

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

LEROY L. PERDUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the sentence should be vacated for failure comply with the requirements of 21 U.S.C. § 851(b).
2. Whether the court erred in assessing a four level enhancement for role in the offense.

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PETITION FOR WRIT OF CERTIORARI

Leroy L. Perdue respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia is unreported. (App. B). The opinion of the United States Court of Appeals for the Fourth Circuit, *United States of America v. Leroy L. Perdue*, Record No. 18-4705 (4th Cir. October 4, 2019) is unreported. (App. A).

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 4, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 851(b) Affirmation of denial of previous convictions

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

21 U.S.C. § 851(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

U.S.S.G. §3B1.1

Based on the defendant's role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

- (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
- (c) if the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

STATEMENT OF THE CASE

On August 9, 2017, Leroy Perdue and 11 co-defendants were charged in a twenty-five count indictment. Subsequently, on September 7, 2017, Perdue and four defendants were charged in a six-count superseding indictment. Perdue was charged in Count 1 with conspiracy to manufacture, distribute, and possess with intent to manufacture and distribute heroin, in violation of 21 U.S.C. § 846; in Count 3 with interstate travel in aid of racketeering, in violation of 18 U.S.C. § 1952(a)(3)(A); and in Count 4 with possession with intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) and 18 U.S.C. § 2. The superseding indictment also sought criminal forfeiture pursuant to 18 U.S.C. §§ 924(d) and 981(a)(1)(C), 21 U.S.C. § 853 and 28 U.S.C. § 2461.

An investigation of Perdue was initiated in 2016 after his name kept coming up during the course of investigating heroin distribution in the area. The FBI conducted controlled buys of heroin from Perdue on a number of occasions in January and February 2017. The investigation revealed that Perdue obtained heroin from a source in New York and distributed the heroin in the Tidewater region of Virginia. The FBI tracked individuals believed to be associated with Perdue through their cell phones and it was determined that an associate of Perdue's would travel to New York to obtain heroin. In June 2017, the associate's phone was tracked to New York and on the way back to Virginia the associate was stopped by law enforcement. The associate was arrested and 800 grams

of heroin was seized. Data from the associate's phone revealed contacts with Perdue and with the source of the heroin in New York.

According to the New York heroin source, he sold Perdue 150 grams to 300 grams of heroin every three to four weeks from 2009 until 2015 until the source was arrested. Although the source was incarcerated, the source continued selling heroin to Perdue through his girlfriend.

Perdue proceeded to trial and the jury convicted Perdue on Counts 1, 3 and 4 of the superseding indictment. On September 19, 2018, the district court sentenced Perdue to life imprisonment on Count 1; sixty (60) months imprisonment on Count 3 and one hundred eighty (180) months imprisonment on Count 4, the sentences for both Counts 3 and 4 to be served concurrently with Count 1.

Failure to comply with the requirements of 21 U.S.C. § 851

On May 7, 2018, the government filed a Criminal Information and Notice pursuant to 21 U.S.C. § 851 alleging eight (8) prior felony drug convictions for Perdue. On May 22, 2018, prior to trial, the district court inquired of the government whether plea offers had been made to Perdue. The government responded that several offers were made to both Perdue's present and former counsel and all offers had been rejected by Perdue. The government also noted that a Criminal Information based on Perdue's eight prior felony drug convictions had been filed and Perdue would face a mandatory sentence of life imprisonment if found guilty. Perdue's counsel agreed that several plea offers had been made by the government, including an offer to cap Perdue's sentence at 35 years and to withdraw the § 851 enhancement, and all offers had been rejected by Perdue. The court then inquired of Perdue:

The Court: Okay, Mr. Perdue, you have heard the United States say the

plea offer that was made, you heard your counsel. Were the plea offers made brought to your attention?

The Defendant: They were.

The Court: And did you understand the plea offers brought to your attention?

The Defendant: Yes, sir.

The Court: Did you reject the plea offer which indicated that the government was willing to cap any penalty you might receive at 35 years?

The Defendant: I did understand.

The Court: And do you reject the suggestion that the government - - any plea offer or negotiation wherein the government would withdraw the 851 petition with respect to you?

The Defendant: I do understand.

The Court: You rejected that offer?

The Defendant: I rejected it.

The Court: Do you understand, Mr. Perdue, that if you get convicted on Count 1, as it now stands you are facing a mandatory life sentence?

