

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1791

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE ALFREDO CASTRO, a/k/a
Adan Rocha, Jr.,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
(3:92 CR 00165 H)

(July 30, 1993)

Before KING and JOLLY, Circuit Judges, and PARKER, District Judge.*

PER CURIAM:**

Jose Alfredo Castro was convicted of one count of distribution of heroin in violation of 21 U.S.C. § 841(a)(1) and one count of obstruction of justice in violation of 18 U.S.C. § 1503. At trial, the government introduced into evidence the transcript of a taped telephone conversation between Castro and a confidential informant

*Chief Judge of the Eastern District of Texas, sitting by designation.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

working with the government. On appeal, Castro argues that the government violated his Sixth Amendment right to counsel by taping this telephone conversation at a time when it knew he was represented by counsel, and that its admission into evidence constitutes reversible error. Procedural defaults require us to review Castro's claim under the plain error standard. Because of the overwhelming evidence establishing Castro's guilt, we conclude that the admission of the transcript of the telephone conversation does not amount to plain error. Accordingly, we affirm Castro's conviction.

I

In 1991, Robert Levenant began working with the Drug Enforcement Administration ("DEA") as an informant. Levenant subsequently became associated with Castro. In March 1992, Levenant informed Castro that he wished to purchase ten ounces of heroin for one of his customers in Fort Worth. Castro told Levenant that he could provide the heroin and stated that his source was a jewelry store.

Castro agreed to meet Levenant at the jewelry store and provide him with the ten ounces of heroin in exchange for \$32,000.00. An undercover DEA agent was to pose as Levenant's customer. Once all the players arrived at the jewelry store's parking lot, Castro entered the store, came back outside with a package in his hand, and motioned for the others to meet him at a nearby pay phone. Castro was carrying a package that contained

five ounces of heroin, and he stated that he wanted to be paid for it before he would deliver the additional five ounces. After the undercover DEA agent received this package, Castro and Levenant were arrested. Castro was then charged with possession and distribution of heroin.

After Castro's arrest, he telephoned Levenant and urged him to tell the government agents that Castro was not involved in the heroin sale. Levenant informed the DEA of this conversation. At this point, a DEA agent called the jail at which Castro was being detained and left a message for Castro; Castro was to call an attorney, collect, at the number left by the DEA agent. Castro called the number. Instead of an attorney, Castro reached Levenant. During this telephone conversation, which was being taped by the government, Castro asked Levenant to lie for him and to say that he had nothing to do with the package of heroin. Specifically, Castro requested Levenant to say that another person left the package of heroin at the phone booth and that when Castro went to use the phone, he picked it up without knowing what it was. Castro also made numerous incriminating statements about the crime. This phone conversation resulted in Castro being charged with one count of obstruction of justice.

During Castro's trial, the transcript of the phone conversation between Castro and Levenant was read to the jury. Castro's attorney did not object to the admission of the transcript. The jury subsequently convicted Castro on one count of

possession and distribution of heroin and one count of obstruction of justice. Castro appeals.

II

On appeal, Castro argues that the government violated his Sixth Amendment right to counsel by using Levenant to question him without the presence of his attorney or a valid waiver of that right. Consequently, the admission into evidence of the transcript of the telephone conversation constitutes reversible error.

On the other hand, the government argues that the district court properly admitted evidence of this telephone conversation because it was introduced to prove the obstruction of justice offense, a count on which Castro had not been indicted when the telephone conversation occurred. Since the Sixth Amendment right to counsel is offense-specific, the government argues that no right to counsel had yet attached. The government also argues that even if the district court erred in admitting the transcript, it does not rise to the level of plain error in the light of the overwhelming evidence of guilt adduced at trial.

III

Because Castro did not object at trial to the introduction of the transcript of the telephone conversation, we review only for plain error. United States v. Pofahl, 990 F.2d 1456, 1471 (5th Cir. 1993). We must ask whether the admission of the transcript, taken as a whole in the context of the entire case, substantially prejudiced Castro's rights. See United States v. Montemayor, 684

F.2d 1118, 1124 (5th Cir. 1982). We recognize plain error only if the alleged error is so obvious that failure to notice it seriously affects the fairness, integrity, or public reputation of judicial proceedings and results in a miscarriage of justice. United States v. El-Zoabi, 993 F.2d 442, 446 (5th Cir. 1993).

Even if we assume, without deciding, that a Sixth Amendment right may have been implicated,¹ we cannot say that the admission of this evidence was plain error. In the circumstances of this case, the admission of the transcript of the telephone conversation would constitute plain error only if the remaining evidence against him was insufficient to uphold Castro's conviction. After reviewing the record, we are convinced that the remaining evidence against Castro was overwhelming.

Besides the transcript of the conversation between Castro and Levenant, the government introduced the testimony of the DEA agent who posed as the buyer during the drug sale transaction; the testimony of the DEA supervisor who participated in the surveillance of the transaction and witnessed Castro leaving the jewelry store with an object in his hand; the testimony of a Dallas police officer who participated in a search of the jewelry store; the testimony of another DEA agent who participated in the

¹It appears that even Castro concedes that the transcript of the telephone conversation was admissible as evidence of the obstruction of justice charge. Any Sixth Amendment violation, therefore, would have occurred by the transcript being introduced as evidence of the heroin charge.

surveillance of the transaction; the testimony of a DEA chemist that the package did indeed contain heroin; and, finally, the testimony of Levenant. All of this evidence clearly established that Castro possessed and distributed heroin and that he was guilty of the crime with which he was charged. In short, the fundamental fairness and the integrity of the proceedings were not affected by its introduction of the transcript of the telephone conversation, and we are thus convinced that no manifest injustice has occurred in this case.

IV

In summary, we find it unnecessary to address the merits of the Sixth Amendment issue that Castro has raised because, even if we assume that the telephone conversation between Castro and the confidential informant violated his Sixth Amendment rights, the violation would not rise to the level of plain error. Accordingly, Castro's conviction is

A F F I R M E D.