

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3056

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DERRICK HOWARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 92 307 M6)

(August 20, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Derrick Howard was convicted of conspiring to possess with intent to distribute cocaine base in violation of 21 U.S.C. § 846 (Count I); possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1) (Count II); and using and carrying a firearm during and in relation to the drug trafficking

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

crimes alleged in Counts I and II in violation of 18 U.S.C. §§ 924(c)(1) and (2) (Count III). Howard was sentenced to forty-one months on Counts I and II and to sixty months on Count III, consecutive to the sentence on Counts I and II. Howard appeals his conviction.

Howard makes only one argument on appeal: the introduction of certain hearsay statements of his non-testifying co-defendant caused him unfair prejudice. He fails to identify clearly which statements he is concerned about.

We begin by noting what this case is not about. In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court established the rule that the admission of pre-trial incriminating statements of a non-testifying co-defendant during a joint trial violated the Confrontation Clause of the Sixth Amendment. Bruton does not apply, however, when the co-defendants' trials are severed, as in this case. See United States v. Briscoe, 742 F.2d 842, 847 (5th Cir. 1984).

What this case is about is the hearsay exception for unavailable declarants contained in Fed. R. Evid. 804(b)(3). The statements of Howard's co-defendant were admitted as statements against penal interest under that exception. In order for a hearsay statement against interest to be admissible, the declarant must be unavailable, the statement must be against the declarant's penal interest, and corroborating circumstances must indicate the trustworthiness of the statement. Briscoe, 742 F.2d at 846. From the record, it appears that Howard's co-defendant

invoked his Fifth Amendment right and was therefore unavailable. The statements of Howard's co-defendant potentially at issue here clearly subjected the co-defendant to criminal liability and a reasonable man in his position would not have made them unless he believed them to be true. See United States v. Vernor, 902 F.2d 1182, 1187 (5th Cir.), cert. denied, 498 U.S. 922 (1990). As for corroborating circumstances, the principal corroborating evidence came from the statements made by Howard himself. Further, both Howard and his co-defendant directed agents to the location where they had purchased their narcotics. In view of the fact that Howard's and his co-defendant's statements and actions were consistent, there were adequate indicia of reliability and trustworthiness to admit the statements of the co-defendant.

Even if we were to assume, arguendo, that the admission of the co-defendant's statements was error, in view of the overwhelming evidence of Howard's guilt contained in the record, the admission of those statements constituted harmless error, i.e., error which did not affect Howard's substantial rights.

The convictions of Howard are AFFIRMED.