

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50700

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARVIN RAY MARSH, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(P-96-CR-94-1)

March 22, 1999

Before DAVIS, STEWART and PARKER, District Judges.

PER CURIAM:*

Marvin Ray Marsh appeals his conviction and sentence for two counts of possession with intent to distribute marijuana. The Government concedes that a Speedy Trial Act violation occurred as to count four of the indictment. The conviction and sentence on count four is therefore vacated. Whether a dismissal for violation of the Speedy Trial Act should be with or without prejudice is a question for the district court and the case is remanded to permit the district court to make that determination. See United States v. Jones, 56 F.3d 581, 586(5th Cir.1995).

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Marsh's argument that there was a Speedy Trial Act violation as to count two is without merit. The two continuances granted by the district court did not contravene the Speedy Trial Act. See 18 U.S.C. § 3161(h)(8)(A); See United States v. Westbrook, 119 F.3d 1176, 1188 & n. 5 (5th Cir. 1997). Marsh's argument that the speedy-trial clock began to run on December 13, 1996, as to count two is a new argument raised for the first time in his reply brief. It was therefore waived. See United States v. Jackson, 50 F.3d 1335, 1340 n.7 (5th Cir. 1995).

Marsh's argument that the two counts of conviction were multiplicitous is also without merit. The jury was justified in finding that Marsh aided and abetted his co-defendants in possessing with intent to distribute on the second count (involving the 1200 pounds of marijuana seized from his co-defendant's van).

The Government's motion to supplement the record on appeal with the order consolidating the trials of Marsh and Billy Mel Alford is GRANTED.

VACATED AND REMANDED; MOTION GRANTED.