

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 **AMENDED SUMMARY ORDER**

4 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER
5 AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER
6 COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER
7 COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN
8 ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.
9

10 At a stated term of the United States Court of Appeals for the
11 Second Circuit, held at the Thurgood Marshall United States
12 Courthouse, Foley Square, in the City of New York, on the 3rd day
13 of September, two thousand and four.

14 PRESENT:

15 HON. JOSEPH M. McLAUGHLIN
16 HON. ROBERT D. SACK,

17 Circuit Judges,

18 HON. NINA GERSHON,

19 District Judge.*

20 -----
21 UNITED STATES OF AMERICA,

22 Appellee,

23 - v -

Nos. 02-1506, 02-1535

24 JOHN A. FERBY, DARNYL PARKER,

25 Defendants-Appellants.
26 -----

27 Appearing For Appellants: KIM P. BONSTROM, Bonstrom & Murphy,
28 New York, NY, for appellant Ferby.

* Of the United States District Court for the Eastern District of New York, sitting by designation.

1 MARK J. MAHONEY, Harrington &
2 Mahoney, Buffalo, NY, for appellant
3 Parker.

4 Appearing For Appellee: ROBERT C. MOSCATI, Assistant United
5 States Attorney, United States
6 Attorney's Office for the Western
7 District of New York (Michael A.
8 Battle, United States Attorney,
9 Paul J. Campana, Assistant United
10 States Attorney, of counsel),
11 Buffalo, NY.

12 Appeal from the United States District Court for the Western
13 District of New York (Richard J. Arcara, Judge).

14 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND
15 DECREED that the judgment of the district court be, and it hereby
16 is, AFFIRMED.

17 Defendants-appellants John A. Ferby and Darnyl Parker appeal
18 from, inter alia, the district court's evidentiary rulings, jury
19 instructions, judgments of conviction, and sentencing decisions.
20 Inasmuch as the parties are familiar with the facts underlying
21 this appeal, we do not recite them here.

22 I. Evidentiary Rulings

23 The appellants argue that the district court erred by
24 admitting under Federal Rule of Evidence 404(b) the statements of
25 Thomas Calhoun regarding alleged "prior bad acts" of Parker, and
26 that the district court should have determined whether the
27 statements were "probably true" and should have "look[ed] at the
28 issue of the credibility of Calhoun's tale." Parker Br. at 180-
29 81. However, when admitting evidence under Rule 404(b), a
30 district court "neither weighs credibility nor makes a finding
31 that the Government has proved [a] conditional fact by a
32 preponderance of the evidence." Huddleston v. United States, 485
33 U.S. 681, 690 (1988).

34 The appellants argue that the district court erred in
35 refusing to allow Parker, during his cross examination of Agent
36 Cid, to play the taped conversations between Calhoun and Parker.
37 The tapes had not been played during direct examination of Agent
38 Cid nor had they been introduced into evidence. The district
39 court therefore "exercise[d] reasonable control . . . [to] make
40 the . . . presentation effective for the ascertainment of truth,"

1 Fed. R. Evid. 611(a), and did not abuse its discretion, United
2 States v. Concepcion, 983 F.2d 369, 391 (2d Cir. 1992).

3 The appellants argue that the district court erred by
4 preventing Parker from extensively questioning Agent Cid
5 regarding the existence of a warrant for the search of the "stash
6 house," even though Parker had no good-faith reason to believe a
7 warrant existed. The lack of a warrant was only evidence
8 demonstrating a conspiracy to violate civil rights and not an
9 element of that crime. "Although counsel may explore certain
10 areas of inquiry in a criminal trial without full knowledge of
11 the answer to anticipated questions, he must, when confronted
12 with a demand for an offer of proof, provide some good faith
13 basis for questioning that alleges adverse facts." United States
14 v. Katsougrakis, 715 F.2d 769, 779 (2d Cir. 1983), cert. denied,
15 464 U.S. 1040 (1984).

16 The appellants claim on appeal that the district court erred
17 in refusing to provide the jury with a "requested readback of the
18 testimony of William Parker and Reno Sayles." Parker Br. at 86.
19 However, the jury asked for transcripts of that testimony. In
20 response, the district court offered to provide to the jury
21 readbacks of that testimony, upon request, because transcripts
22 were not at that time available. The jury did not respond to
23 this offer, and the district court did not err.

24 II. Jury Instructions

25 The appellants argue that the district court's instruction
26 regarding the charge that the defendants conspired to violate
27 civil rights (Count I) was improper because it erroneously
28 equated an intent to convert seized funds with an intent to
29 violate due process. Police officers who convert to private
30 purposes funds lawfully seized from suspected criminals violate
31 those criminals' civil rights. United States v. McClean, 528
32 F.2d 1250, 1255 (2d Cir. 1976).

