IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8858
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE ANTONIO ARRIOLA,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(SA-93-CR-25(1))

(February 24, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Jose Antonio Arriola was convicted by a jury of conspiracy and possession with intent to distribute marijuana and was sentenced to 120 months' imprisonment and four years' supervised release.

The facts underlying this appeal are briefly stated as follows: On January 30, 1993, Texas Department of Public Safety Sergeant Ralph Sramek was conducting an investigation of narcotics

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

traffickers in San Antonio, Texas. At about 3:00 p.m., a confidential informant notified Sramek that he had observed approximately 1,000 pounds of marijuana stored in a garage at 817 East Euclid. At about 4:00 p.m., Sramek arrested a person in possession of marijuana who told Sramek that he had purchased the marijuana at 817 Euclid. Sramek obtained a search warrant for that address, executed the warrant that evening, and discovered 1,777 pounds of marijuana in the garage, along with various paraphernalia used for packaging and distribution. Arriola was present at the house when the search warrant was executed. He attempted to flee and was arrested. The key to the garage was in Arriola's possession. The house was Arriola's residence. Sramek testified that Arriola told him that he had agreed to provide his house for storage of the marijuana for a fee of $2,000. He told Sramek that from time to time, the people who paid him to store the marijuana would come to the house to distribute the marijuana. Arriola denied making this statement. Arriola testified that a man named Ramon forced him to store the marijuana upon threats of death.

I

Arriola argues that the district court erred in denying his motion for disclosure of the confidential informant, which in turn deprived him of his right to test the sufficiency of the search warrant. He contends that the district court should have granted his motion for disclosure upon his substantial showing that the information in the warrant affidavit was false and made in reckless

disregard of the truth by Sergeant Sramek. He argues further that had the court granted his motion, a Franks[1] hearing would have disclosed that absent the false and reckless statements, there would have been insufficient probable cause to support the issuance of the warrant. He asks that his conviction be reversed and remanded for a new trial for the district court to conduct a Franks hearing.

Arriola's argument is convoluted and confusing, but the controlling issue is the denial of his motion for disclosure of the identity of the confidential informant and possibly the denial of a Franks hearing. He does not argue that there was no probable cause for the warrant absent the alleged false statements by Sramek in the affidavit, and he does not argue actually that the district court erred in denying his motion to suppress. He only argues that he could not properly challenge the affidavit without knowing the identity of the informant.

Arriola cites the standard of review for failure to hold a Franks hearing, but he never requested a Franks hearing in the district court. He did file a motion for disclosure and a motion to suppress. In his motion for disclosure, Arriola argued only that the identity of the informant was needed to prepare his case for trial. He did not make the argument that he now makes on appeal, that the informant was needed to challenge the warrant

[1]Franks v. Delaware, 438 U.S. 154 (1978).

affidavit. The district court denied the motion for disclosure. Arriola's motion to suppress was general in nature. He did not identify the evidence which he sought to suppress or argue why it should be suppressed. He stated that he would file a supplemental motion later, but he did not. At the hearing on his motion to suppress, Arriola's counsel cross-examined Sgt. Sramek, the affiant in the warrant affidavit, but he did not present any evidence or make any argument as to why the evidence seized pursuant to the warrant should be suppressed. The district court denied the motion without reasons.

Because the issue that Arriola raises on appeal was not raised in the district court, it must be reviewed for plain error. Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, this court may remedy the error only in the most exceptional case. United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. United States v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1777-79, 123 L.Ed.2d 508 (1993).

First, an appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain ("clear" or "obvious"), and that it affects substantial rights. Olano, 113 S.Ct. at 1777-78; Rodriguez, 15 F.3d at 414-15;

Fed. R. Crim. P. 52(b). This court lacks the authority to relieve an appellant of this burden. Olano, 113 S.Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is `plain' and `affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Olano, 113 S.Ct. at 1778 (quoting Fed. R. Crim. P. 52(b)). As the Court stated in Olano:

> the standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, [297 U.S. 157] (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Olano, 113 S.Ct. at 1779 (quoting Atkinson, 297 U.S. at 160). Thus, this court's discretion to correct an error pursuant to Rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17. See also United States v. Calverley, 37 F.3d 160 (5th Cir. 1994) (en banc).

This court reviews the district court's denial of a request to disclose an informant's identity for abuse of discretion. United States v. Sanchez, 988 F.2d 1384, 1391 (5th Cir.), cert. denied, 114 S.Ct. 217 (1993). The informant told Sramek that within the past 72 hours, he had seen a large quantity of marijuana in the garage of 817 Euclid, which was in control of a hispanic male named Joe, described as being approximately 30 years old, 70 inches tall,

180 pounds, and having black hair with a long pony tail. Sramek included this information in the affidavit when he applied for the search warrant. When an informant's involvement is limited to providing information used to establish probable cause for a search warrant, disclosure is not required. McCray v. Illinois, 386 U.S. 300, 311-13 (1967).

