UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30601
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

BRUCE MCLAUREN,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 93 153 M)

August 18, 1995

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Bruce McLauren appeals his conviction for conspiracy to possess cocaine with intent to distribute. 21 U.S.C. § 846. He argues, among other things, that his right to a speedy trial was violated. Finding no error, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Bruce McLauren was charged in a criminal complaint with conspiracy to possess with intent to distribute approximately two kilograms of cocaine hydrochloride and made his first appearance in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court before a magistrate judge on April 6, 1993. McLauren was subsequently indicted for conspiracy, along with co-defendants Pat Ford and Tony Monk. Trial was scheduled for June 14, 1993. Co-defendant Ford filed a motion for continuance of the trial on June 2, 1993. Ford alleged that his counsel had recently received numerous tapes and did not have sufficient time to review all of the tapes in order to properly prepare for trial. The motion reflected that the Assistant U.S. Attorney and the co-defendants, including McLauren, had no objection to the motion. The court granted the motion and continued the trial until August 16, 1993.

On July 28, 1993, the United States filed a motion to continue the trial because the case agent was scheduled to be in Washington during the week that the trial was scheduled, which the district court granted. The trial was rescheduled for October 7, 1993. Defendant Ford filed another motion for continuance on October 7, 1993, arguing that his counsel required additional preparation time. The motion reflected that the other defense counsel and the U.S. Attorney had no objection to the continuance. The district court continued the trial until December 6, 1993.

The defendants and the United States filed a joint motion for continuance on November 24, 1993, contending that they all required further trial-preparation time. The district court granted the motion and continued the trial until January 31, 1994. Co-defendant Ford pleaded guilty on January 26, 1994. On that same date, a motion for a continuance was filed by McLauren's counsel on his behalf and on behalf of co-defendant Monk. The motion asserted

that these defendants required further time to investigate because of recent developments concerning the alignment of the co-defendants. Finding the continuance in the interest of the ends of justice, the district court continued the trial until March 21, 1994.

On March 11, 1994, McLauren's counsel filed a joint motion for continuance on behalf of McLauren and Monk, alleging that they required further trial-preparation time. Counsel represented that McLauren was serving a five-year sentence for an unrelated offense and would not be inconvenienced by a continuance and that he had agreed to the continuance. The district court continued the trial until April 11, 1994. In a minute entry dated March 21, 1994, the district court ordered that, upon the request of counsel, the trial be continued until May 23, 1994.

McLauren's counsel filed another motion for continuance on May 17, 1994, arguing that he needed additional preparation time because he had been out of the office for three weeks due to surgery. There was no objection to the motion by defendant Monk or the government, and the trial was continued until July 25, 1994.

On July 5, 1994, McLauren filed a pro se motion to dismiss his counsel and to dismiss the indictment based on the violation of his constitutional right to a speedy trial. McLauren argued that his counsel was ineffective because he had assisted the prosecution in having McLauren incarcerated for sixteen months in violation of his speedy-trial rights. McLauren argued that he did not consent to a waiver of his rights and did not give his counsel consent to do so.

In response to the motion, McLauren's counsel filed a motion to substitute counsel, which was granted by the district court. McLauren's new counsel then filed a motion for a hearing on McLauren's motion to dismiss based on the speedy trial violation. Following the hearing, the motion to dismiss was denied. At the conclusion of the hearing, McLauren indicated that he was not prepared to go to trial because of a conflict of interest with the Public Defender's Office. The district court denied his request for a continuance.

At the commencement of trial, counsel advised the court that Monk was also entering a guilty plea. The jury found McLauren, the only remaining defendant, guilty of the conspiracy charge. The court sentenced McLauren to 109 months imprisonment.

II. SPEEDY TRIAL CLAIM

McLauren argues that he was denied his constitutional right to a speedy trial because he remained jailed for sixteen months while his counsel continued his trial without his knowledge or consent. He argues that such a delay is presumptively prejudicial.

