speak with them about his case. As a result of these contacts, the FBI contacted Salomon, who insisted that he wanted to be present at any interview. The government asserts that when the agents informed Witherspoon that Salomon wanted to be present for any interview, he responded that he had not retained Salomon, that somebody else had made the arrangement, and that Salomon did not speak for him.

At the detention hearing, Chesser testified that the United

States Attorney's office instructed him to inform Witherspoon that, if he wanted to speak with the FBI, he needed to write a letter stating that he was no longer represented by counsel. Witherspoon then wrote and distributed a letter addressed to Salomon, stating in part that "I Fred Witherspoon which [sic] to widraw [sic] you as counsel representing me in my case . . . . This decision is based on numerous factors. However, I feel you are indeed a good attorney, your schedule is too complicated to accommodate my situation." After discharging Salomon, Witherspoon spoke with law enforcement officials without counsel present. The only information received then or thereafter from Witherspoon was exculpatory in nature; no evidence of any such statements were introduced at Witherspoon's trial. After Salomon was discharged, Peter Edwards was appointed to represent Witherspoon on July 29, 1993. Two months later, John W. Focke was appointed to represent Witherspoon when Edwards became ill.

On July 28, 1994, a federal grand jury returned a 2-count indictment charging Witherspoon with 1 count of possession with intent to distribute 1753 grams of cocaine base in violation of 21 U.S.C. § 841(a) and 1 count of conspiracy to possess with intent to distribute the same quantity of cocaine in violation of 21 U.S.C. § 841(a) and 21 U.S.C. § 846. The jury convicted Witherspoon of both counts.[2] On April 14, 1994, the district court sentenced Witherspoon to 235 months imprisonment, 5 years supervised release,

[2] Lee and Bell were named in count two of the indictment. The jury acquitted Lee. Bell was apprehended at a later date, tried, and convicted.

and imposed a special assessment of $100. Witherspoon filed a timely notice of appeal.

Discussion

I. Right to Counsel

Witherspoon's first point of error is that the district court erred in denying his motion for a new trial based on the violation of his Sixth Amendment right to counsel. He alleges that the FBI violated his Sixth Amendment right to counsel of his choice by telling him that, if he wanted to discuss his case with them, he would have to discharge Salomon, his retained attorney. Although Witherspoon was well aware of the facts underlying his discharge of Salomon,[3] he raised this issue for the first time in his motion for a new trial filed on December 23, 1993, one week after the jury found him guilty on both counts.

"No procedural principle is more familiar to this Court than that a constitutional right . . . may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *United States v. Olano*, 113 S.Ct. 1770, 1776 (1993) (citation and internal quotation marks omitted). In *Olano*, the Supreme Court posited the three requirements for showing plain error under Federal Rule of Criminal Procedure 52(b). In order to obtain relief under the plain error standard, a defendant must show that (1) the district court deviated from a legal rule in the absence of

[3] Chesser's testimony at the detention hearing sufficiently elicited the relevant facts surrounding the discharge of Salomon. Moreover, because Witherspoon himself discharged Salomon, he was clearly aware of the events leading up to this decision.

a waiver, (2) the error was clear or obvious, and (3) the error affected substantial rights and influenced the district court proceedings. *Id.* at 1777-78. Even if all three requirements are satisfied, "appellate courts possess the discretion to decline to correct errors which do not `seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Calverley*, 37 F.3d 160, 162 (5th Cir. 1994) (en banc), *cert. denied*, 1995 U.S.L.W. 36679 (Feb. 27 1995) (citations omitted). Application of the plain error standard presupposes the absence of a waiver, which the Court distinguished from a forfeiture: "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 113 S.Ct. at 1777 (citing *Johnson v. Zerbst*, 58 S.Ct. 1019, 1023 (1938)). This distinction is important in determining whether an error within the meaning of Rule 52(b) has occurred. "Mere forfeiture, as opposed to waiver, does not extinguish an `error' under Rule 52(b)." *Id.* In other words, the waiver of a known right extinguishes the error and thus renders it unreviewable on appeal. *Calverley*, 37 F.3d at 162.