33 The appellants claim that the district court improperly
34 refused to instruct the jury that, in determining whether the
35 appellants converted a "thing of value" owned by the United
36 States, in violation of 18 U.S.C. § 641 (Count IV), (1) the
37 United States does not own property when it relinquishes control
38 of the funds to another person who is not subject to the
39 direction or control of the United States, and (2) the jury
40 should determine whether the money was owned by the United States
41 at the time it was converted. However, even if a party
42 voluntarily relinquishes property to police officers during a
43 lawful seizure, the party retains an interest in the property

1 that entitles the party "to have the status of the seized
2 property determined by due process." McClellan, 528 F.2d at 1256.
3 This retained interest in the seized property is a "thing of
4 value" under section 641. The first proposed jury instruction
5 misstates the law, the refusal to give the second caused no
6 prejudice, United States v. Walsh, 194 F.3d 37, 52 (2d Cir.
7 1999), and the district court did not err in refusing to give the
8 requested instructions.

9 Parker argues that the district court erred by refusing to
10 instruct the jury that he could only be convicted under Count X
11 of the indictment as an aider or abettor. Count X charged Parker
12 with "knowingly and willfully conduct[ing] . . . a financial
13 transaction in violation of Title 18, United States Code,
14 Sections 1956(a)(3)(A) and 2." Indictment at 21, United States
15 v. Parker, No. 00-CR-053A (W.D.N.Y. 2000). 18 U.S.C. § 2(a)
16 provides that "[w]hoever commits an offense against the United
17 States or aids, abets, counsels, commands, induces or procures
18 its commission, is punishable as a principal." Section 2 is thus
19 not limited to derivative liability. Moreover, "courts have
20 encountered no "difficulty sustaining convictions when the
21 indictment did not specify whether the defendant was the aider
22 and abettor or the principal." United States v. Knoll, 16 F.3d
23 1313, 1323 (2d Cir. 1994).

24 Parker argues that the district court erred in refusing to
25 instruct the jury on an entrapment defense for the narcotics
26 conspiracy charge against Parker (Count XI). "Entrapment is an
27 affirmative defense that requires a defendant to prove by a
28 preponderance of the evidence the government's inducement to
29 commit the crime and lack of predisposition on the defendant's
30 part." United States v. Williams, 23 F.3d 629, 635 (2d Cir.
31 1994). Parker has not identified any evidence convincing us that
32 the district court abused its discretion by finding that there
33 was no evidence of inducement by the government, see United
34 States v. Mayo, 705 F.2d 62, 68 (2d Cir. 1983), and the court
35 thus did not err in refusing to give an entrapment instruction.

36 Parker argues that the district court should have instructed
37 the jury to determine who amongst the alleged coconspirators
38 listed in the indictment (Count XI) -- William Parker and Sayles
39 -- was in the narcotics conspiracy with Parker. However, Parker
40 has demonstrated no prejudice from the district court's decision
41 to require instead that the jury indicate whether the narcotics
42 conspiracy involved more or less than 500 grams of cocaine.
43 Walsh, 194 F.3d at 52.

1 III. Sufficiency of the Evidence

2 Parker argues that there is insufficient evidence to support
3 his conviction for conspiring to violate civil rights (Count I),
4 in violation of 18 U.S.C. § 241, because, he claims, he did not
5 actually violate any civil rights. Parker may be convicted of
6 the inchoate offense of conspiracy even if the object of the
7 conspiracy was never achieved. United States v. Wallace, 85 F.3d
8 1063, 1068 (2d Cir. 1996). After a careful review of the record,
9 we are satisfied that the evidence supports Parker's conviction
10 for conspiracy to violate civil rights. For example, the
11 recorded conversations between Parker and Calhoun provide
12 substantial evidence of Parker's intent to violate civil rights.
13 Moreover, Parker's participation in the search of the "stash
14 house" and the theft of the jewelry contained therein supports a
15 finding of a conspiracy to violate the right to be free from
16 unreasonable searches and seizures. Likewise, the conversion of
17 the funds taken from Agent White demonstrates a conspiracy to
18 violate due process rights. McClellan, 528 F.2d at 1256. There is
19 also ample evidence demonstrating that, during the search of the
20 "stash house" and the apprehension of Agent White, Parker and his
21 colleagues acted under color of law. Pitchell v. Callan, 13 F.3d
22 545, 547-48 (2d Cir. 1994).

