

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7042
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RANDALL WEST,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
CR S92 00015 03 P

July 8, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Randall West appeals his conviction of, and sentence for, conspiracy to possess with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 846; interstate travel in aid of unlawful activity, in violation of 18 U.S.C. § 1952(a)(3); and possession with intent to distribute a controlled

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

substance, in violation of 21 U.S.C. § 841(a)(1). We affirm in part, reverse in part, and remand.

I.

A jury found West guilty on all counts. The district court sentenced him to serve concurrent terms of imprisonment ranging from 60 months to 360 months, to run concurrently with the sentences previously imposed for West's convictions for conspiracy to possess with intent to distribute marihuana, possession with intent to distribute marihuana, and interstate travel in aid of unlawful activity. See United States v. West, No. 92-7701 (5th Cir. June 10, 1993). A total of five years of supervised release was ordered to be served concurrently with supervised release in the marihuana case.

II.

A.

1.

West argues that the instant cocaine conspiracy count violates the Double Jeopardy Clause because he was already convicted of participating in a marihuana conspiracy. He argues that the two indictments describe only one conspiracy, the object of which was to distribute both marihuana and cocaine.

Whether a defendant participated in one or more than one conspiracy is determined by looking to whether the conspiracies that are charged involved (1) the same charged offenses;

(2) similar goals, scopes, and natures as evinced by the overt acts charged; (3) the same locations; (4) the same time frames; and (5) the same persons. United States v. Greer, 939 F.2d 1076, 1087 (5th Cir.), vacated for rehearing en banc, 948 F.2d 934 (5th Cir. 1991), reinstated in pertinent part, 968 F.2d 433, 434 (5th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1390 (1993). The government has the burden of showing the separateness of the offenses by a preponderance of the evidence.

The essential issue is whether the defendant entered into one or more than one agreement. United States v. Deshaw, 974 F.2d 667, 673 (5th Cir. 1992). A court looks to the trial evidence to determine whether one overall conspiracy existed. Greer, 939 F.2d at 1087. On review, the evidence is examined in the light most favorable to the government.

2.

West has not included in the record of the instant appeal the indictment and proof in the marihuana case. The appellant has the burden of including all proceedings relevant to the issues on appeal. FED. R. APP. P. 10(b). We do not consider an issue about which the record is insufficient. Powell v. Estelle, 959 F.2d 22, 26 (5th Cir.), cert. denied, 113 S. Ct. 668 (1992); United States v. Dunham Concrete Prods., 475 F.2d 1241, 1251 (5th Cir.), cert. denied, 414 U.S. 832 (1973). As the facts of the marihuana case are available to the court because we have issued an opinion, the merits may be addressed, however.

At the conclusion of the government's case, West moved for judgment of acquittal on the conspiracy count raising the double jeopardy issue. The court denied that motion but deferred a detailed ruling until it was received at the close of all the evidence.

Even though the two trials were held in the same court, the district court began its analysis of the motion by stating that "the Court, quite frankly, wishes that it had more evidence before it to rule on that." The court noted that the two prosecutions proceeded separately with different prosecutors and that the parties and the court were "meticulous" in keeping evidence of the marihuana operation from the jury in the instant case to avoid prejudice. "So the Court doesn't have all of the evidence," said the district court.

Nevertheless, the court analyzed the following factors to find that the government had proven two conspiracies: The time frames were different, with the cocaine operation lasting from 1987 through October 1991 and the marihuana operation lasting only from May to September 1990. The cocaine conspiracy involved trips from Mississippi to Florida, New York, and Houston, and only one trip to the Harlingen, Texas, area, which was the source of the marihuana transported to Mississippi. The dealers from whom the organization purchased cocaine were different from those from whom the organization purchased marihuana. "Mule" John Burge was paid two different prices for his services for the marihuana and the

cocaine.

The court articulated these factors at trial. At sentencing, however, the court announced that it would order the sentences on the cocaine convictions to run concurrently with the sentences on the marihuana convictions "to give the defendant the benefit of the legal argument that . . . this was one single conspiracy and that there should not have been two trials."

