NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1059

UNITED STATES OF AMERICA

v.

CURTIS L. MCKEITHAN,

Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal No. 00-cr-00278)
District Judge: Hon. Sylvia H. Rambo

Submitted Under Third Circuit LAR 34.1(a)
September 24, 2002

Before: BARRY, AMBRO and COWEN, Circuit Judges

(Filed October 30, 2002)

OPINION

COWEN, Circuit Judge

Appellant Curtis L. McKeithan was charged in the United States District Court for the Middle District of Pennsylvania with one count of conspiracy to distribute in excess of fifty grams of cocaine base in violation of 21 U.S.C. 846; one count of distribution and possession with intent to distribute in excess of fifty grams of cocaine base in violation of 21 U.S.C. 841(a)(1); one count of interstate travel in aid of drug trafficking in violation of 21 U.S.C. 843(b); one count of using a communications facility to further a drug trafficking offense in violation of 21 U.S.C. 843(b); one count of possessing a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. 924(c)(1); and one count of being a felon in possession of a firearm in violation of 18 U.S.C. 922(g) and 924(a)(2). Following trial to a jury, McKeithan was convicted on all counts and sentenced to a total of 420 months imprisonment. We have jurisdiction pursuant to 18 U.S.C. 3742(a) and 28 U.S.C. 1291. We will affirm.

McKeithan argues that 1) the testimony of a government witness violated his Sixth Amendment right to cross-examination; 2) the government's evidence was insufficient to withstand his motion for a directed verdict; 3) the government's evidence was insufficient to establish a leadership role in a conspiracy; 4) his coronary artery disease warranted a downward sentencing departure; and 5) the indictment was insufficiently detailed, and therefore defective. We discuss each in turn.

I.

McKeithan first argues that the testimony of a government witness, who recanted her prior statements to a grand jury and then asserted her privilege under the Fifth Amendment, violated his rights of confrontation and cross-examination under the Sixth

Amendment.

McKeithan's Sixth Amendment arguments stem from the testimony of Bessie Perry, an admitted crack user who resided at McKeithan's home in Chambersburg, Pennsylvania. Perry had testified before a grand jury on September 7, 2000 that she had both acquired crack from, and sold crack for, McKeithan over a period of several years. However, when the government called Perry as a witness against McKeithan at trial, Perry recanted her grand jury testimony stating that she had lied. Instead, Perry stated that any drugs or weapons found on McKeithan's property were hers, and that McKeithan was innocent. The prosecutor then walked Perry through a portion of her grand jury testimony implicating McKeithan in a series of drug transactions. Perry admitted making each of the statements, but reiterated her position that her grand jury answers had been fabricated out of hostility towards McKeithan.

Following Perry's recantation, the District Court ended the government's direct examination, advised Perry of her privilege under the Fifth Amendment, and appointed counsel from the Federal Public Defender's office to represent her. Perry then invoked her Fifth Amendment privilege against self-incrimination, and refused to testify further.

In light of Perry's invocation of the Fifth Amendment, the government sought to read Perry's grand jury testimony to the jury, but later withdrew its motion. McKeithan then moved for a mistrial. In evaluating that motion, the District Court questioned McKeithan's attorney regarding Perry's trial statements, and her subsequent unavailability for cross-examination. McKeithan's attorney noted his inability to cross-examine Perry regarding her recantation, but also stated that he "would not call her as our own witness . . . ." App. at 239. The District Court inquired whether McKeithan's attorney was requesting that Perry be brought back to the stand, to which counsel replied: "No, Your Honor, I am not asking that she be brought back." App. at 240. The District Court then asked whether McKeithan was waiving his right to cross-examine Perry, which counsel stated he was. This waiver was later confirmed by the District Court in a separate colloquy:

> THE COURT: I just want to make sure that the record is clear. Mr. Boyle, you are waiving the right to cross-examine Bessie Perry on the testimony she has presented to date; is that correct, sir?
>
> MR. BOYLE: That's correct, Your Honor.

App. at 241. The District Court acknowledged McKeithan's waiver of cross-examination, concluding "that solves that problem," and proceeding with the remainder of the trial. McKeithan now argues that his inability to cross-examine Perry violated his rights under the Sixth Amendment.