In reviewing a constitutional speedy trial claim, the court examines four factors: 1) the length of delay; 2) the reason for the delay; 3) the defendant's assertion of the right; and 4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972). The length of delay is a "triggering mechanism" in that, if the delay reaches a threshold level, it is regarded as "presumptively prejudicial" and the court must balance the remaining Barker factors. Robinson v. Whitley, 2 F.3d 562, 568

(5th Cir. 1993), cert. denied, 114 S.Ct. 1197 (1994). A delay of one year generally triggers the Barker analysis.

The Sixth Amendment right to a speedy trial attaches at the time of arrest or indictment, whichever comes first, and continues until the date of trial. United States v. Garcia, 995 F.2d 556, 560 (5th Cir. 1993). McLauren was arrested in April 1993, and he was not tried until July 24, 1994, almost sixteen months later. Because the delay between his first appearance and his trial exceeded one year, the remaining Barker factors must be considered.

The second factor to be considered was the reason for the delay. Although the government sought one continuance and joined with the defendants in one other joint motion for continuance, the remaining continuances were requested by McLauren's counsel or his co-defendants. It appears that the majority of the delay was attributable to a need for further trial preparation and the change in the complexion of the case following Ford's guilty plea. The delay was not attributable to the government's lack of diligence.

The third factor, involving the defendant's assertion of the right, does not weigh in McLauren's favor. The defendant bears the burden of asserting his right to a speedy trial. Barker, 407 U.S. at 531. Although McLauren was arrested on April 6, 1993, he did not assert his right to a speedy trial until early July 1994.

The last factor to be considered is whether McLauren was prejudiced by the delay. In Doggett v. United States, 112 S.Ct. 2686, 2693 (1992), the Court discussed the circumstances which would result in increasing or decreasing the defendant's burden to

prove prejudice. If the government acts with reasonable diligence in bringing a defendant to trial, the defendant is required to "show specific prejudice to his defense." Id. If the government had intentionally delayed the trial, "to gain some impermissible advantage", and there was an extended delay, "an overwhelming case for dismissal" would be presented. Id. If the delay is caused by the government's mere negligence, consideration must be given to the portion of the delay attributable to the government's negligence and whether the delay resulting from such negligence is of such duration that prejudice to the defendant should be presumed. See Robinson, 2 F.3d at 570.

The record reflects that the government acted with reasonable diligence in prosecuting the case. It last sought a continuance of the trial in November 1993, when it argued that its witnesses were not available for trial preparation. The government sought no further continuances and did not oppose the defendants' motions for continuance. McLauren does not assert that the government failed to act with due diligence or that the delay was caused by its negligence. McLauren, through his counsel, was responsible for the delays following the scheduled January 1994 trial date.

A defendant who is responsible "for the lion's share" of the delay must demonstrate "concrete proof" of his prejudice. Robinson, 2 F.3d at 570. Prejudice may be established by 1) proof of oppressive pretrial incarceration; 2) proof of anxiety and concern of the accused; and 3) proof of the possibility that the defense was impaired. Barker, 407 U.S. at 532.

McLauren argues that he was prejudiced by the delay because he was in the Marshal's custody, which was a very restrictive environment, and that his anxiety level was exacerbated by the lack of a satisfactory explanation for the delays. Id.

The government responds that McLauren remained detained following his arrest and a detention hearing because the magistrate judge determined that there was probable cause that he had committed a serious drug offense, he was on probation for a state conviction at that time, and he had a history of non-compliance with supervision. McLauren acknowledges that his state probation was revoked on July 27, 1993. McLauren certainly was aware that his state probation would probably be revoked following his arrest and that he would probably remain incarcerated regardless of the outcome of his drug trial. If McLauren experienced anxiety as a result of his incarceration, it was not solely attributable to the delay in his drug trial. Although the conditions of McLauren's confinement may have been restrictive, his allegations that he was "denied personal contacts visits with his family, had limited movement, and no employment" do not support a finding of "oppressive conditions of incarceration."

