

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60229
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY "BIRD" SMITH, a/k/a Larry Belfour,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(CR-3:93-80-2)

(March 31, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appellant Larry "Bird" Smith was sentenced to 84 months imprisonment following a jury conviction for aiding and abetting a co-defendant in the distribution of more than 5 grams of crack cocaine. On appeal, Smith challenges the sufficiency of the evidence, the government's alleged failure to disclose its witness

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

statements, and various aspects of the prosecutor's closing argument. Finding no error, we affirm.

Smith's contention that the evidence was insufficient to convict him is based on alleged inconsistencies between the testimony of FBI agent Tillman, cooperating witness Spry, and a tape recording of the crack cocaine deal. The jury was entitled to decide whether or not there were inconsistencies, and they evidently rejected Smith's argument. This court has no warrant to reverse the jury's credibility determination.

Second, Smith asserts that the government withheld "302" reports prepared by Tillman and Spry, which he believes would have been favorable to the defense. The existence of the documents was disclosed at trial on the witnesses' cross-examinations. Smith neither made a contemporaneous request for the documents, nor moved for recess or continuance in order to prepare his impeachment. Compare Lawrence v. Lensing, ____ F.3d ____ (5th Cir. Dec. 1994) (No. 94-30221) (1994 WL 716299). If, as the government asserts, these reports were covered by the Jencks Act, Smith was not entitled to them because he failed to move for their production. If, however, they constituted Brady material, as Smith asserts, Smith still does not prevail. At most, not knowing what is in the documents, he thinks they would have supported his defense of testimonial inconsistencies. That argument was abundantly available from the testimony and tape recording at trial, so Smith cannot show how the reports would have materially improved his impeachment efforts. Consequently, he has not demonstrated that

the government's failure to disclose the reports constituted plain error or affected his substantial rights. United States v. Olano, 113 S. Ct. 1770 (1993).

In contending on appeal that the prosecutor's closing argument contained reversible errors, Smith must also depend on the plain error rule. None of the matters now raised was objected to at trial. We have carefully reviewed the prosecutor's closing arguments and find no plain error or impairment of Smith's substantial rights.

The judgment of the district court is **AFFIRMED**.