We hold that Witherspoon's failure to raise this argument until after the guilty verdict constitutes at least a forfeiture. Accordingly, our review is limited to plain error. The right to counsel guaranteed by the Sixth Amendment does not include an absolute right to counsel of one's choice. *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993); *United States v. Paternostro*, 966 F.2d 907, 912 (5th Cir. 1992). Nevertheless, a criminal defendant has a strong interest in being able to obtain counsel of his own

choosing. *United States v. Snyder* 707 F.2d 139, 145 & n.5 (5th Cir. 1983). We hold that Witherspoon has failed to satisfy the plain error standard. In support of our conclusion, we observe that the government obtained only exculpatory information during the interviews with Witherspoon in the absence of counsel (and no evidence resulting therefrom was introduced at trial).[4] Moreover, according to the government, Witherspoon stated that a third party retained Salomon to represent him and that Salomon did not speak for him. Because Witherspoon has failed to show how the government's conduct affected his substantial rights or influenced the district court proceedings, we find that his argument that he was denied the counsel of his choice in violation of the Sixth Amendment does not present plain error; and we accordingly decline to review it since it was first raised after verdict and no good cause appears for the failure to raise it earlier.

II. Magistrate Judge's Report

Witherspoon next argues that the district court did not conduct a proper *de novo* review of the magistrate judge's report recommending denial of his motion to suppress. On October 7, 1993, the magistrate judge held an evidentiary hearing on Witherspoon's motion to suppress and filed a report on December 1, 1993. On the same day, the district court signed an order adopting the magistrate judge's report and denied Witherspoon's motion to suppress. At the time the district court initially adopted the magistrate judge's report, the transcript of the evidentiary

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[4] Witherspoon has not alleged that the government obtained any inculpatory information from these contacts.

hearing had not been prepared. On December 9, 1993, Witherspoon filed various objections to the magistrate judge's December 1, 1993 report and moved for a continuance to permit the district court to conduct a *de novo* review.

After a magistrate judge files a report and recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). At the beginning of the first day of trial on December 13, 1993, the district court acknowledged that it had adopted the magistrate judge's report prematurely, stated that it had subsequently reviewed Witherspoon's objections and the record, and stated that it still concurred in the denial of the motion to suppress. The district court therefore denied Witherspoon's motion for a continuance. We hold that the district court's acknowledgment that it prematurely adopted the magistrate judge's report and its reconsideration of Witherspoon's objections and review of the full record of the suppression hearing cured any error.[5]

III. Motion to Suppress

Witherspoon next argues that the district court erred in denying his motion to suppress, alleging that he was illegally detained at the airport, that his consent to search the carry-on

[5] Witherspoon asserts, without support in the record (or otherwise), that the transcript of the evidentiary hearing was not available on December 13, 1993. However, the record reflects that the transcript was certified by the court reporter on December 7, 1993 and filed with the district court on December 10, 1993.

luggage was not given freely and voluntarily, and that the search warrant for the checked luggage was invalid because it was based on the evidence obtained as a result of the illegal detention and invalid consent. In reviewing a district court's ruling on a motion to suppress, we review questions of law *de novo*. *United States v. Maldonado*, 735 F.2d 809, 814 (5th Cir. 1984). We consider the evidence in the light most favorable to the prevailing party and accept the district court's factual findings unless clearly erroneous or influenced by an incorrect view of the law. *United States v. Lanford*, 838 F.2d 1351, 1354 (5th Cir. 1988).

Witherspoon testified at the suppression hearing that the piece of checked luggage in which the cocaine was found belonged to Bell. Based on this testimony, the magistrate judge determined, and the district court agreed, that Witherspoon had no standing to challenge the search of the checked luggage under the Fourth Amendment. It is well established that a defendant bears the burden of establishing standing to challenge a search under the Fourth Amendment. *United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir.), *cert. denied*, 113 S.Ct. 621 (1992). In order to establish standing, a defendant must show that he has "a privacy or property interest in the premises searched or the items seized which is sufficient to justify a `reasonable expectation of privacy' therein." *United States v. Judd*, 889 F.2d 1410, 1413 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 1494 (1990) (citations omitted). Here, Witherspoon initially gave the officers consent to search the checked luggage but revoked his consent after the discovery of the marihuana in his carry-on luggage and asserted

that the checked luggage belonged to Bell. Accordingly, Witherspoon cannot show a privacy interest in the checked luggage sufficient to establish standing. *See Pierce*, 959 F.2d at 1303 (holding that defendant had no standing to challenge search of bag containing cocaine where he denied ownership of the bag, denied ever being in possession of the bag, and continually tried to distance himself from the bag during trial). Alternatively, we hold that Witherspoon abandoned any privacy interest that he may have had in the suitcase by disclaiming ownership and possession of it. Therefore, we reject his contention that the presence of his suit in the suitcase provides him with standing. *See, e.g., United States v. Alvarez*, 6 F.3d 287 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1384 (1994) (holding that a defendant has no standing to complain of a search of property that he has voluntarily abandoned); *United States v. Piaget*, 915 F.2d 138, 140 (5th Cir. 1990) ("Once a bag has been abandoned, and the abandonment is not a product of improper police conduct, the defendant cannot challenge the subsequent search of the bag.").