Although Arriola did not request a Franks hearing or make the required showing for a Franks hearing, Arriola effectively had a Franks hearing when he had the opportunity to cross-examine Sgt. Sramek about the affidavit at the suppression hearing. He does not explain how the identity of the informant would have helped him attack the affidavit.

Arriola has failed to show that the district court committed plain error by denying the motion for disclosure.

II

Arriola argues that the district court erred in denying his motion for an evidentiary hearing and motion for new trial based on juror misconduct. He contends that prejudicial extraneous information was brought to the attention of the jury during deliberations and that the jurors engaged in premature deliberations in violation of the trial judge's instructions, which violated his Fifth Amendment due process rights and his Sixth Amendment right to a fair and impartial jury. He argues that the jurors' misconduct created a presumption of prejudice. He argues that the district court's in camera hearing was insufficient, and

that this case should be remanded for an evidentiary hearing and reconsideration of his motion for new trial.

Arriola filed a motion for an evidentiary hearing to inquire into the validity of the verdict pursuant to Fed. R. Evid. 606(b), a motion for new trial, and a motion to interview jury panel members. The basis for these motions was allegations of jury misconduct contained in an affidavit by the son (Elpidio R. Villarreal) of one of the jury members (Elpidio A. Villarreal), who asserted that his father told him that one of the jurors, whom he believed to be Henry W. Miller, advised his fellow jurors during deliberations that he had visited the scene and began to tell the jury of his findings from written notes he had made. Villarreal allegedly told Miller that his actions violated the judge's instructions, and Miller put his notes away. Juror Villarreal also allegedly observed several jurors discussing the testimony and the weight of the evidence during breaks in the trial.

The district court denied Arriola's motion to interview the jurors and conducted its own in camera interviews of several jurors. Juror Villarreal testified that one of the jurors, Henry Miller, told the jury that he went to the house, but that before he could say anything else, the jury foreman stopped him. He did not say anything more, and the jury did not discuss it further. They deliberated only on the matters presented in the courtroom. Juror Henry Miller testified that he did not go to the house or tell the

jury that he did. He stated that the jury considered only the testimony presented in the courtroom at trial. Juror Ellerbee, the jury foreman, did not recall any member of the jury making any remarks about a private investigation of the scene of the crime. He stated that the jury deliberated on the evidence presented in the courtroom. Juror Foltz did recall one of the gentleman jurors saying that he had driven by the house and noticed that there were neighbors (Arriola had testified he had no neighbors). She told the gentleman juror that it was not relevant because of the six-month time gap. Some of the other members of the jury pointed out to him that the judge had instructed that private investigation was not allowed, and nothing else was said about it. The jury considered only the evidence presented in the courtroom. Juror Medley admitted that he drove down the street past the house and that he had told the jury that it seemed like there was a neighbor in the house next door because there was a light on. The foreman told him that they could not consider that, and nothing else was said about it. They considered only the evidence presented at trial. The district judge determined that he had heard enough, excused the rest of the jurors, and ordered the interviews transcribed for the lawyers.

The district court found that only one piece of extraneous information entered the jury room, the fact that there may have been neighbors next door to Arriola's house. It was not recalled by everyone, it was discussed only briefly, and it was agreed that

it could not be considered. The court found that no actual prejudice to Arriola occurred, and that there was no reasonable probability that the jury's verdict was influenced by the extraneous information. The court denied Arriola's motion for an evidentiary hearing beyond that held by the court and for new trial.

The district court's decision on whether to hold an evidentiary hearing to determine whether juror misconduct occurred is reviewed for abuse of discretion. United States v. Chiantese, 582 F.2d 974, 978 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979). Fed. R. Evid. 606(b) prohibits the use of juror testimony to impeach a verdict, except to establish whether extraneous prejudicial information was brought to the jury's attention or whether there were improper outside influences on the jury. When the alleged jury misconduct involves outside influence, there is a presumption of prejudice and failure to hold a hearing constitutes an abuse of discretion. Chiantese, 582 F.2d at 979. When extraneous prejudicial information finds its way into the jury room, a defendant "is entitled to a new trial unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it." United States v. Ortiz, 942 F.2d 903, 913 (5th Cir. 1991), cert. denied, 112 S.Ct. 2966 (1992) (internal quotation marks and citation omitted). A district court's refusal to grant a new trial is reviewed for abuse of discretion. Id.

The first instance of alleged jury misconduct, the independent investigation of the scene by juror Medley, constituted extraneous information brought to the attention of the jury. Therefore, the issue is whether the district court abused its discretion by holding an in camera hearing as opposed to a hearing at which Arriola's counsel could be present, and whether the court abused its discretion in denying Arriola's motion for new trial.

A very similar situation occurred in Ortiz, when two jurors related to the jury that they had driven by and seen the airport and the apartments mentioned in the trial. The court conducted an in camera interview of the jurors, concluded that there was no reasonable possibility of prejudice, and denied the defendant's motion for new trial. We affirmed, finding no abuse of discretion. Ortiz, 942 F.2d at 913-14.