In light of the five applicable factors, court's expression of discomfort with the lack of evidence and its willingness to give West the benefit of the double jeopardy argument appear incompatible with its finding that the government bore its burden of proving two conspiracies by a preponderance of the evidence. First, both indictments charged West with conspiring to violate the prohibition in section 841(a)(1) against possessing with intent to distribute a controlled substance. One indictment specified the controlled substance as marihuana, and the other specified cocaine.

Second, the two indictments were worded similarly, alleging knowing and willful conspiracies to violate section 841(a)(1), including allegations that the defendants "would make arrangements for the transportation, sale and distribution of [the controlled substance] in Mississippi and elsewhere." This could indicate that the goal, scope, and nature of each operation were the same. The trial evidence shows this more clearly.

The prosecutor asked Rusty Crawford, a co-conspirator and government witness, the following:

Q. I'm going to take you back, if I can, at this point to 1987 when you said you got into this cocaine

organization. You mentioned some of the people who were involved. Did you have any particular role that you played in this?

A. All I did was package.

Q. Okay. What did you package? Explain to the jury what you))

A. Drugs, cocaine, marihuana.

Later, Crawford identified a set of scales. When the prosecutor asked its use, Crawford responded, "That's what I used to weigh cocaine and marihuana on."

Crawford also explained the division of labor in the cocaine operation. West's brother Leroy (a/k/a Lee Roy, a/k/a Roy) and John Burge hauled the drugs, Crawford weighed and divided them, John Galbo distributed them, and West handled the money. This is the same way that the West organization conducted the marihuana operation.

Galbo testified similarly. He distributed the cocaine to customers. West was the leader; Lee Roy delivered the cocaine; West handled the money and gave orders to the others. This description of the cocaine operation matches the description of the marihuana operation. Galbo also testified that Leroy delivered both cocaine and marihuana.

Burge also said that he joined the West organization in May or early June 1990. That was the beginning of the marihuana conspiracy as charged. The prosecutor asked Burge how he got involved, and Burge answered,

Randall and Lee Roy come to my house one night and told me they wanted me to carry drugs for them from Texas to Mississippi and told me what they would pay me.

Q. What did they tell you they would pay you?

A. \$25 a pound for marihuana and \$1 a gram for cocaine.

The prosecutor asked Burge to restrict his testimony to cocaine.

Later, the prosecutor asked Burge whether cocaine was West's only source of income, as far as he knew. Burge responded, "Cocaine and marihuana were the only sources I know of."

Burge also testified that West gave him and Leroy cash in thousand-dollar packets before they left New Orleans by air and that Crawford and Randall, as well as Galbo, met them when they returned. West, Crawford, and Leroy's son Butch would divide the cocaine into smaller packages. So, West handled the money, Leroy and Burge were the "mules," Crawford divided the cocaine, and Galbo distributed it. This description matches the description of the marihuana operation.

Burge, did testify that, when he was arrested in McAllen, he was not dealing in cocaine but only in marihuana. That, however, is the only hint in Burge's testimony that the two operations were separate. Overall, the trial testimony strongly indicates that the marihuana trafficking and the cocaine trafficking were parts of the same scheme.

Third, the same locales are alleged in the indictments. The cocaine conspiracy involved trips to Florida, New York, and Texas, while the marihuana conspiracy involved trips to Texas only.

Fourth, the cocaine conspiracy lasted from 1987 to October 1991. The marihuana conspiracy continued from May to September 1990.

Fifth, six of the seven individuals charged in the cocaine conspiracy were charged in the marihuana conspiracy, with one additional person. In arguing that the persons were different, the prosecutor said that there were "some overlaps." The fact is that the conspirators overlapped substantially. The prosecutor did argue that the sources of the two drugs differed but noted that the Texas connection was "the same both in the marihuana and the cocaine" cases. "But the rest of the [cocaine] sources, and there were a number of them, were not in any way associated with the marihuana side of it."