Even if Witherspoon had standing to challenge the search of the suitcase, we would still affirm the district court's denial of his motion to suppress on the ground that the search did not run afoul of the Fourth Amendment. Witherspoon first argues that the officers illegally detained him at the Monroe airport. We disagree. "Whether a suspect has actually been `seized' for purposes of the fourth amendment is determined by viewing `all circumstances surrounding the incident,' and determining whether `a reasonable person would have believed that he was not free to

leave.'" *United States v. Galberth*, 846 F.2d 983, 991 (5th Cir.), *cert. denied*, 109 S.Ct. 167 (1988) (quoting *United States v. Mendenhall*, 100 S.Ct. 1870, 1877 (1980)). The district court, adopting the magistrate judge's report, assumed that the airport questioning of Witherspoon constituted a seizure within the ambit of the Fourth Amendment but held that the officers had reasonable suspicion to detain him. It is clear that until Witherspoon admitted he had marihuanasQthus establishing probable cause for arrestsQhis detention amounted to no more than a *Terry* stop. *Terry v. Ohio*, 88 S.Ct. 1868 (1968); *United States v. Butler*, 988 F.2d 537, 541 (5th Cir.), *cert. denied*, 114 S.Ct. 413 (1993). We hold that the following factors demonstrate that the officers had reasonable suspicion to initially stop and question Witherspoon at the airport: the information provided by the Dallas law enforcement officer; the fact that this tip was confirmed by the presence of the described individuals on the designated flight; the presence of luggage on the designated flight matching the baggage claim numbers given to Ellis by the Dallas officer; the fact that Witherspoon's travelling companion Bell fled when approached by the officers; and the nervousness exhibited by Witherspoon and Bell in the airport terminal. *See, e.g., Butler*, 988 F.2d at 541 (holding that officers had reasonable suspicion to detain defendant at airport where one-way ticket was paid for with cash by woman who did not board flight, ticket was issued in another person's name, and defendant initially denied having identification but subsequently produced identification card); *United States v. Hanson*, 801 F.2d 757, 763 (5th Cir. 1986) (finding that airport

detention was supported by reasonable suspicion where defendants appeared nervous in airport terminal, were travelling under assumed names, and paid cash for one-way tickets to Miami).

Witherspoon next asserts that his consent to search his carry-on luggage was not voluntary. Again, we disagree. Based on the officer's testimony and the district court's adoption of the magistrate judge's finding that Witherspoon's testimony was incredible, we hold that Witherspoon voluntarily consented to the search of his carry-on luggage. *See, e.g., United States v. Ponce*, 8 F.3d 989 (5th Cir. 1993); *United States v. Richard*, 994 F.2d 244 (5th Cir. 1993). Finally, Witherspoon argues that the search warrant for the checked luggage was based on the illegal airport detention and the illegal search of the carry-on bag which yielded the marihuana. Because we uphold the airport detention and the search of Witherspoon's carry-on bag, we also reject this argument.[6]

IV. Sufficiency of the Evidence

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[6] The officers searched three pieces of checked luggage pursuant to the search warrant. The government, however, only sought to introduce evidence from the suitcase in which the cocaine was found. Accordingly, the district court did not consider the validity of the search of the two other checked bags. Likewise, we limit our analysis to the search of the suitcase in which the cocaine was discovered.

We observe that the search warrant was adequately supported by probable cause based on the discovery of marihuana in Witherspoon's carry-on bag, the information provided by the Dallas officer, the presence of four irregularly shaped objects in the suitcase similar in appearance to packaging often used to conceal crack cocaine, and the dog's alert to the suitcase containing the suspicious objects. *See United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir.), *cert. denied*, 114 S.Ct. 155 (1993) (holding that a drug dog sniff is not search for Fourth Amendment purposes).

Witherspoon's fourth point of error is that the evidence is insufficient to support his convictions because it was circumstantial and did not exclude every reasonable hypothesis of innocence. In reviewing challenges to the sufficiency of the evidence, we review the evidence, whether direct or circumstantial, in the light most favorable to the jury verdict. *United States v. Nguyen*, 28 F.3d 477, 480 (5th Cir. 1994). All credibility determinations and reasonable inferences are to be resolved in favor of the verdict. *Id.* We hold the evidence sufficient if we conclude that a rational trier of fact could have found therefrom the essential elements of the crime beyond a reasonable doubt. *United States v. Villasenor*, 894 F.2d 1422, 1425 (5th Cir. 1990). Contrary to Witherspoon's assertion, "[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt." *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), *aff'd on other grounds*, 103 S.Ct. 2398 (1983). Based on our review of the evidence presented to the jury, we hold that the government produced sufficient evidence to support both of Witherspoon's convictions.