The district court conducted a thorough investigation into the allegations in Villarreal's affidavit regarding the juror who drove by Arriola's house. All of the jurors questioned testified that they had not considered that information in reaching their verdict. The district court found that there was no reasonable probability of prejudice and no actual prejudice. Under these facts, we conclude that neither the district court's denial of an evidentiary hearing nor its denial of a new trial was an abuse of discretion.

The second instance of alleged juror misconduct, that the jurors were engaging in premature deliberations, does not involve extraneous information or outside influence, but only juror

violation of the court's instructions not to discuss the case until deliberations. See Chiantese, 582 F.2d at 979 (making that distinction). The reason for that prohibition is that the jury may form opinions about the case before it hears all the evidence, arguments, and instructions of the court. Id. In evaluating a claim of juror misconduct, this court begins with the presumption that the juror is impartial, and it is the defendant's burden to prove otherwise. United States v. Collins, 972 F.2d 1385, 1403 (5th Cir. 1992), cert. denied, 113 S.Ct. 1812 (1993). In a case where a juror has made a premature expression as to guilt, this court defers to the district court's decision as to whether the defendant has received a fair trial by an impartial jury. Id. at 1404. The trial judge's decision on whether to interview the jurors in camera or hold a hearing at which counsel is present is reviewed for abuse of discretion. United States v. Webster, 750 F.2d 307, 338-39 (5th Cir. 1984), cert. denied, 471 U.S. 1106 (1985); Grooms v. Wainwright, 610 F.2d 344, 347-48 (5th Cir.), cert. denied, 445 U.S. 953 (1980). See also United States v. Cuthel, 903 F.2d 1381, 1382 (11th Cir. 1990) ("The district court has discretion to determine whether evidence of premature deliberation warrants an evidentiary hearing.").

The district court's questioning of the jurors did not address the allegations of premature deliberations, but focused solely on the allegation of the juror's independent investigation of the scene. The court also did not specifically address the allegation

of premature deliberations in its order denying the motion for evidentiary hearing and new trial. However, Arriola has the burden of establishing that as a result of their premature deliberations, the jurors formed an opinion as to his guilt before they heard all the evidence and were incapable of impartiality. Collins, 972 F.2d at 1403. Villarreal's affidavit merely stated that the other jurors were discussing the testimony and weight of the evidence; it did not state that they expressed any opinions about Arriola's guilt before deliberations. Arriola does not make such an allegation of prejudice in his brief. The jurors interviewed by the trial judge all stated that they conducted their deliberations based on the evidence presented in the courtroom.

On the basis of these facts, Arriola has not demonstrated that the alleged juror misconduct resulted in an impartial jury. We therefore hold that the district court did not abuse its discretion in denying his motion for an evidentiary hearing and new trial.

III

Arriola argues that the district court erred in failing to award a downward adjustment based on his role as a minor participant in the offense. He argues that his role was limited to providing a location for the marijuana to be stored for a mere $2,000, that he did not own the marijuana, did not package or sell it, and did not recruit any of the co-conspirators. He asserts that he was a minor participant and should have been given a two-level downward adjustment under U.S.S.G. § 3B1.2.

The probation officer recommended no adjustment for role in the offense. Arriola objected to the absence of a downward adjustment for his minor role in the offense. The probation officer responded that although he did not play a leadership role, Arriola did not play a minor role because he was in possession and control of a large quantity of marijuana and had the key on his person. The district court found that Arriola "played neither an aggravating nor a mitigating role."

Section 3B1.2 provides for a reduction of two levels in the base offense level for minor participants. A "minor participant" is defined as one who is "less culpable than most other participants, but whose role could not be described as minimal." Id. (n.3). This court has noted that because most offenses are committed by participants of roughly equal culpability, "it is intended that [the adjustment] will be used infrequently." United States v. Mitchell, 31 F.3d 271, 278-79 (5th Cir.), cert. denied, 115 S.Ct. 649 (1994) (internal quotation marks and citation omitted). A district court's finding on this sentencing factor is reviewed under the clearly erroneous standard. Id. at 278.

A district court should not award the minor participation adjustment simply because a defendant's participation is somewhat less than the other participants. The defendant's participation must be enough less so that his actions could be considered at best "peripheral to the advancement of the illicit activity." United

States v. Thomas, 932 F.2d 1085, 1092 (5th Cir.), cert. denied, 112 S.Ct. 264, 428, 887 (1991 & 1992).

The key to the garage containing the marijuana was in Arriola's possession. The house was Arriola's residence. Arriola told Sramek that he had agreed to provide his house for storage of the marijuana for a fee of $2,000, a fact Arriola does not challenge for purposes of this issue. Based on these facts, the district court's finding that Arriola was not a minor participant was not clearly erroneous. See United States v. Hurtado, 899 F.2d 371, 375-76 (5th Cir.), remanded on other grounds on rehearing en banc, 905 F.2d 74 (5th Cir. 1990)(district court did not clearly err in denying downward adjustment for minor participant to defendant who stored large amount of cocaine in her home).

IV

For the reasons stated in this opinion, the conviction and sentence of Jose Antonio Arriola are

A F F I R M E D.