UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60370
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EVELYN LOUISE GRIFFIN,

Defendant-Appellant.

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

(CR C 93 205 3)

(June 16, 1995)

Before POLITZ, Chief Judge, JONES and BARKSDALE, Circuit Judges.

PER CURIAM:*

Evelyn Louise Griffin appeals her convictions and sentence for controlled substance offenses. Finding no reversible error, we affirm.

Background

Corpus Christi police arrested Griffin after observing a drug

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

transaction. Griffin stopped her automobile at the curb and handed her passenger, Luis Riascos-Gamboa, a plastic bag containing crack cocaine to be passed to Potter Davis, a known street dealer who was standing on the curb with $50 in hand. All three were arrested and indicted for conspiracy to possess cocaine base with intent to distribute in violation of 21 U.S.C. § 846, and possession with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). Griffin pleaded not guilty but Riascos-Gamboa and Davis entered guilty pleas and were called as witnesses for the prosecution. The jury returned guilty verdicts on both counts and Griffin was sentenced to 63 months imprisonment. This appeal timely followed.

Analysis

At sentencing Griffin claimed, for the first time, that she had been denied her right to testify and to call witnesses, contending that her attorney ignored her wishes and did not advise that the decision was hers to make. In a careful effort to protect Griffin's rights, the district court appointed another attorney to pursue the matter. Counsel filed two petitions for collateral relief, both of which were found to be premature and denied without prejudice. Griffin urges these same issues on appeal but the record is not adequate for our review. The appropriate procedural mechanism for raising these matters would be a motion under 28 U.S.C. § 2255 upon exhaustion of direct review.[1]

[1]See **United States v. Fry**, 51 F.3d 543 (5th Cir. 1995) (ineffective assistance claim should be raised by a section 2255 motion if the record is inadequate for decision on direct review);

Griffin's remaining contentions involve the admission of extrinsic offense evidence under Rule 404(b) of the Federal Rules of Evidence, to-wit, the testimony of two witnesses that on several occasions Griffin had sold them crack cocaine from her automobile. Griffin challenges the adequacy of both the government's notice that it intended to use that testimony and its proof that she in fact committed the offenses. We review the district court's decision to admit the evidence for abuse of discretion.[2]

Rule 404(b) was amended in 1991 to require the government to present reasonable notice of its intent to use extrinsic offense evidence. The advisory committee notes explain that the amendment was intended "to reduce surprise and to promote early resolution on the issue of admissibility" but otherwise leaves the determination of reasonableness to case-by-case adjudication. Our Eleventh Circuit colleagues have identified three pertinent factors:

> (1) When the Government, through timely preparation for trial, could have learned of the availability of the witness;
>
> (2) The extent of prejudice to the opponent of the evidence from a lack of time to prepare; and
>
> (3) How significant the evidence is to the prosecution's case.[3]

Parsons v. United States, 404 F.2d 888 (5th Cir. 1968) (deciding a claim of denial of the right to testify on a section 2255 motion); cf. **Johnson v. Hargett**, 34 F.3d 310 (5th Cir. 1994), vacated pending rehearing en banc, 42 F.3d 1483 (1995), on rehearing, ___ F.3d ____, 1995 WL 293042.

[2]**United States v. Willis**, 6 F.3d 257 (5th Cir. 1993).

[3]**United States v. Perez-Tosta**, 36 F.3d 1552, 1562 (11th Cir. 1994).

In the case at bar, each of these three factors favors admissibility. The government gave notice at least one week before trial, when the witnesses first agreed to testify. Griffin's attorney conducted able cross-examination and had witnesses available to refute the testimony. Finally, the testimony was important as a counter to Griffin's "mere presence" defense.[4]

Griffin also complains that the notice was not sufficiently specific. We are not persuaded. Rule 404(b) requires notice only of the general nature of the extrinsic acts evidence; the advisory committee rejected a requirement of specificity equivalent to that of a charging instrument.[5] The government advised Griffin of the identity of the witnesses and the fact that their testimony would concern prior cocaine purchases from her. This information was adequate.

Finally, Griffin maintains that the government did not present sufficient evidence that she in fact committed the extrinsic offenses, another prerequisite of admissibility under Rule 404(b). The testimony of the purchasers, however, sufficed for a reasonable jury to find that Griffin made the sales.[6]

AFFIRMED.

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[4]Cf. **Perez-Tosta**.

[5]Advisory Committee Notes, 1991 Amendment.

[6]See **United States v. Jackson**, 978 F.2d 903 (5th Cir. 1992), cert. denied, 113 S.Ct. 2429 and 113 S.Ct. 3055 (1993).