UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 99-10576

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PEDRO MCPHEARSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

June 21, 2000

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:[*]

Pedro McPhearson appeals his sentence and conviction for conspiracy with intent to distribute over fifty grams of crack cocaine in violation of 21 U.S.C. § 846. We now affirm.

In September 1998, a box was left at a Mailboxes Etc. in Encino, California to be shipped to

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

"Chris" or "Chrish" Henderson in Abilene, Texas. An envelope with a return address of "Peedee," 8865 Independence No. 4, Canoga Park, California, was left at the same business. The handwriting on the envelope was similar to that on the box. Pedro McPhearson, whose nickname is Peedee, lived at the Canoga Park address at the time. A security videotape depicted a person carrying both a box and envelope similar in size to those described above.

After a drug detection dog alerted to the box, law enforcement officials obtained a search warrant. Inspection of the box revealed 979 grams of crack cocaine hidden inside a toy truck. The crack was repackaged, and the box was delivered to 391 Northway Drive in Abilene. Malcom McClotten lives at 391 Northway Drive. His nephew, who has a son named Christopher Henderson, lives across the street. Pursuant to a search warrant, officials searched McClotten's house and found the unopened box.

Also acting pursuant to a search warrant, police searched McPhearson's residence. They discovered, *inter alia*, pictures of the Henderson house, two large plastic bags containing smaller plastic baggies commonly used for packaging street-level amounts of crack, a receipt from the same Mailboxes Etc. with a date different from the date of the offense, an air bill with handwriting similar to the writing on the box; receipts for postal money orders with the name "Peedee McPhearson," small plastic bags containing cocaine, and $7,060 in currency.

Upon his arrest, McPhearson stated that he would take the blame for the cocaine found in his home. Fingerprints taken at the time of McPhearson's arrest matched prints found in an inside flap of the box that contained the crack.

Prior to trial, McPhearson filed a motion for a continuance, alleging an inability to locate defense witnesses Anthony Shelby and Wayne Tavarez. The court denied the motion but ordered the

United States Marshal to bring witnesses Shelby and Martin Elam to court.[1] Neither Shelby nor Tavarez was secured for trial.

McPhearson was convicted of conspiracy with intent to distribute crack cocaine. A pre-sentence report ("PSR") assessed McPhearson a two-level increase for obstruction of justice because he had perjured himself by testifying that he was not the person depicted on the security tape. McPhearson objected to the enhancement, arguing that the tape was "hazy" and "did not allow for reliable identification." The district court overruled McPhearson's objections, finding that he had perjured himself not only by testifying that he was not on the tape, but also by stating under oath that he had been hired by both the sheriff's department and the probation office.[2]

On appeal, McPhearson first argues that the district court erred in denying his motion for a continuance to locate Shelby and Tavarez. "We review the denial of a defendant's motion for a continuance for abuse of discretion resulting in serious prejudice." *United States v. Pollani*, 146 F.3d 269, 272 (5th Cir. 1998). When a continuance is requested because a witness is unavailable, the party seeking the continuance must demonstrate that (1) due diligence was exercised to obtain the attendance of the witness, (2) the witness would provide "substantial favorable evidence," (3) the witness will be available and willing to testify, and (4) denial of the continuance would materially prejudice the movant. *See United States v. Olaniyi-Oke*, 199 F.3d 767, 771 (5th Cir. 1999). McPhearson fails to satisfy this burden, and, accordingly, the district court did not abuse its discretion

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[1] McPhearson contends that while he had subpoenaed Shelby and Tavarez, due to confusion, the court erroneously ordered marshals to bring Shelby and Elam to court.

[2] Because we find that McPhearson's perjured statement regarding his identity on the security tape is sufficient to warrant the sentencing enhancement, we do not address his statements regarding employment with the sheriff's department and the probation department.

in denying his motion for a continuance.

McPhearson argues that Shelby would have testified that he was the owner of the crack found at McPhearson's residence. Given the weight of the other evidence against McPhearson, this testimony cannot properly be characterized as "substantially favorable evidence." Nor did the absence of this evidence result in "serious prejudice." *United States v. Scott*, 48 F.3d 1389, 1393 (5th Cir. 1995).

McPhearson contends that Tavarez would have provided employment records that would have shown the McPhearson was working at the time the packages were dropped off at the Mailboxes Etc. However, at trial, McPhearson's investigator testified that Tavarez had gone out of business and no longer had McPhearson's employment records. Accordingly, Tavarez would not have provided the favorable testimony that McPhearson alleges he would have provided. His absence from the trial therefore cannot properly be characterized as prejudicial.