23 The appellants contend that there is insufficient evidence
24 to support their convictions for willful conversion of property
25 of the United States because they believed that Agent White,
26 posing as the Jamaican drug dealer, abandoned the money seized
27 during his apprehension. A defendant violates 18 U.S.C. § 641 if
28 he "know[s that the converted property] belongs to someone other
29 than himself," United States v. LaPorta, 46 F.3d 152, 158 (2d
30 Cir. 1994), even if the defendant does not know that the
31 converted property is owned by the United States, United States
32 v. Jermendy, 544 F.2d 640, 641 (2d Cir. 1994) (per curiam). If
33 Agent White had abandoned the money, it would have been owned by
34 the Buffalo Police Department, the City of Buffalo, the State of
35 New York, or some combination thereof. People v. Martinez, 574
36 N.Y.S.2d 467, 476 (Sup. Ct. 1991). The defendants thus knew that
37 the converted property belonged to someone else and, as noted
38 above, the United States retained a property interest in the
39 seized funds.

40 Parker argues that there is insufficient evidence supporting
41 his convictions for the crimes charged in Counts V, VI, VIII, IX,
42 and X, each of which requires a nexus with interstate commerce.
43 Parker argues that his actions could not have had an actual
44 impact on interstate commerce because Calhoun was a government
45 agent and not a drug dealer. However, "'[f]actual impossibility'

1 is no defense to the inchoate offense of conspiracy under the
2 Hobbs Act." United States v. Clemente, 22 F.3d 477, 480-81 (2d
3 Cir. 1994). The defendant's intent may establish the required
4 nexus with interstate commerce. United States v. Fabian, 312
5 F.3d 550, 555 (2d Cir. 2002).

6 Parker argues that there is insufficient evidence to support
7 his convictions under Counts V, VI, VIII, and IX for conspiring
8 and attempting to extort money under color of right, because, he
9 claims, he performed no official acts in exchange for money or
10 property. "[T]he offense [of extortion under color of right] is
11 completed at the time when the public official receives a payment
12 in return for his agreement to perform specific official acts;
13 fulfillment of the quid pro quo is not an element of the
14 offense." Evans v. United States, 504 U.S. 255, 268 (1992).
15 "[T]he Government need only show that a public official has
16 obtained a payment to which he was not entitled, knowing that the
17 payment was made in return for official acts." Id. There is
18 adequate evidence demonstrating that Parker conspired and
19 attempted to exchange Agent White's physical liberty for his
20 property interest in the seized money, McClellan, 528 F.2d at 1256,
21 and that, in exchange for the two \$1000 payments from Calhoun,
22 Parker agreed to provide police information that would help
23 Calhoun and his alleged drug partner avoid arrest.

24 Parker argues that there is insufficient evidence to support
25 his conviction for conspiring to distribute and to possess with
26 intent to distribute narcotics because the evidence supports only
27 a narcotics agreement with Calhoun. We conclude that the
28 evidence, when viewed "in the light most favorable to the
29 Government and drawing all reasonable inferences in its favor,"
30 indicates that a rational trier of fact could have found Parker
31 guilty of a conspiracy with William Parker and Sayles. United
32 States v. Glenn, 312 F.3d 58, 63 (2d Cir. 2002).

33 IV. Miscellaneous

34 Parker argues that the acquittal of his alleged
35 coconspirators requires his acquittal for the conspiracies
36 charged in Counts I, II, and V. Inconsistent verdicts are
37 generally not reviewable. They may, for example, be the result
38 of jury lenity, which does not have to be provided uniformly to
39 all codefendants. United States v. Powell, 469 U.S. 57, 65-66
40 (1984); accord United States v. Acosta, 17 F.3d 538, 544-45 (2d
41 Cir. 1994); United States v. Alvarado, 882 F.2d 645, 654 (2d Cir.
42 1989); United States v. Chang An-Lo, 851 F.2d 547, 559-60 (2d
43 Cir. 1988).

1 Parker argues that a new trial is required because the
2 district court refused to determine the impact of negative trial
3 publicity on individual jurors. However, at Parker's request,
4 the court asked the jury, as a group, if any of them had been
5 exposed to the negative publicity. Because no juror answered in
6 the affirmative, the district court did not abuse its discretion
7 by declining to question the jurors individually. United States
8 v. Lord, 565 F.2d 831, 838-39 (2d Cir. 1977).

9 V. Sentencing

10 A. Parker

11 Parker argues that the district court erred by increasing
12 his offense level for the narcotics conspiracy conviction
13 pursuant to United States Sentencing Guideline ("U.S.S.G.")
14 § 3B1.3, which provides a two-level enhancement for abuse of a
15 position of trust. Parker concedes that, as a police officer, he
16 occupied a position of trust but suggests that he did not abuse
17 that position. "Section 3B1.3 applies to convictions for
18 conspiracy provided the district court concludes with reasonable
19 certainty that the defendant conspired to use . . . [a position
20 of trust] significantly [to] facilitate[] the commission or
21 concealment of the offense." United States v. Downing, 297 F.3d
22 52, 64 (2d Cir. 2002) (internal quotation marks and citations
23 omitted). The district court did not commit clear error, United
24 States v. Hussey, 254 F.3d 428, 431 (2d Cir. 2001), in concluding
25 that there was a "reasonable certainty" that Parker would have
26 used his position as a police officer to further his own drug-
27 dealing activities.

