IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7453

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

IRAHAN AVILA, a/k/a "James Favilla", a/k/a "Nuke",

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(CR-1:93-0005-S-D)

(June 3, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

We affirm Irahan Avila's conviction and his sentence.

I.

Irahan Avila ("Nuke") and others called Robert Ellis and asked if people were selling drugs in Columbus, Mississippi. Avila went to Columbus from California with half an ounce of crack cocaine.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

He and others operated out of Robert Ellis' trailer where they cut and packaged the rocks of crack for sale. When the half ounce was sold, Avila ordered more crack from Frank Wright ("Nitty"). Wright said he would send four and a half ounces of crack cocaine to "Nuke and them."

Before Wright's package arrived, police arrested Avila, Ellis, and James Raney ("Junkman"). Police intercepted the package, addressed to Ellis, and found four and a half ounces of crack cocaine within it. Around this time, at the direction of Postal Inspector investigators, Ellis made a consensually monitored telephone call to Wright.

Avila was charged with one count of conspiracy to distribute more than 50 grams of cocaine base and one count of possession with intent to distribute more than 50 grams of cocaine base. Avila was convicted of the conspiracy charge and found not guilty of the possession charge. He received a sentence of 168 months' imprisonment.

II.

Avila argues that the district court erred by admitting hearsay statements from Wright. On cross-examination, Avila's trial counsel asked Ellis when he made a phone deal with Wright for more drugs. Defense counsel for co-defendants Raney and Irving also asked about the call. On redirect, the government asked Ellis why he made the call to Wright. Ellis explained that he made the call to explain why he got involved in the drug trade, and added that the package was for "Nuke and them." Ellis received no more

questions about his call. Avila contends that Ellis's statement on redirect is inadmissible because it was not made in the course of or in furtherance of the conspiracy.

The district court did not plainly err in admitting this statement. Wright was not under arrest when he spoke to Ellis. He asked whether "Nuke and them got the package" to see if the drugs he mailed to Mississippi had arrived. Ellis may have been under arrest, but Wright was free and continuing the activities of the conspiracy, making his statements admissible.[1] Avila's Confrontation Clause and ineffective assistance arguments thus fail as well.[2]

Avila also argues that the district court erred by failing to make on-the-record findings regarding the admissibility of the coconspirator's statement. Avila did not move for findings, and the court denied his motion for acquittal at the close of evidence, implictly finding that sufficient evidence established the existence of a conspiracy.[3] We find no plain error under these circumstances.

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[1]See United States v. Ascarrunz, 838 F.2d 759, 762 (5th Cir. 1988); United States v. Postal, 589 F.2d 862, 888 (5th Cir. 1979).

[2]See Bourjaily v. United States, 483 U.S. 171, 182 (1987); United States v. Saks, 964 F.2d 1514, 1525 (5th Cir. 1992).

[3]United States v. Fragoso, 978 F.2d 896, 900-01 (5th Cir. 1992), cert. denied, 113 S. Ct. 1664 (1993).

We also find no plain error in basing Avila's sentence on the four and a half ounces of crack in Weight's package.[4] Evidence sufficient to sustain the sentence shows that Avila did not cancel his order.

AFFIRMED.

[4]See United States v. Lopez, 923 F.2d 47, 49 (5th Cir.), cert. denied, 111 S. Ct. 2032 (1991).