IV. Remaining Arguments

Witherspoon's remaining three points of error all relate to allegations of racial animus in his prosecution. Witherspoon filed three pretrial motions as part of this racial animus argument. Without conducting a hearing, the magistrate judge recommended denying these motions. Adopting the magistrate judge's report, the district court denied the motions. Witherspoon raises three points

of error based on the district court's denial of these motions. First, Witherspoon complains of the district court's denial of his motion to dismiss the indictment based on a denial of equal protection in sentencing and a claim of selective prosecution. Second, he challenges the district court's denial of his motion to retain an expert witness in criminology and its denial of his motion for discovery to assist him in his claim that he was denied equal protection and was selectively prosecuted. Third, he argues that he was entitled to an evidentiary hearing on his motion to dismiss. These three challenges are slight variations on the argument that, because crack cocaine use is more prevalent among blacks and powder cocaine use is more prevalent among whites, the Sentencing Guidelines for cocaine offenses violate equal protection in providing higher punishment for possession of crack cocaine than for a similar amount of powder cocaine. Witherspoon concedes that this Circuit has held that this distinction does not violate equal protection. *United States v. Fisher*, 22 F.3d 574, 579-80 (5th Cir.), *cert. denied*, 115 S.Ct. 529 (1994); *United States v. Watson*, 953 F.2d 895, 897 (5th Cir.), *cert. denied*, 112 S.Ct. 1989 (1992). Nevertheless, Witherspoon argues that the district court erred in denying his pretrial motions.

The district court, adopting the magistrate judge's report, rejected Witherspoon's equal protection argument based on the Sentencing Guidelines as prematurely raised in a motion to dismiss the indictment. In any event, as stated above, a direct equal protection challenge on the sentencing distinctions is precluded by *Fisher* and *Watson* (and Witherspoon has proffered nothing to suggest

and indeed has not alleged that the guidelines provisions were adopted from racial motives). In his motion to dismiss the indictment on the basis of selective prosecution, Witherspoon argued that "a systematic scheme exists between the local and state narcotics units and the Federal Bureau of Investigations [sic], where by mutual consent and agreement black defendants allegedly engaged in cocaine base offenses are prosecuted in federal court solely because of the race of the defendants and the fact that in cases involving cocaine base, the penalties in federal court are much more severe." The district court, adopting the magistrate judge's report, also rejected this argument, holding that he failed to establish a prima facie case.

We agree. The government has broad discretion in determining whom to prosecute. *Wayte v. United States*, 105 S.Ct. 1524, 1530 (1985); *United States v. Sparks*, 2 F.3d 574, 580 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 720, 899, 1548 (1994). A prima facie case of selective prosecution requires the defendant to show that he was singled out for prosecution while others similarly situated who committed the same crime were not prosecuted. *Sparks*, 2 F.3d at 580. He must also show that the government's discriminatory selection of him for prosecution was invidious or done in bad faith. *Id.* The only evidence proffered by Witherspoon in support of his selective prosecution argument was a February 1993 American Bar Association report showing that nationally drug arrests are increasing at a much faster rate among minorities and posingSQ*but not answering*SQ the question whether the increase resulted from increased involvement with drugs among minorities or selective

prosecution. Because the ABA report fails to establish either element of a prima facie case of selective prosecution, we reject Witherspoon's argument. Moreover, as the district court noted, this report has limited, if indeed any, relevance to this prosecution.

Lastly, Witherspoon argues that the district court erred in denying his motions to retain an expert witness and to pursue discovery to aid in his motion to dismiss, and he contends that the district court should have held an evidentiary hearing on his motion to dismiss. "In order for a defendant to discover documents relevant to his selective prosecution defense, he first must establish a colorable claim of selective prosecution." *United States v. Kahl*, 583 F.2d 1351, 1355 (5th Cir. 1978). Because Witherspoon has not established a prima facie case of selective prosecution, we hold that he was not entitled to the requested discovery or to retain the services of an expert witness. Likewise, we hold that he was not entitled to an evidentiary hearing on his motion to dismiss based on equal protection and selective prosecution grounds. *See United States v. Jennings*, 724 F.2d 436, 445 (5th Cir.), *cert. denied*, 104 S.Ct. 2682 (1984) (holding that defendant must establish reasonable doubt about the constitutionality of his prosecution in order to obtain an evidentiary hearing on a claim of selective prosecution).

Conclusion

For the foregoing reasons, Witherspoon's convictions are

AFFIRMED.