While the government had the burden of proving two separate conspiracies by a preponderance of the evidence, we must evaluate the evidence in the light most favorable to the government. In summary, (1) the indictments charged conspiracies to violate the same statute, though the object drug was different; (2) the operations were almost identical: Burge entered into one agreement for both drugs; Crawford admitted playing the same role in both operations, as did Galbo; the testimony at both trials described operations of near-identical natures; (3) the locales were different but did overlap; (4) the time frames were different but did overlap; (5) most of the indicted co-conspirators were the same in the two operations, and most of the sources of the drugs were different.

As identified by the district court, the problem in evaluating these factors is that the government put on separate trials about marihuana and cocaine and presented very little evidence about the

relationship between the two operations. The five factors, viewed in a light most favorable to the government, do not show two agreements. Accordingly, the government did not meet its burden, and the conspiracy conviction must be reversed for violation of the Double Jeopardy Clause.

B.

1.

West argues that the verdict on the conspiracy count is against the weight of the credible evidence. As the conviction on the cocaine conspiracy count should be reversed, this issue is moot.

2.

One line in West's brief states, "There is no credible evidence that Randall West transported, possessed nor distributed cocaine." This is the only language that could be construed as an attack on the convictions on the counts other than conspiracy. Arguments, however, must be briefed to be preserved. See FED. R. APP. P. 28(a)(5); Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988). Even if we were to consider that West does attack the non-conspiracy counts, his argument is that the testimony of the co-conspirators who had made agreements with the government was not credible.

Crawford explained West's role in handling the money for the purchase of cocaine and the proceeds of its resale, as well as

West's direction of the operation. Galbo testified that Randall handled the money and led the organization. Burge testified that West handled the money, participated in dividing the cocaine into smaller amounts for resale, and figured the amount of the substance used to cut the cocaine. The testimony can support a conviction because it is "not incredible or otherwise insubstantial on its face." United States v. Singer, 970 F.2d 1414, 1418 (5th Cir. 1992).

C.

West argues that his sentence was miscalculated because the quantity of cocaine upon which it was based was too large and because he should not have been found to be a leader or organizer. He argues that the only evidence of the large quantity was unreliable because it was the uncorroborated hearsay of co-conspirators, and the only evidence of his role in the offense was the uncorroborated testimony of co-conspirators. West makes similar arguments in the appeal of the marihuana convictions.

The quantity in the instant case, unlike that in the marihuana case, was based not upon trial testimony but upon information provided by a customs agent who testified at sentencing and supplied information for the presentence investigation report ("PSR"). Agent Ray Walsh interviewed West's co-defendants, who had agreed to cooperate with the government. They were Leroy, Galbo, Burge, Mike Davis, and Crawford. Based upon his interviews, Walsh made calculations of quantities attributable to West "either [as]

a transporter or a co-conspirator or an aider and abetter of the transporter." The amount was more than 150 kg. West argues that the amount should have been substantially less because only 1 kg. and 5 oz. were charged in the non-conspiracy counts of the indictment, only 4.5 oz. or 126 g. were introduced as evidence at trial, and Crawford testified that the amount ranged from 4 oz. to 1 kg.

Walsh's testimony about his interviews with West's co-conspirators was hearsay. FED. R. EVID. 801(c). The district court, however, may consider any evidence that has "sufficient indicia of reliability to support its probable accuracy," including hearsay. U.S.S.G. § 6A1.3, comment.; United States v. Manthei, 913 F.2d 1130, 1138 (5th Cir. 1990). The PSR itself bears such indicia. United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990). The district court also may rely upon trial evidence in determining a sentence. United States v. Jackson, 978 F.2d 903, 913 (5th Cir. 1993), cert. denied, 1993 WL 137133 (May 24, 1993).

Based upon the evidence at both trials, which were held in the same court, the court found that West handled more than 150 kg. of cocaine. Walsh's detailed debriefing of the co-defendants, combined with the district court's own recollection of the extensive nature of the marihuana and cocaine operations as described in the two trials, bears sufficient indicia of reliability. Accordingly, the trial testimony as described above supports the adjustment for West's role in the offense.

The convictions for possession with intent to distribute and

for interstate travel in aid of unlawful activity are AFFIRMED.
The conviction for conspiracy is REVERSED and the case REMANDED for
the district court to modify the judgment and sentence accordingly.