McPhearson next contends that the district court erred in imposing a two-level increase in his offense level for obstruction of justice based on its finding of perjury. *See* U.S.S.G. § 3C1.1 ("If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels."). A sentencing enhancement under U.S.S.G. § 3C1.1 is required upon a finding that the defendant committed perjury. *See United States v. Storm*, 36 F.3d 1289, 1295 (5th Cir. 1994). We review a district court's factual finding that a defendant has obstructed justice for clear error. *See id.*

"[I]f a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful

impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition." *United States v. Dunnigan*, 507 U.S. 87, 113 S. Ct. 1111, 122 L. Ed.2d 445 (1993); *see also United States v. Storm*, 36 F.3d 1289, 1295 (5th Cir. 1994) (same). A defendant commits perjury if, while testifying under oath, he "gives false testimony concerning a material matter with the willful intent to provide false testimony." *United States v. Como*, 53 F.3d 87, 89 (5th Cir. 1995). Separate and clear findings of each element of the alleged perjury, "though preferable, [are] not required." *Como*, 53 F.3d at 89; *see also Dunnigan*, 507 U.S. at 95, 113 S. Ct. 1111 ("The district court's determination that enhancement is required is sufficient, however, if, as was the case here, the court makes a finding of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury.").

Here, McPhearson denied that he was the individual on the security video and objected to the court's enhancement of his sentence based upon that statement. The district court overruled McPhearson's objections to the PSR, finding that "the defendant did obstruct justice in committing perjury. As to the matters set forth in the pre-sentence report dealing with whether or not he brought the package containing the drugs to Mailboxes Etc., and denying that he was the person shown on the video, the jury heard all of the evidence, they viewed the video, and they found him guilty of the charge in question. . . . Therefore, the two levels increase for obstruction of justice is justified." We have previously held similar findings adequate to support a sentence enhancement under § 3C1.1. *See, e.g., Como*, 53 F.3d at 89 (noting implicit materiality finding in district court's statement that "I'm familiar with the statements made and the position taken, although or albeit through cross-examination during the trial. And I do not believe that Mr. Como was totally candid and truthful at the suppression hearing as established by other testimony and evidence presented."); *see also United*

States v. Haas, 171 F.3d 259, 268 (5th Cir. 1999) (finding materiality as a matter of law where court did not make a materiality finding).

Furthermore, the record amply supports the district court's finding that McPhearson committed perjury. The jury determined that McPhearson was the individual on the videotape based on still photographs made from the tape as well as fingerprint evidence. Also, McPhearson's perjured statement regarding his identity was material as a matter of law since, if believed by the jury, it would have influenced or affected the issue to be determined. *See Storm*, 36 F.3d at 1297. Accordingly, the district court did not err in enhancing McPhearson's sentence under § 3C1.1.[3]

For the foregoing reasons, the conviction and sentence of the district court is AFFIRMED.

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[3] McPhearson also argues that the enhancement is unconstitutional because (1) it fails to provide adequate notice that a crime has been committed, (2) the two-level increase has a more severe effect on individuals with higher base offense levels, and (3) it resulted in an increase of five and one half years of McPhearson's sentence, whereas, had McPhearson been convicted of perjury alone, he would have faced a statutory maximum sentence of five years. Because McPhearson raises these arguments for the first time on appeal, we review them for plain error. *See United States v. Flintco, Inc.*, 143 F.3d 955, 971 (5th Cir. 1998). None of McPhearson's claims survives such scrutiny.

First, a defendant's testimony at trial affords adequate notice of the district court's intent to enhance his sentence for obstruction of justice. *See United States v. Marmolejo*, 89 F.3d 1185, 1201 (5th Cir. 1996). Second, we have previously acknowledged, in the context of a sentencing enhancement due to career-offender classification, that "[t]he imposition of greater punishmnet based on the nature of the crime and on the recidivist nature of the perpetrator is recognized as a legitimate sentencing principle." *United States v. Hayden*, 898 F.2d 966, 967 (5th Cir. 1990). Accordingly, McPhearson's argument that the enhancement is unconstitutional because it has a greater effect on a defendant with a higher base offense level also lacks merit. Finally, McPhearson fails to cite any cases in which a court recognizes his argument that the enhancement is unconstitutional because it is longer than the possible sentence for perjury alone. Indeed, he fails to fully articulate the constitutional violation that he alleges. As a result, it was not clear error for the court to apply the enhancement. *See United States v. Calverley*, 37 F.3d 160, 162-63 (5th Cir. 1994) (holding that to "clear or obvious error" requirement "contemplates an error which was clear under current law at the time of trial").