

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-50310
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MICHAEL HOUSTON ROBERSON,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

(A-93-CR-109)

(January 3, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Defendant-Appellant, Michael Houston Roberson, challenges his conviction by a jury of conspiracy and possession of cocaine base with the intent to distribute. At Roberson's trial, Austin, Texas police officer Scott Ehlert testified that in June 1993 he had

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

obtained warrants to arrest an Andrew Bailey and search Bailey's motel room. Police received information before the search team arrived at the motel that Bailey had gone to a restaurant next to the motel. Before officers could arrest Bailey, four people arrived in a yellow Cadillac, entered the restaurant, and met with Bailey. Out of concern for the safety of restaurant patrons, the police decided not to enter the restaurant and arrest Bailey. Bailey and the four people with whom he had met left the restaurant in the Cadillac. Police officers attempted to stop the car. The driver of the Cadillac refused to stop.

Austin police officer Chuck Crawford testified that he and other officers followed the yellow Cadillac in three police cars with sirens and lights activated. The police pursued the car on an expressway and briefly on a city street. After the car stopped, police positioned themselves for a high risk car stop. Crawford ordered the occupants of the car to place their hands behind their heads. They complied. The car began to inch forward. Officer Martinez ordered Bailey, the driver, to turn off the ignition and throw the car keys out of the window. Bailey accelerated and left the scene.

According to Crawford, he and Martinez got into their cars and chased Bailey and the Cadillac. Bailey ran stop lights and stop signs and drove at a high rate of speed. Crawford and Martinez lost Bailey when they slowed for a stop light at a dangerous intersection. Meanwhile, several other police cars had picked up

the chase. Officer Dadignac announced over the radio that he had picked up surveillance and that the occupants of the Cadillac were bailing out of the car.

Crawford arrived at the scene and Bailey was placed under arrest. Shortly thereafter, Officer Mata told other officers that two of the other occupants of the Cadillac were running down an alleyway. Crawford and Mata pursued those two suspects and arrested them. Defendant-Appellant Roberson was one of the two suspects arrested in the alley.

Austin police officer Douglas Skolaut testified that he was in a raid van following the police cars that chased Bailey. According to Skolaut, the police in the van found three one-ounce baggies of crack cocaine on the street along the route the Cadillac took.

Skolaut testified that the police quickly searched the Cadillac. A crowd gathered during the search. The police decided to take the Cadillac to the police impound yard. Skolaut drove the car. After Skolaut arrived at the impound yard, he thoroughly searched the Cadillac. He noticed that the door arm rests were loose. He pulled the arm rests back and saw a bag in each door that contained "cookies" of crack cocaine.

Drug Enforcement Administration (DEA) Special Agent Jack Derington testified that he interviewed Roberson and Roberson's girlfriend. According to Derington, Roberson waived his rights and told Derington that he wished to talk without an attorney present. Roberson averred that the Cadillac was his. He told Derington that he had purchased the crack cocaine found in the Cadillac from an

individual in Houston called "Red." According to Derington, Roberson told him that he had taken the Cadillac to a friend's house. That friend helped Roberson remove the door panels, place the crack cocaine into the doors, and replace the panels.

Over Roberson's objections, the district judge allowed the government to introduce testimony Roberson gave at Bailey's trial. Roberson testified that he previously had been convicted twice of drug offenses. He testified that he and Bailey had driven around Austin in June 1993 with 12 ounces of crack cocaine in their possession. Roberson and Bailey sold their crack cocaine in one-ounce or two-ounce quantities.

Roberson testified that he returned to Houston and purchased 22 more ounces of crack cocaine for \$11,000. He placed the crack cocaine in the front door panels of the Cadillac. Eventually, he met Bailey at the restaurant. Bailey drove from the restaurant because he knew how to reach a garage where Roberson wished to purchase shock absorbers. According to Roberson, one of the occupants of the cars tossed a bag of crack cocaine out of the back window as police chased the Cadillac. All of the crack cocaine found in the car belonged to Roberson.