The Defendant: Yes, Sir.

The Court: And you wish to go to court facing a mandatory life sentence?

The Defendant: Yes, sir.

That colloquy prior to trial was the only discussion of an § 851 enhancement that the district

court had with Perdue at any time during the course of the case. The district court failed to comply with the requirements of § 851 to inquire of Perdue after the jury returned its guilty verdicts or prior to sentencing whether he affirmed or denied that he had been previously convicted as alleged in the information. Nor did the court inform Perdue that any challenge to a prior conviction not made before sentence was imposed may not thereafter be raised to attack the sentence. Perdue did not file a written response denying any of the prior convictions nor did the government submit any documentation verifying Perdue as the individual named in the prior convictions.

REASONS FOR GRANTING THIS WRIT

I. THE COURT FAILED TO COMPLY WITH REQUIREMENTS OF 21 U.S.C. § 851.

The court of appeals held that Perdue failed to show that the district court's noncompliance with the requirements of 18 U.S.C. § 851 affected the outcome of the proceedings. But the district court's failure to comply with the requirements of § 851 by inquiring of Perdue whether he admitted or denied the prior convictions denied Perdue the opportunity to challenge the prior convictions. The district court's failure prevented Perdue from having a "full and fair opportunity to establish that he was not the previously convicted individual or that the convictions were an inappropriate basis for enhancement under 21 U.S.C. § 841. Section 851(b) also allows the defendant to preserve for appeal his objections to the prior conviction." *United States v. Campbell*, 980 F.2d 245, 252 (4th Cir. 1992)

There was nothing in the record to indicate that Perdue understood the enhancement provisions of § 841 and § 851 or that he understood his right to challenge the prior convictions in the information. Nor is there any indication that his counsel explained the enhancement provisions to him. *United States v. Garcia*, 526 F.2d 958, 961 (5th Cir. 1976) (while a defendant's admission

of a prior conviction at trial might be construed as substantial compliance, “it is doubtful that a substantial compliance would suffice.”); *United States v. Cevallos*, 538 F.2d 1122, 1128 (5th Cir. 1976) (“[U]nless the Judge complies with section 851(b) in imposing an enhanced sentence, the legal requirements for the lawful imposition of an enhanced sentence have not been met, and thus the enhanced sentence in fact exceeds the normal statutory maximum which the Judge is otherwise authorized to impose.”).

The government filed a Criminal Information and Notice pursuant to Title 21 U.S.C. § 851 listing eight felony convictions with dates, courts and offenses alleged to be Perdue’s convictions, but failed to provide any supporting documentation, certified or otherwise, of the judgments, orders or other documents, from the courts of conviction. Nor did the government submit any documentation containing any birth dates, social security numbers or other data to verify Leroy Perdue as being the same Leroy Perdue named in the Criminal Information. The district court did not require that the government make any offer of proof that Perdue was same Leroy Perdue in the Criminal Information. *United States v. Kellam*, 568 F.3d 125, 144-46 (4th Cir. 2009). Nor did the court, as required by § 851(b), inform Perdue that any challenge to a prior conviction not made before the court imposed sentence could not be raised in the future to attack his sentence. *Id.* at 146. While § 851(e) prohibits a defendant from challenging the validity of a prior conviction which occurred more than five years before the date of the information, a challenge to the prior conviction based on identity is not barred by § 851(e). *United States v. Gonzalez*, 625 F.3d 824, 826-27 (5th Cir. 2010). (“[I]f it is not a conviction of him, he likely had no notice of it or reason to sooner challenge it.”)

While Perdue did not file a written response denying the allegations of the prior convictions

as required by § 851(c), the court's failure to comply with the requirements of § 851(b),¹ either after the jury returned the guilty verdict or before pronouncement of sentence, denied Perdue his statutorily provided rights.

The failure of the district court to follow the mandates of § 851(b) require that the appellant's enhanced sentence be vacated and the matter remanded to the court of appeals for further proceedings.

II. THE COURT ERRED IN ASSESSING A FOUR LEVEL ENHANCEMENT FOR ROLE IN THE OFFENSE.

The court of appeals concluded that the district court did not commit err in increasing Perdue's offense level by four levels as an organizer or leader of a criminal activity involving five or more participants or was otherwise extensive. U.S.S.G. § 3B1.1. Neither the evidence adduced at trial nor the information contained in the presentence report supported the enhancement.

