

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7140
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARGARET JO CHRISTMAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(CR W 91 37 S D)

March 12, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

From her conviction for several marijuana-related offenses, Margaret Jo Christman appeals. We find no error and affirm.

Margaret Jo Christman and her husband, Michael Christman, were charged in a seven-count indictment with drug conspiracy, four counts of possession of marijuana with intent to distribute,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

carrying and using a firearm during drug trafficking, and possession of a firearm by a felon. Only Michael was named in counts two and seven.

Steven and Anthony Farese represented Michael, and Omar Craig and David Minyard represented Margaret Jo. At trial, Michael testified but Margaret Jo did not. The jury found Margaret Jo and Michael guilty on all the charges.

At the sentencing and motion-for-bail-pending-appeal hearings, Margaret Jo voiced her dissatisfaction with her trial counsel, alleging that they prevented her from exercising her right to testify in her own behalf. Margaret Jo's new counsel moved this Court to remand her case to the district court for an evidentiary hearing so that the record would be adequate for the issue of ineffective assistance of counsel to be addressed on direct appeal. This Court granted the motion. U.S. v. Christman, No. 92-7140 (5th Cir. June 24, 1992) (unpublished).

After receiving evidence on the ineffective-assistance-of-counsel claim, the district court held that Margaret Jo's "[S]ixth [A]mendment rights were not violated." The district court found that "Mrs. Christman knew and understood her right to testify but nevertheless acquiesced in the advice and recommendation of her lawyers and voluntarily and understandably waived her right to testify."

I. Sufficiency of the Evidence

Margaret Jo argues that the evidence was insufficient to convict her of Counts three, four, five, and six: possession with

intent to distribute various weights of marijuana and carrying a weapon during drug trafficking. She does not raise this issue as to Count one, conspiracy to possess and distribute marijuana. Any argument concerning sufficiency of the evidence as to Count one is waived. See U.S. v. Green, 964 F.2d 365, 371 (5th Cir. 1992).

Margaret Jo's conspiracy conviction holds her culpable for the substantive counts.

"[E]ach conspirator may be held criminally culpable for substantive offenses committed by the conspiracy of which he is a member while he is a member." . . . A party to a conspiracy may be held responsible for a substantive offense committed by a coconspirator in furtherance of the conspiracy, even if that party does not participate in or have any knowledge of the substantive offense. Pinkerton v. U.S., 328 U.S. 640, 647, 66 S. Ct. 1180, 1184, 90 L.Ed. 1489 (1946). Thus, a defendant is deemed guilty of substantive acts committed in furtherance of the conspiracy by any of his criminal partners once the conspiracy and the defendant's knowing participation therein has been established beyond a reasonable doubt. . . . "This principle has been repeatedly applied by this circuit in cases involving drug conspiracies and substantive drug violations."

U.S. v. Garcia, 917 F.2d 1370, 1377 (5th Cir. 1990) (citations omitted). The indictment charged a conspiracy extending from December 1989 through February 24, 1990, encompassing the dates of the substantive offenses of conviction. Further, her husband testified at their trial and admitted to his participation in a drug conspiracy and his guilt as to the substantive drug charges. The jury received a Pinkerton instruction. Under Pinkerton, the evidence is sufficient as to the substantive counts which Margaret

Jo appeals. Appellant's brief nowhere challenges the dispositive impact of the Pinkerton doctrine here.

II. Effective Assistance of Counsel

Margaret Jo argues that she was denied effective assistance of counsel because her counsel denied her the right to testify in her own behalf. By virtue of the evidentiary hearing conducted in the district court at this court's order, the issue was placed before the district court so that we could review it.

To succeed on her claim, Margaret Jo must show both that her attorneys failed to give her reasonably competent assistance and that the deficient performance prejudiced the defense. United States v. Blankenship, 923 F.2d at 1117 (explaining Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The district court held that Margaret Jo received effective assistance of counsel. In support of its decision, the district court found that Margaret Jo understood her right to testify but voluntarily waived the right upon the advice of her counsel and Michael's counsel. This Court reviews the district court's findings of fact for clear error, but determines the issue of law de novo. Barnard v. Collins, 958 F.2d 634, 636 (5th Cir. 1992) (habeas case).

The record supports the district court's finding that Margaret Jo understood her right to testify and voluntarily waived it. Margaret Jo testified that she understood that if she wanted to testify, she would be allowed to do so. During breaks in the trial, meetings occurred between the defendants and their four

attorneys. Craig and Minyard testified that during one of these meetings held before defense rested, they gave Margaret Jo their recommendations that she not take the stand. Minyard testified that the potential harm of Margaret Jo's cross-examination was the basis for his recommendation. Michael's attorney, Steven Farese, testified that during the meeting, Margaret Jo asked him for his advice and that he told her he agreed with her counsel, but it "was her choice to make." Further, Farese was under the impression that she agreed to take their advice.

Because the district court's finding is not clearly erroneous, there is no showing of counsel's deficient performance. We therefore need not address the prejudice prong of the Strickland test.

III. Waiver of Right to Testify in the Record

Margaret Jo argues that the defendant's right to testify is a fundamental right, that such a waiver should be found in the trial record, and that without such a waiver in this record, her trial was constitutionally infirm. This issue was not timely brought before the district court, during trial, although the court apparently considered it during the hearing on remand. Even though one could argue this was untimely, the more important point here is that the issue whether Margaret Jo understandingly and voluntarily waived her right to testify was determined against her under the court's ineffective-assistance-of-counsel analysis. There is thus no evidentiary basis from appellant's contention that she was denied, against her will, the right to testify.

The judgment of conviction is AFFIRMED.