Clearly, the right to confront and question adverse witnesses is a critical component in fact-finding at trial. United States v. Riggi, 951 F.2d 1368, 1376 (3d Cir. 1991). However, the record indicates that McKeithan has not preserved his Sixth Amendment argument. The District Court acknowledged the potential problems caused by Perry's testimony, and questioned McKeithan's counsel on the proper course of action. McKeithan's counsel responded with two separate and unambiguous waivers of any cross-examination of Perry. Therefore, we review McKeithan's Sixth Amendment claim only for plain error under Federal Rule of Criminal Procedure 52(b). United States v. Richards, 241 F.3d 335, 341 (3d Cir. 2001); Abrams v. Lightolier, Inc., 50 F.3d 1204, 1213 (3d Cir. 1995).

Plain error under Rule 52(b) requires the appellant to show 1) that an error was committed, 2) that the error was plain, and 3) that the error affected a substantial right. United States v. Hart, 273 F.3d 363, 371 (3d Cir. 2001) (citing United States v. Olano, 507 U.S. 725 (1993)). This analysis requires "an assessment of the gravity of the error in the context of the proceedings." United States v. Nappi, 243 F.3d 758, 762 (3d Cir. 2001). Finally, if each of these factors indicates plain error, we have authority to correct the mistake, but are not required to do so. Olano, 507 U.S. at 732. Instead, we will correct a plain error only if it "seriously affected the fairness, integrity, or public reputation of judicial proceedings." United States v. Reynoso, 254 F.3d 467, 474-75 (3d Cir. 2001).

McKeithan argues simply that his inability to cross-examine Perry's trial testimony recanting her grand jury statements tainted the jury. McKeithan argues that Perry's testimony was analogous to the situation in Bruton v. United States, 391 U.S. 123 (1968), where the testimony of an unavailable co-conspirator was admitted against the defendant without an opportunity for cross-examination. The Supreme Court found a substantial risk that the jury "looked to the incriminating extrajudicial statements," in violation of the defendant's right to confront and examine his accuser under the Sixth Amendment. Id. at 126 (emphasis added); Richards, 241 F.3d at 340.

In this case, Perry's testimony repeatedly exculpated McKeithan of any criminality. Perry testified that her statements to the grand jury were lies, denied purchasing crack from McKeithan, claimed ownership of the drugs and weapons found in the home she shared with McKeithan, and justified the inconsistencies in her testimony as motivated by revenge. McKeithan has not identified any harm that flowed from Perry's testimony, which when viewed as a whole appears to have damaged the government's case rather than the defense. Accordingly, McKeithan's inability to cross-examine Perry's trial testimony did not violate the Sixth Amendment, and therefore did not seriously affect the fairness, integrity, or public reputation of his trial.

II.

McKeithan next argues that the government offered insufficient evidence of the drug quantities to support the indictment for possession of cocaine with the intent to distribute. Alternatively, he contends that the District Court should have at a minimum entered a directed verdict as to the conspiracy count under 21 U.S.C. 846, arguing that the government's evidence revealed only discrete transactions among addicts. Although McKeithan challenged the sufficiency of the government's evidence in a motion for a directed verdict, he failed to renew his motion at the end of the defense's case, and has thus failed to preserve these issues for appeal. United States v. Anderson, 108 F.3d 478, 480 (3d Cir. 1997) (citing United States v. Barel, 939 F.2d 27, 37 (3d Cir. 1991)). Accordingly, we review the alleged insufficiency of the evidence for plain error only. United States v. Wolfe, 245 F.3d 257, 260-61 (3d Cir. 2001). We review the facts developed at trial in the light most favorable to the prosecution, and determine "whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt." Id. at 261.

Notwithstanding the fact that the government did not introduce substantial amounts of crack cocaine, there was adequate testimony presented at trial from which a rational jury could conclude McKeithan's control and direction of the drug conspiracy. Numerous witnesses testified that McKeithan distributed crack cocaine through intermediaries. The testimony of James Forest and Lisa Kelley specifically ascribed McKeithan the leadership role in the drug operation. Kim Baker and Rodney Hellman both testified that McKeithan supplied crack cocaine for orders they received from buyers in exchange for money. Baker further testified that McKeithan used her home to solicit orders for crack cocaine. Teresa Franzoni testified that McKeithan paid for an automobile registered in Franzoni's name, but delivered to Perry. Franzoni, Hellman, and Joe Doleman testified to driving McKeithan to purchase cocaine powder. In all, the government's witnesses testified to an orchestrated network of drivers, dealers, and distribution points under McKeithan's control. The combined testimony provided more than ample evidence from which a rational jury could have found proof of McKeithan's drug conspiracy beyond a reasonable doubt.

III.