In determining whether a role enhancement should apply, the court must evaluate seven factors;

(1) the exercise of decision making authority, (2) the nature of participation in the commission of the offense, (3) the recruitment of accomplices, (4) the claimed right to a larger share of the fruits of the crime, (5) the degree of participation in the planning or organizing of the offense, (6) the nature and scope of the illegal activity, and (7) the degree of control and authority exercised over others.

The presentence report contained only conclusory statements in support of the four level

¹ 21 U.S.C. § 851(b) states:

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

enhancement for role in the offense:

Leroy Perdue was the head of a conspiracy and had various co-defendants working for him that traveled to New York to pick up drugs and also had co-defendants distributing the drugs in Virginia for the benefit of the organization. As a result, his offense level was increased four levels for being an organizer or leader in a conspiracy involving 5 or more participants pursuant to Section 3B1.1(a) of the U.S.S.G.

Other than that statement, there was nothing in the presentence report to support a four level role in the offense enhancement for Perdue.

The trial testimony had Perdue obtaining heroin from New York and selling it to his co-defendants and others in the Tidewater region of Virginia. Perdue and the New York supplier were independent suppliers who did not exercise any authority or control over the individuals to whom the heroin was sold. The buyers who purchased heroin from Perdue testified that Perdue did not share in the profits from the sales of heroin, did not control the price at which to sell the heroin, and did not control where or to whom to sell the heroin. The buyers could sell the heroin, give the heroin away or use the heroin themselves. Perdue did not direct the buyers in any way.

The co-defendants all testified that they had their own users to whom they sold and that they were not directed in any way by Perdue. The co-defendants paid for their heroin and did not share the profits from their sales. If they were fronted the heroin by Perdue, they had to pay for the drugs once they sold the heroin but kept whatever profit they made from the sales. Many of the co-defendants were heroin users themselves and sold to support their habits.

Selling large quantities of heroin over several years without some leadership or decision making authority over others does not make Perdue an organizer or leader of a criminal activity involving five or more people nor otherwise *United States v. Sayles*, 296 F.3d 219, 225 (4th Cir.

2002.), *United States v. Llamas*, 599 F.3d 381, 389-90 (4th Cir. 2010). Perdue did not set any prices for others to sell their heroin, did not direct their drug dealing activities by telling who, when or where to sell their drugs, did not advise them of any drug sales techniques, arrange delivery nor payment methods. *United States v. Weaver*, 716 F.3d 1074 (7th Cir. 2013) (Defendant did not tell buyers what price they should charge or impose territorial limits or set distribution quotas.); *United States v. Rodriguez-Lopez*, 756 F.3d 422 (5th Cir. 2014) (No evidence defendant exercised any managerial control over any of the participants in drug organization.); *United States v. Al-Talib*, 55 F.3d 923, 932 (4th Cir. 1995); *United States v. Slade*, 631 F.3d 185, 187, 191 (4th Cir.) *cert. denied*, 563 U.S. 1026, (2011) (Defendant supplied drugs to co-conspirators who sold drugs but there was “no evidence that defendant exercised any supervisory responsibility over these persons by controlling them or directing terms of sales.”); *United States v. Bartley*, 230 F.3d 667, 674 (4th Cir. 2000) (Aggravating enhancement only applicable where defendant “controlled the activities of other participants.”); *United States v. Lopez-Sandoval*, 146 F.3d 712 (9th Cir. 1998) (No evidence defendant arranged drug transactions or had authority over his coconspirators.); *United States v. Walker*, 160 F.3d 1078 (6th Cir. 1998) (No witness discussed an organizational role for the defendant.); *United States v. Anderson*, 189 F.3d 1201 (10th Cir. 1999) (Defendant’s role as supplier of drugs to others, not enough for aggravating role.).

The only person whom it appeared that Perdue directed was the individual who went to New York to obtain the heroin for Perdue. The New York supplier James testified that the individual had to call someone to get directions as to the amount of heroin to buy. The phone records indicated that calls were to Perdue’s phone. There was evidence that Perdue’s son was involved in the distribution of heroin but the evidence was not clear whether Perdue directed or supervised his son in the heroin


trade.

The district court erred in assessing Perdue a four level enhancement for role in the offense.

CONCLUSION

Based on the foregoing Petitioner respectfully requests that this Honorable Court grant his petition.

Respectfully submitted,
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