The jury at Roberson's trial found Roberson guilty. Roberson was sentenced to concurrent life terms of imprisonment.

OPINION

Roberson first contends that the district court incorrectly denied his motion to suppress evidence found in the Cadillac. Roberson argues that the inventory search was improper because it

went beyond the police department's inventory-search policy. He also argues that the police lacked probable cause to search the car because police should have inferred when they found the bags of crack cocaine on the street that the occupants of the car had thrown all of their drugs out of the car.

[I]t is well-established that warrantless searches of automobiles are permitted by the Fourth Amendment if supported by probable cause. . . . "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."

United States v. Kelly, 961 F.2d 524, 527 (5th Cir. 1992)(internal and concluding citations omitted), *overruled in part on other grounds*, *United States v. Calverley*, 37 F.3d 160, 163-64 (5th Cir. 1994)(en banc).

Police had ample cause to search the Cadillac. Bailey, for whom the police had an arrest warrant, did not stop immediately when police signaled for him to stop. After he did stop, he fled and led the police on a high-speed chase. The police found three baggies of crack cocaine on the ground in the car's path. The police had reason to believe that they would find more drugs in the car.

Roberson next contends that the district court incorrectly admitted evidence of his two previous drug convictions. After the end of testimony at Roberson's trial, the government offered copies of his two previous convictions for possession of crack cocaine. The district judge admitted the convictions. Before the government offered the previous convictions, the parties disputed the

admissibility of the convictions and the district judge determined that the convictions were admissible.¹ Roberson argues that his convictions are not "acts" for purposes of FED. R. EVID. 404(b) and that the convictions were admitted only to show that he had acted in conformity with his character.

Prior bad acts are inadmissible to prove bad character and action in conformity therewith. They may be admissible, however, to prove, *inter alia*, intent, knowledge, or absence of mistake. FED. R. EVID. 404(b). Prior convictions qualify as "acts" for purposes of Rule 404(b). See *United States v. Gadison*, 8 F.3d 186, 192 (5th Cir. 1993). Therefore, Roberson's contention that they do not is unavailing.

If prior bad act evidence is relevant to an issue other than character and therefore admissible under Rule 404, it is admissible if its prejudicial effect does not substantially outweigh its probative value. *Id.* A defendant "put[s] his intent at issue when he enter[s] a plea of not guilty to [a] conspiracy charge[.] . . . A prior conviction for possession of cocaine is probative of a defendant's intent when the charge is conspiracy to distribute." *Id.* (internal citation omitted). Prior convictions, however, are not necessarily admissible to prove the scienter necessary to prove possession with intent to distribute. See *United States v. Yeagin*, 927 F.2d 798, 803 (5th Cir. 1991)(admission erroneous when

¹The admissibility of the previous convictions was determined before the introduction of Roberson's testimony from Bailey's trial, in which Roberson testified that he had been convicted twice of drug offenses.

defendant offered to stipulate to intent if the government could prove possession and possible relevance was outweighed by prejudicial effect).

The district judge instructed the jury as follows regarding Roberson's previous convictions:

You must not consider any of this evidence in deciding if the defendant committed the acts charged in the indictment. However, you may consider this evidence for other very limited purposes.

If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the acts charged in the indictment, then you may consider evidence of the prior convictions to determine:

whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment; or

whether the defendant had a motive or the opportunity to commit the acts charged in the indictment; or

whether the defendant acted according to a plan or in preparation for commission of a crime; or

whether the defendant committed the acts for which he is on trial by accident or mistake.

These are the limited purposes for which any evidence of other similar acts may be considered.

Id. at 175.

