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USA v. Pineiro

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 02-1958

UNITED STATES OF AMERICA

v.

LUIS PINEIRO,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 00-cr-00257-1)
District Judge: Honorable William H. Yohn

Submitted Under Third Circuit LAR 34.1(a)
on March 3, 2003

Before: ROTH, BARRY and FUENTES, Circuit Judges

(Opinion filed : June 30, 2003)

OPINION

ROTH, Circuit Judge:

On September 28, 2001, Luis Pineiro was found guilty by a jury of conspiracy to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § 846. On February 7, 2002, Pineiro was sentenced to 211 months imprisonment. Judgment was entered on February 11, 2002. On March 26, 2002, Pineiro filed his Petition to File Appeal Out of Time along with a Notice of Appeal. The District Court granted both the petition and the notice and filed Pineiro's Notice of Appeal as of March 26, 2002.

The Government challenges this appeal on the ground that it was untimely and therefore we lack jurisdiction. We disagree. Our review of the relevant dates, pursuant to Federal Rule of Appellate Procedure 4(b)(1)(A), convinces us that the appeal was timely filed.

Pineiro raises two issues in his appeal. First, he contends that the District Court erred in denying his request to transfer venue. Venue was proper in the Eastern District of Pennsylvania. Nevertheless, Pineiro claims that the case should have been transferred to the Southern District of Florida because that is where his witnesses reside. Location of witnesses is one factor that a district court can consider when reviewing a request for transfer of venue. *See Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 243-44 (1964). In this case, however, there were no other factors favoring transfer and

indeed several, including the location of the most of the conspiratorial activity and the location of the government's witness, favored holding the trial in the Eastern District of Pennsylvania. We conclude that the District Court did not abuse its discretion in denying the request for change of venue.

Pineiro also contends that he was illegally sentenced when the District Court found by a preponderance of the evidence that he was responsible for 50 to 150 kilograms of cocaine. He argues that, pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the drug quantity attributable to him should have been decided by the jury. The jury did, however, find that Pineiro had distributed more than five kilograms of cocaine in violation of 21 U.S.C. § 846. Pursuant to § 841(b)(1)(A)(ii), the maximum statutory penalty for this offense is life in prison. Since Pineiro's sentence of 211 months imprisonment was less than the statutory maximum, *Apprendi* is not applicable. *See, e.g., United States v. Williams*, 235 F.3d 858, 862-64 (3d Cir. 2000), *cert. denied*, 122 S.Ct. 49 (2001).

For the above reasons, we will affirm the judgment of the District Court.

TO THE CLERK:

Please file the foregoing Opinion.

By the Court,

/s/ Jane R. Roth

Circuit Judge