28 Parker asserts that the district court erred by increasing
29 his offense level pursuant to U.S.S.G. § 3C1.1, which provides a
30 two-level enhancement for obstruction of justice. Prior to
31 trial, Parker encouraged William and Sayles not to testify
32 against him. Parker suggests that he was merely advising William
33 and Sayles of their constitutional rights. "'[W]hile a witness
34 violates no law by claiming the Fifth Amendment privilege against
35 self-incrimination . . . , one who bribes, threatens, coerces a
36 witness to claim it or advises with corrupt motive a witness to
37 take it, can and does obstruct or influence the administration of
38 justice.'" United States v. Cioffi, 493 F.2d 1111, 1119 (2d Cir.
39 1974) (quoting Cole v. United States, 329 F.2d 437 (9th Cir.
40 1964)) (emphasis added). The district court found that Parker
41 had such a "corrupt motive," and we conclude that, on the record
42 before us, this finding was not clearly erroneous. United States
43 v. Hamilton, 334 F.3d 170, 188 (2d Cir. 2003); United States v.
44 Williams, 254 F.3d 44, 46 (2d Cir. 2001).

1 Parker argues that the district court erred by increasing
2 his applicable offense level for the narcotics conspiracy
3 conviction pursuant to U.S.S.G. § 3B1.1(c), which provides a two-
4 level enhancement for occupying a leadership role. Parker argues
5 that this conviction was not supported by sufficient evidence and
6 therefore cannot support an enhancement. As noted above, the
7 evidence adequately supports this conviction.

8 Parker argues that the district court erred by refusing to
9 grant a downward departure based on the "imperfect defense of
10 entrapment," which Parker describes as "an entrapment claim that
11 may not have been strong enough for a jury to accept at trial,
12 but should . . . be accounted for at sentencing as a basis to
13 downwardly depart." Parker Br. at 161. The district court found
14 no credible evidence of inducement, and we cannot conclude that
15 the district court clearly erred in so finding. Parker does not
16 suggest that a refusal to downwardly depart based on such a
17 finding evinces a "'mistaken belief that it lacked authority to
18 depart.'" United States v. Bala, 236 F.3d 87, 91 (2d Cir. 2000)
19 (quoting United States v. Martin, 78 F.3d 808, 814 (2d Cir.
20 1996)).

21 B. Ferby

22 Ferby argues that the district court erred by increasing his
23 applicable offense level pursuant to U.S.S.G. § 3A1.3, which
24 provides a two-level adjustment "[i]f a victim was physically
25 restrained in the course of the offense." During sentencing,
26 Ferby withdrew his objection to the application of this
27 enhancement, and we therefore review for "plain error." We do
28 not find on the record before us that the district court
29 committed plain error. United States v. Henry, 325 F.3d 93, 100
30 (2d Cir. 2003).

31 Ferby argues that the district court erred by refusing to
32 decrease his applicable offense level pursuant to U.S.S.G.
33 § 3E1.1(a), which provides a two-level reduction "[i]f the
34 defendant clearly demonstrates acceptance of responsibility for
35 his offense." Although Ferby admitted at trial that he failed to
36 file the appropriate paperwork for the money seized from Agent
37 White, the district court did not commit clear error in finding
38 that Ferby did not accept responsibility because he "admitted
39 only that which could not be denied under the circumstances."
40 United States v. Reyes, 9 F.3d 275, 281 (2d Cir. 1993).

41 Ferby also asserts that the district court erred by upwardly
42 departing by four levels for conduct for which Ferby was
43 acquitted. "[W]ith respect to acts of misconduct not resulting

1 in conviction, the [Sentencing Guidelines] . . . permit
2 departures for acts that relate in some way to the offense of
3 conviction, even though not technically covered by the definition
4 of relevant conduct." United States v. Kim, 896 F.2d 678, 684
5 (2d Cir. 1990). After careful review of the facts, we conclude
6 that the district court did not err in finding by a preponderance
7 of the evidence that Ferby committed the acts charged in Counts
8 I, II, III, V and VI. United States v. Kostakis, 364 F.3d 45, 51
9 (2d Cir. 2004). Moreover, the district court did not err by
10 determining the size of the departure based on the sentence that
11 Ferby would have received if he had been convicted of Count I.
12 "Reference to an analogous statute is a well-established method
13 to determine the magnitude of an upward departure." United
14 States v. Fan, 36 F.3d 240, 245 (2d Cir. 1994); accord United
15 States v. Guzman, 282 F.3d 177, 182 (2d Cir. 2002).

16 For the foregoing reasons, the judgment of the district
17 court is hereby AFFIRMED.

18 FOR THE COURT:
19 ROSEANN B. MACKECHNIE, Clerk

20 _____
21 By: Date