

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-3054

September Term, 2003

Filed On: September 16, 2003 [772631]

United States of America,
Appellee

v.

Byron Lamont McDade, a/k/a Barry,
Appellant

Appeal from the United States District Court
for the District of Columbia
(No. 00cr00105-04)

Before: ROGERS and ROBERTS, *Circuit Judges* and SILBERMAN,
Senior Circuit Judge.

J U D G M E N T

This cause was considered on the record from the United States District Court for the District of Columbia and on the briefs by the parties. For the reasons presented in the accompanying memorandum opinion, it is

ORDERED AND ADJUDGED that the judgment of the district court is affirmed.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Deputy Clerk

MEMORANDUM OPINION

Appellant McDade raises three issues on appeal, all of which are meritless under District of Columbia Circuit case law.

First, McDade contends that the district court erred in denying his motion for a judgment of acquittal because there was insufficient evidence of interdependence to show a single conspiracy. McDade loses under any theory and our cases have exhausted the subject. See *United States v. Childress*, 58 F.3d 709-11 & n.3 (D.C. Cir. 1995); *United States v. Tarantino*, 846 F.2d 1384, 1392 (D.C. Cir. 1988)(per curiam). First, there is evidence to show a single chain link conspiracy: Casanovas sold large amounts of cocaine to Alvarado and Singleton; Singleton, who had a national distribution operation, sold drugs to Johnson and Webster for distribution to drug wholesalers in the D.C. area, and in 1998 Webster enlisted McDade as her exclusive agent to sell her drugs to her wholesale customers. By contrast, in *United States v. Mathis*, 216 F.3d 18, 24 (D.C. Cir. 2000), cited by McDade, the evidence showed a hub conspiracy with multiple suppliers. Second, McDade does not contest that there was evidence of a common goal and overlap of participants, and there also was evidence showing interdependence, as for example between Johnson and Webster. See Appellee's Br. at 16 (citing Tr. 935-36, 949-53, 1042-43).

McDade's bare assertion that the evidence showed multiple conspiracies, and hence there was a fatal variance with charge in the indictment, is either factually wrong or legally wrong, see Appellee's Br. at 21, assuming his contention is adequately explained. See *United States v. Thomas*, 114 F.3d 228, 244 (D.C. Cir. 1997). Even were the court to conclude that the evidence showed multiple conspiracies, there was no prejudicial variance from spillover evidence. See *United States v. Gaviria*, 116 F.3d 1484, 1516 (D.C. Cir. 1997). McDade was the only defendant on trial and the jury had "no need to look beyond" McDade's own words to convict, *id.* at 1533, for the government introduced taped recordings of his conversations with his supplier (Webster) that showed his understanding of the scope of the conspiracy and his active involvement in it. McDade's claim that he was prejudiced by evidence of Singleton's non-D.C. distribution is unpersuasive. See Appellee's Br. at 28, 29.

Second, McDade contends there was reversible error as a result of the prosecutor's rebuttal closing argument. There was no error, much less plain error (as no objection was made by McDade in the district court). The prosecutor commented neither directly nor indirectly on McDade's failure to testify and was entitled to respond to defense counsel's closing argument attacking the credibility of the government's witnesses. *United States v. Harris*, 627 F.2d 474, 476 (D.C. Cir. 1980), is dispositive. See *United States v. Monaghan*, 741 F.2d 1434, 1439 (D.C. Cir. 1984). Unlike *United States v. Cotnam*, 88 F.3d 487 (7th Cir. 1996), on which McDade relies, the prosecutor did not mention McDade's right not to testify or vouch for the strength of the government's evidence but referred to the absence of a defense and not to "uncontroverted" evidence to which only McDade could respond. Moreover, jury instructions ameliorated any prejudice. *United States v. Catlett*, 97 F.3d 565, 573 (D.C. Cir. 1996) (citation omitted).

Third, McDade contends the district court clearly erred in finding that McDade was a manager or supervisor under § 3B1.1 of the Sentencing Guidelines. There was no clear error. This section of the Guidelines requires a finding by the district court that the defendant exercise some control over others. *United States v. Graham*, 162 F.3d 1180, 1182 (D.C. Cir. 1998); see *United States v. Kelley*, 36 F.3d 1118, 1129 & n.6 (D.C. Cir. 1994). In *Graham*, the court interpreted § 3B1.1 to create three tiers: (1) leaders and organizers, (2) managers and supervisors, (3) everyone else. 162 F.3d at 1185. And, as the government notes, Appellee's Br. 45-46, the court has warned that conclusory labels and evidence the defendant directed buyers to sellers is not enough, and that operating at the "middle zone" of the hierarchy is necessary but not sufficient. *Graham*, 163 F.3d at 1183-84.

The district court applied the correct legal standard under § 3B1.1, see App. 237, 239, and found that although McDade was not an organizer or leader he was a manager. App. 237. The district court pointed to evidence that McDade recruited his own customers and managed Webster's wholesale customers. App. 239. McDade does not contest that he recruited his own customers, but claims he did not exercise control over the wholesale customers with regard to how the customers disposed of the purchased drugs or what prices to

charge. Appellant's Br. at 19. In *Graham*, the court reviewed what was necessary to find the defendant was a manager under § 3B1.1 and never suggested that such elements were necessary. Rather, *Graham* focused on what a defendant did when he was acting as a manager other than pointing to customers, 162 F.3d at 1183, such as evidence that the defendant supervised other dealers, was trusted with operational control, received extra compensation for serving as a manager, and held himself out as a link in the chain of command. *Id.* at 1184. The evidence here meets *Graham's* test, showing that McDade was Webster's lieutenant in charge of all cocaine sales to Webster's wholesale customers, coordinating the logistics of these sales, and that in return McDade received a break on the price of drugs he purchased from Webster. McDade errs in stating there was no evidence McDade received a share of the profits beyond the profits of his own sales. Appellant's Br. at 19-20.

Webster testified that in 1998 she turned over operational control of her wholesale customers to McDade. She trusted McDade and gave him exclusive responsibility to deal with her customers. She had contemplated quitting the business because she was tired of running around and paging people and people were getting angry with her because she was not on time. Tr. 1087-88. Webster also testified that McDade received extra compensation from Webster for handling her customers. Tr. 1089. Further, in addition to evidence (wiretapped phone calls) that McDade had a new position of trust with Webster and Singleton, Tr. 1102-03, 1093, 1167, 1186, there was testimony credited by the district court, App. 234, by two of Webster's wholesale customers (Miles and Ashe) indicating that McDade did more than direct street-level buyers to sellers: McDade handled the operational tasks, the coordinating logistics, that Webster relinquished. Miles testified that he paged McDade when he wanted to make a purchase they would meet and McDade would transferred drugs to Miles at that place, and at a later time Miles would give McDade the money that Miles owed Webster. Tr. 1514-15. Ashe testified that he knew Webster was broke and wanted someone else to share the weight and that she was dealing through McDade, who was handling her drugs; Webster gave McDade's cellphone number to Ashe, Tr. 1581-82.

Hence, the district court did not clearly err in finding by a preponderance of the evidence that McDade managed

Webster's wholesale operations, enabling Miles and Ashe to sell Webster's drugs on a consignment basis and thereby make good on their debts to Webster. This suffices to show control under the second tier of § 3B1.1. See *Graham*, 162 F.3d at 1183-1185. There also was evidence that on two occasions, upon calling McDade's cellphone number, a man named Black returned Ashe's call and delivered the drugs to Ashe. Tr. 1591, 1596.