IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40649
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN DOMINGO GARZA,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas
(1:93 CR 151 1)

(March 27, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

I

A one-count indictment charged "[t]hat from on or about a date sometime in 1982 and continuing thereafter until on or about April 27, 1992," Juan Domingo Garza knowingly and intentionally conspired to distribute and to possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846. At

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

trial, the government adduced evidence of a conspiracy starting in 1987 and continuing through April 27, 1992; the evidence included testimony from David Oglesby that he started distributing marijuana in 1986, and in 1987 he began distributing marijuana that had been supplied by Garza (and transported from Houston, Texas) in Nashville, Tennessee. Oglesby testified that the arrangement continued through April 27, 1992. Daryl Dewees testified that he agreed to assist Oglesby with transporting a load of marijuana from Houston to Nashville in April 1992; that they travelled by car to Houston; that Oglesby contacted his distributor, Garza; that Dewees and Oglesby went to an apartment complex, met Garza, followed Garza to another apartment complex, and picked up 62 pounds of marijuana from one of the apartments. Telephone and pager records established that between February 1992 and June 1992 calls were placed from Garza's telephone number to Oglesby's pager 709 times and to Oglesby's telephone 136 times.

After the jury returned a guilty verdict, the district court sentenced Garza to a 60-month term of imprisonment.

II

On appeal, Garza contends that the evidence was insufficient to convict him because the indictment charged that the conspiracy began in 1982 and continued through 1992, and the government "wholly failed to establish that any conspiracy existed prior to 1987." According to Garza, the conviction should be reversed because the government was required to prove the dates of the

conspiracy "within reasonable limits" and that it failed to do so. Garza did not move for judgment of acquittal at any point in the proceedings. United States v. Thomas, 12 F.3d 1350, 1358 (5th Cir.), cert. denied, 114 S.Ct. 1861 (1994), reiterates the principle that such a failure limits appellate review to the plain-error standard, under which a conviction will be reversed only for a "manifest miscarriage of justice." "Such a miscarriage would exist only if the record is devoid of evidence point to guilt, or . . . because the evidence was so tenuous that a conviction would be shocking." United States v. McCarty, 36 F.3d 1349, 1358 (5th Cir. 1994) (internal citation and quotation omitted).

To establish a conspiracy under 21 U.S.C. § 846, the government must prove beyond a reasonable doubt "(1) the existence of an agreement between two or more persons to violate the narcotics laws, (2) that each alleged conspirator knew of the conspiracy and intended to join it, and (3) that each alleged conspirator did participate in the conspiracy." United States v. Puig-Infante, 19 F.3d 929, 936 (5th Cir.), cert. denied, 115 S.Ct. 180 (1994). Garza's argument does not implicate the sufficiency of the evidence supporting the conviction.

As the government points out, Garza's issue is more properly analyzed as whether there was a fatal variance between the indictment and the proof at trial. Because Garza did not raise this issue in the district court, 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, 1994 WL 36679 (Feb. 27, 1995) (No. 94-7792). 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 (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.

"A material variance occurs when a variation between proof and indictment occurs, but does not modify an essential element of the offense charged." United States v. Thomas, 12 F.3d at 1357. A material variance will not constitute a ground for reversal of the conviction, however, unless "1) the defendant establishes that the evidence the government offered at trial varied from what the government alleged in the indictment, and 2) the variance

prejudiced the defendant's substantial rights." Puig-Infante, 19 F.3d at 935-36 (internal quotation and citation omitted). Substantial rights are affected if the defendant is surprised at trial or placed in risk of double jeopardy. United States v. Robinson, 974 F.2d 575, 578 (5th Cir. 1992); see also Cochran, 697 F.2d at 604 ("[w]ith variance, our concern is whether the indictment, assuming it has otherwise alleged the elements of the offense, has so informed a defendant that he can prepare his defense without surprise and has protected him against a second prosecution for the same offenses"). The government correctly recites the rule "[i]n this circuit [that] an allegation as to the time of the offense is not an essential element of the offense charged in the indictment, and within reasonable limits, proof of any date before the return of the indictment and within the statute of limitations is sufficient." United States v. Cochran, 697 F.2d 600, 604 (5th Cir. 1983) (internal quotation, punctuation, and citation omitted).

A variance occurred between the offense charged in the indictment and the proof adduced at trial because the government proved that a conspiracy between Garza and Oglesby existed from 1986 through April 1992, but the indictment alleged that a conspiracy existed "from on or about a date sometime in 1982 and continuing thereafter until on or about April 27, 1992." Garza has not asserted, however, either that the variance impaired the preparation of his defense at trial or placed him in risk of double

jeopardy. Because Garza made no showing that the variance affected his substantial rights, because he does not otherwise contest the sufficiency of the evidence proving that he and Oglesby conspired to violate narcotics laws from 1986 through April 27, 1992, and because Garza has not shown an error, plain or otherwise, his conviction is

A F F I R M E D.