McLauren further argues that his defense was impaired by the delay because he was the only remaining defendant at trial. This argument has little merit in light of the fact that McLauren filed a motion to sever his trial from the trial against co-defendant Monk. McLauren alleged in the motion that Monk was additionally charged with obstruction of justice and that the government

intended to introduce a tape recording in support of this charge containing several references to McLauren's role in the conspiracy. McLauren argued that he would be prejudiced if tried with Monk because these incriminating statements against him would be admitted into evidence. By being tried alone, McLauren had the advantage of the jury not holding him accountable for the bad acts of his co-conspirators. He has not demonstrated that he was prejudiced because he was tried alone.

McLauren argues that the delay affected his position at sentencing because the evidence presented at trial did not reflect his limited participation in the offense. McLauren points out that co-conspirator Ford admitted in the factual basis supporting his guilty plea that he was involved in two other drug transactions not including McLauren, prior to the drug transaction which was the subject of the trial. The information concerning Ford's involvement in other drug transactions was contained in the Presentence report (PSR) provided to the district court. Further, McLauren argued his limited involvement at the sentencing hearing in the conspiracy. McLauren did not show that because he was tried alone, he was prejudiced at sentencing.

McLauren also contends that his sentence was greater due to the delay because he was sentenced after his state probation was revoked which increased his criminal history category. This argument is erroneous. McLauren was sentenced to two years probation in August 1992 in connection with a state court conviction for distributing cocaine. McLauren's criminal history

category was increased by two points because he was on probation at the time that he committed the offense and not because his probation was revoked in July 1993. U.S.S.G. § 4A1.1(d). Thus, he was not prejudiced by his trial being delayed until after his probation was revoked. McLauren has not provided "concrete proof" that he was prejudiced by the delay. McLauren has not shown a Sixth Amendment speedy-trial violation.[1]

III. QUANTITY OF COCAINE

McLauren argues that the district court clearly erred in holding him accountable for the total amount of cocaine provided by the agent in the reverse sting. McLauren argues for the first time on appeal that the agent "entrapped" him in order to expose him to a more severe sentence.[2] McLauren argues that the fact that he had only $1000 in his pocket indicated that his predisposition to engage in the sale of smaller amounts.

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[1] In his reply brief, McLauren argues for the first time that, although the district court complied with the technical requirements of the Speedy Trial Act by determining that the "ends of justice" would be served, it granted too many continuances in the case without any apparent good reason for doing so. McLauren argues that the district court's general findings were not sufficient to toll the time from running under the Speedy Trial Act. We will not review issues which are initially raised in a reply brief. United States v. Prince, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, 493 U.S. 932 (1989).

[2] McLauren argued in his objections to the PSR that he should be held accountable for one kilogram only of cocaine because it was not foreseeable to him that the transaction would involve two kilograms. However, he did not assert that he was "entrapped" by the agents into being involved in a two-kilogram transaction. Nor did he raise the entrapment issue at the sentencing hearing.

Under Fed.R.Crim.P. 52(b), we may correct forfeited errors only when the appellant shows the following factors: (1) there is an error, (2) that is clear or obvious, and (3) that affects his substantial rights. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc) (citing United States v. Olano, 113 S.Ct. 1770, 1776-79 (1993)), cert. denied, 115 S.Ct. 1266 (1995). If these factors are established, the decision to correct the forfeited error is within the sound discretion of the court, and the court will not exercise that discretion unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 113 S.Ct. at 1778.

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, we may remedy the error only in the most exceptional case. Calverley, 37 F.3d at 162. The Supreme Court has directed the courts of appeals to make this determination by using a two-part analysis. Olano, 113 S.Ct. at 1777-79.