The prior convictions were relevant to Roberson's scienter. To convict a defendant of conspiracy to possess with intent to distribute, the government must prove, *inter alia*, the defendant's knowledge of an agreement to traffic in drugs and his voluntary

participation in that agreement. *United States v. Ayala*, 887 F.2d 62, 67 (5th Cir. 1989). To prove possession with intent to distribute, the government must show that the defendant knowingly possessed drugs with the intent to distribute. *Id.*

On cross-examination, Roberson's attorney asked Austin police officer Chuck Crawford if it would have been dangerous for an individual to jump out of the car Bailey was driving. During closing arguments, Roberson's attorney suggested that Roberson was a passenger in the car driven by Bailey and lacked knowledge that Bailey possessed drugs. Roberson's prior convictions were relevant to show that Roberson was not merely a passenger and knew that the occupants of the car possessed drugs.

The prejudicial effect of the convictions did not substantially outweigh their probative value. First, the government introduced the copies of Roberson's convictions without comment and offered no testimony on those convictions. Second, Roberson himself testified at Bailey's trial that the crack cocaine in the car belonged to him. That testimony was read into evidence at Roberson's trial. The introduction of the convictions could have done little to prejudice Roberson, given his own testimony. Third, the district judge properly instructed the jury regarding the purposes for which it could consider the prior convictions.

Roberson finally contends that the district court incorrectly ruled admissible his testimony from Bailey's trial. Roberson's argument is unavailing.

Roberson's plea agreement provided that he would cooperate

with law enforcement authorities, provide those authorities with truthful information, and testify truthfully at any proceedings at which he was called. The agreement also provided that the government could use any statements by Roberson and evidence derived therefrom "in a prosecution for any offense if he violates any provisions of this agreement." Roberson did not object when the government rescinded the plea agreement on the basis that he had "failed to give a full, complete and truthful statement to law enforcement authorities as required by paragraph 5 of the plea agreement." He did not contend at trial that the government had rescinded the plea agreement improperly, though he challenged the use of his testimony at the Bailey trial on the ground that the testimony was immunized pursuant to the agreement.²

Roberson does not contend on appeal that the government improperly rescinded the plea agreement. "Failure to prosecute an issue on appeal constitutes waiver of the issue." *United States v. Green*, 964 F.2d 365, 371 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 984 (1993). Roberson therefore has abandoned any contention that the rescission was improper.

Plea bargain agreements are contractual in nature, and are to be construed accordingly. Under the principles of contract law, a party may avoid the obligations of an agreement gained by misrepresentation or fraud. Moreover, if a defendant materially

²The government averred during the discussion of the admissibility of Roberson's testimony that Roberson had lied on cross-examination, minimizing Bailey's role in the drug conspiracy. The docket sheet indicates that the government moved at Bailey's trial to dismiss the charges against Bailey. The government rescinded Roberson's plea agreement the next day.

breaches his commitments under a plea agreement, the government is released from its obligations under that compact and may bring a new indictment on previously dismissed charges, regardless of what it may have promised earlier.

United States v. Ballis, 28 F.3d 1399, 1409 (5th Cir. 1994)(internal and concluding citations omitted).

The plea agreement explicitly stipulated that the government could use any statement made by Roberson in a later prosecution for any offense should Roberson fail to satisfy his obligations. The government did not limit the use of Roberson's statements to prosecutions for perjury, false statement, or contempt of court, as is contemplated by the federal use-immunity statute, 18 U.S.C. § 6002, nor does the record in Roberson's case indicate that his testimony at Bailey's trial was compelled subject to the restrictions of the statute.

Roberson is responsible for providing this Court with any transcripts necessary for review of his contentions. *Powell v. Estelle*, 959 F.2d 22, 26 (5th Cir.), *cert. denied*, 113 S. Ct. 668 (1992). This Court therefore need not consider whether the transcript of Bailey's trial might demonstrate that Roberson's testimony was compelled pursuant to the immunity statute.

The government may enter an immunity agreement that does not limit it to prosecution for perjury, false statement, or contempt upon breach of the agreement. *Ballis*, 28 F.3d at 1410. The government informed Roberson in the agreement that it could use his

statements against him upon breach of the agreement. The government did no more than what it reserved the right to do.

AFFIRMED.