McKeithan similarly objects to the District Court's enhancement of his sentence for his leadership and organizational role in the conspiracy. Section 3B1.1 of the United States Sentencing Guidelines increases a sentence by four levels if the defendant was an "organizer or leader" of five or more participants in a criminal activity. We exercise plenary review of the District Court's interpretation and application of the Sentencing Guidelines. United States v. Geevers, 226 F.3d 186, 189 (3d Cir. 2000). Factual determinations underlying the sentence, however, are reviewed only for clear error. Id.; United States v. Cianci, 154 F.3d 106, 109 (3d Cir. 1998).

McKeithan contends that the government's evidence demonstrated only a loose collection of addicts, lacking any structure or hierarchy. We disagree. In United States v. Gricco, 277 F.3d 339, 358 (3d Cir. 2002), we explained the factors to be considered in enhancing a sentence for a leadership role. Here, the testimony of a dozen witnesses assigned McKeithan a central role in the purchase and distribution of crack cocaine in the Chambersburg area under the Gricco factors. These witnesses testified that McKeithan recruited their participation, determined the time and place of drug purchases, retained the money from each transaction, coordinated the use of personal residences for drug trafficking, arranged the purchase of an automobile for deliveries, and coerced compliance of a subordinate with violence. Based on this evidence, the District Court did not err in finding that McKeithan's leadership extended to five or more participants.

IV.

McKeithan also argues that the District Court erred in denying his request for a downward departure in sentencing in light of his physical impairments. Section 5H1.4 of the Sentencing Guidelines states that the physical condition of the defendant is normally not relevant to the calculation of a sentence. United States v. Iannone, 184 F.3d 214, 227 n.10 (3d Cir. 1999). However, 5H1.4 notes that "an extraordinary physical impairment may be reason to impose a sentence below the applicable guideline range." United States v. McQuilkin, 97 F.3d 723, 730 (3d Cir. 1996). Prior to sentencing, McKeithan established a history of heart problems, including significant congestive heart failure and chronic obstructive pulmonary disease. Based on these conditions, McKeithan argued that absent a heart transplant his life expectancy was between three and five years. The government did not challenge McKeithan's medical claims, and instead argued that his health problems could be adequately treated while incarcerated.

We lack jurisdiction to review McKeithan's argument because the District Court, knowing of its authority under 5H1.4 to depart downward, nonetheless determined that departure was not warranted. McQuilkin, 97 F.3d at 729 (citations omitted); see also United States v. Sally, 116 F.3d 76, 79 (3d Cir. 1997). At sentencing, the District Court explained its decision to deny the motion for a departure as follows: "I think that any downward departure that I could possibly give would not in any way would in any event still amount for his purposes to a life sentence. The Court believes that to do so under the circumstances of this case would set a bad precedent." App. at 570-71. Accordingly, we will not review the District Court's exercise of its discretionary authority denying McKeithan's request for a downward departure.

V.

We need only briefly address McKeithan's final argument that the indictment charging him with both intent and conspiracy to distribute in excess of fifty grams of cocaine base was defective because it failed to specify a precise quantity of narcotics. McKeithan argues that under Apprendi v. New Jersey, 530 U.S. 255 (2000), the specific amount of cocaine involved should have been stated in the indictment.

Count I of the indictment alleged that McKeithan conspired to distribute in excess of fifty grams of cocaine base in violation of 21 U.S.C. 846. Count II of the indictment alleged that McKeithan distributed, and possessed with intent to distribute, in excess of fifty grams of cocaine base in violation of 21 U.S.C. 841(a)(1). Each offense carries a statutory maximum penalty of life imprisonment. 21 U.S.C. 841(b)(1)(A); 846. The jury convicted McKeithan of both Counts I and II. At sentencing, the District Court found that McKeithan had trafficked in 1,725 grams of cocaine base, and sentenced McKeithan to 360 months on each Count to be served concurrently.

The requirements of Apprendi are not triggered unless a defendant's sentence exceeds the statutory maximum sentence. See United States v. Vazquez, 271 F.3d 93, 98 (3d Cir. 2001). As neither the District Court's finding on the specific amount of cocaine base involved, nor its Guideline calculation, increased McKeithan's maximum sentence beyond the life terms already prescribed by 841(b)(1)(A) and 846, Apprendi is inapplicable.

VI.

Accordingly, for the reasons herein, we will dismiss the appeal seeking review of the failure to depart and, in all other respects, affirm the judgment of conviction and sentence of the District Court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Robert E. Cowen
United States Circuit Judg