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, and that it affects substantial rights. Olano, 113 S.Ct. at 1777-78; United States v. Rodriguez, 15 F.3d 408, 414-15 (5th Cir. 1994); Fed. R. Crim. P. 52(b). Plain error is one that is "clear or obvious, and, at a minimum, contemplates an error which was clear under current law at the time of trial." Calverley, 37 F.3d at 162-63 (internal quotation and citation omitted). "[I]n most cases, the affecting of substantial rights

requires that the error be prejudicial; it must affect the outcome of the proceeding." Id. at 164. 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, 56 S.Ct. 391, 80 L. Ed. 555 (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, our discretion to correct an error pursuant to Rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

In United States v. Richardson, 925 F.2d 112, 117-18 (5th Cir.), cert. denied, 501 U.S. 1237 (1991), we held that the separation of powers doctrine and the defendant's due process rights were not violated by a reverse-sting operation involving money laundering although the undercover agents determined the amount of money involved in the scheme. Richardson determined that the district court's discretionary determination of the defendant's relevant conduct was sufficient to limit the executive branch's ability to influence the sentencing range. Id. at 117-18. It also

found no due process violation because the defendant "freely decided to accept th[e] negotiated amount." Id. at 118 (internal quotations and citations omitted). We have applied the Richardson analysis in rejecting a defendant's argument that agents manipulated his sentence by "fronting" him drugs without requiring immediate payment. See United States v. Tremelling, 43 F.3d 148, 151 (5th Cir.), cert. denied, 115 S.Ct. 1990 (1995).

The presentence investigation revealed that a "reverse sting" was set up during which undercover agents would distribute two kilograms of cocaine hydrochloride to Ford and McLauren. The agent agreed to sell one kilogram for $19,000 and to "front" the other kilogram to the to defendants. The agent went to Ford's home where the defendants were making calls to contact persons who could deliver the money for the purchase of the cocaine. They contacted Monk, who arrived at the home a short time later. After displaying the two kilograms of cocaine, the agents advised the defendants of their identities. Ford and McLauren were arrested immediately and $1000 was found in McLauren's possession. Monk subsequently was apprehended and found in possession of $18,000.

The PSR reflects that McLauren freely participated in the negotiation for the sale of two kilograms and actively sought a buyer for the drugs. The mere fact that McLauren was in possession of only $1000 at the time of the arrest does not prove that he would be unable to obtain financing from a third party. Rather, the procurement of a substantial amount of money for a kilogram on the same date as the agents made the offer is indicative of the

defendants' ability to obtain the financing for the second kilogram. The district court did not commit error, plain or otherwise, in failing to determine that McLauren was "entrapped" by the agents in order to increase his sentence.

IV. SENTENCING ADJUSTMENT FOR MINOR ROLE IN OFFENSE

McLauren argues that the district court erred in refusing to adjust his offense level for his minor role in the offense because he is substantially less culpable than his co-defendants. McLauren argues that he was charged in only one count of a three-count indictment charging him and co-defendants Monk and Ford. He also argues that the factual basis for Ford's plea reflects that he was the leader of the offense and that Monk was his primary associate. McLauren also argues that it is relevant that he was in possession of only $1000.

We review a sentencing court's determination that a defendant did not play a minor role in the offense for clear error. United States v. Zuniga, 18 F.3d 1254, 1261 (5th Cir.), cert. denied, 115 S.Ct. 214 (1994). The defendant bears the burden of proving his mitigating role by a preponderance of the evidence. Id.

Section 3B1.2 provides for a two-level reduction for a minor participant. The adjustment under § 3B1.2 is intended for those participants who are "substantially less culpable than the average participant." § 3B1.2, comment., (backg'd). Because most offenses are committed by participants of equal culpability, this adjustment will be used infrequently. United States v. Maseratti, 1 F.3d 330, 341 (5th Cir. 1993), cert. denied, 114 S.Ct. 1096 (1994). 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 PSR reflects that McLauren participated in the negotiations for the purchase of the drugs and was actively involved in contacting individuals who could finance the purchase. He also was in possession of $1000 which, combined with Monk's funds, supplied the purchase price for the first kilogram of cocaine. The district court did not clearly err in refusing to adjust his offense level downward for his role in the offense.

CONCLUSION

For the above stated reasons, McLauren's conviction and sentence are AFFIRMED.