

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-5111
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CARLETHIA J. HASKINS and ATLAS W. PHILLIPS,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
(1:90CR114 (1) (2))

(January 15, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Carlethia J. Haskins and Atlas W. Phillips appeal their convictions for possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). Additionally, Phillips appeals his convictions for possession of a firearm and possession of ammunition by a felon, in violation of 18 U.S.C. § 922(g)(1), and for use of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1); and Haskins appeals

¹ Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

her sentence enhancement, under U.S.S.G. § 2D1.1(b)(1), for possession of a firearm. We **AFFIRM**.

I.

In October 1990, while travelling on I-10, Haskins and Phillips, common-law spouses, were stopped by two Beaumont, Texas, police officers, David Froman and Jerry LaChance, for failing to wear their seatbelts. When Haskins, who was driving, opened her purse to retrieve her driver's license, Officer Froman noticed rolling papers in it, which he associated with marijuana use. He also detected the odor of fabric softener, which he also associated with the presence of drugs, and noticed that Phillips appeared extremely nervous. Additionally, Haskins and Phillips gave conflicting stories regarding their destination. As a result, Froman obtained written consent from Haskins to search the car.

Because Froman's search revealed marijuana under the front seat, he arrested Haskins and Phillips and read them their **Miranda** warnings. Haskins then told Officer LaChance that there was more marijuana in the trunk, a search of which revealed three suitcases containing several large bundles of the contraband. LaChance also found a pistol with five rounds of ammunition in Phillips' suitcase on the back seat. The total amount of marijuana seized was 55.71 kilograms.

The day after the arrest, Special Agent David Bock of the Bureau of Alcohol, Tobacco & Firearms interviewed Phillips about the gun, after again advising him of his **Miranda** rights and obtaining a signed waiver. Phillips told Bock that the gun and

ammunition were his, and that he had purchased the gun because he thought he would need it for his business -- "drugs". Phillips also told a DEA agent that all of the marijuana belonged to him. At trial, Haskins admitted that the marijuana found under the front seat was hers, but denied any knowledge of the marijuana found in the trunk.

Both Haskins and Phillips were convicted of possession with intent to distribute marijuana. Phillips was also convicted of one count of possession of a firearm by a felon, one count of possession of ammunition by a felon, and one count of use of a firearm during and in relation to a drug trafficking crime. Haskins was sentenced to 46 months imprisonment; Phillips to concurrent 87-month terms for the three possession counts and a consecutive five-year term for use of a firearm during and in relation to a drug trafficking crime. Five years of supervised release and a \$50 mandatory assessment per count of conviction were also imposed against each.

II.

A.

Both defendants contest the lawfulness of the initial stop, contending that the officers engaged in a pattern of pretextual stops along that stretch of highway for minor traffic violations with the real intention of catching drug traffickers. They concede that the officers had a legitimate reason to stop them (the seatbelt violation), but urge us to reverse precedent and

"recognize this stop and detention for the pretext it was, and declare it illegal".

United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc), settled the question of pretextual stops, holding that "so long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry". See also **United States v. Harris**, 932 F.2d 1529, 1536 (5th Cir.), cert. denied, ___ U.S. ___, 112 S. Ct. 270 (1991). The force of this en banc ruling has not been negated by statute or the Supreme Court. It should go without saying that a panel of this court is powerless to overrule a decision by an earlier panel, much less an en banc decision, even if we were inclined to do so, which we are not.

B.

Defendants next assert error based on evidentiary rulings.

1.

They contend that the district court erred by excluding evidence, for impeachment purposes, of the officers' pattern of stops. Needless to say, the trial court has broad discretion to limit the scope of cross-examination, **United States v. Rocha**, 916 F.2d 219, 242 (5th Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 2057 (1991), and to determine relevance, **United States v. Young**, 655 F.2d 624, 626 (5th Cir. 1981). As noted by the district court, allowing such proof in this case essentially would have involved allowing the defense to litigate a host of other cases involving similar stops. Additionally, it would have had little,

if any, relevance, because, as discussed above, the officers acted within their authority. The district court did not abuse its discretion.

2.

Phillips maintains that his statements to Special Agent Bock regarding the gun and ammunition should not have been admitted because (1) he had previously invoked his right to remain silent during questioning by a different agent on a different crime,² (2) he did not have counsel present (although apparently, he never requested it), and (3) Bock did not inform Phillips of the firearms charge against him.³

Because Phillips did not object at trial on the first two of these grounds, he failed to preserve error on them for appeal. See **United States v. Berry**, 977 F.2d 915, 917 (5th Cir. 1992). Accordingly, we review only for plain error, *id.*, which Phillips cannot establish, and, indeed, has not even alleged. His third ground is likewise without merit; Bock had no affirmative obligation to advise Phillips of the crime he was investigating. See **Colorado v. Spring**, 479 U.S. 564, 577 (1987).⁴ Furthermore, that the gun and ammunition were found in Phillips' suitcase amply

² Cf. **Kelly v. Lynaugh**, 862 F.2d 1126, 1130-31 (5th Cir. 1988), *cert. denied*, 492 U.S. 925 (1989) (no constitutional violation where three interrogations on same crime were spread over seven to twelve hours and preceded by renewed warnings).

³ Before admitting the evidence, the district court held a hearing pursuant to 18 U.S.C. § 3501, and determined that the statements were voluntary.

⁴ Bock *did*, nonetheless, inform Phillips that he was investigating a possible violation of the Federal Firearms Act.

supports the jury's finding that they belonged to Phillips, rendering any possible error in admitting his statements to Bock harmless. Fed. R. Crim. P. 52(a).

C.

Haskins and Phillips each contest the sufficiency of the evidence for each count of conviction. As is more than well established, we examine the evidence, together with all reasonable inferences and credibility choices, in the light most favorable to the government. *United States v. Jokel*, 969 F.2d 132, 134 (5th Cir. 1992). And, the jury verdict must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. *Glasser v. United States*, 315 U.S. 60, 80 (1942). Here, however, at the close of all the evidence, the appellants failed to renew their motions for judgment of acquittal under Fed. R. Crim. P. 29, so we review only for a manifest miscarriage of justice. *United States v. Daniel*, 957 F.2d 162, 164 (5th Cir. 1992). Under this standard, the convictions must be sustained unless the record is "devoid of evidence pointing to guilt". *Id.* (quoting *United States v. Ruiz*, 860 F.2d 615, 617 (5th Cir. 1988)). As discussed below, the record is not devoid of such evidence.

1.

For the possession with intent to distribute marijuana convictions, Haskins and Phillips each contend that the evidence was insufficient to connect them to the marijuana found in the trunk. In order to convict for possession with intent to

distribute, the government must prove knowledge, possession, and intent to distribute. **United States v. Gonzalez**, 700 F.2d 196, 204 (5th Cir. 1983). Both possession and intent to distribute may be proved by circumstantial evidence. **United States v. Prieto-Tejas**, 779 F.2d 1098, 1101 (5th Cir. 1986).

Haskins' knowledge was established by her statement to Officer LaChance that there was more marijuana in the trunk. Additionally, the jury could have inferred knowledge from the totality of the circumstances, see **United States v. Diaz-Carreon**, 915 F.2d 951, 955 (5th Cir. 1990); specifically, the marijuana under the seat that she admitted was hers, the smell of fabric softener, the presence of her briefcase in the trunk along with the bundles of marijuana, and her control over the car for several days by virtue of her status as renter and driver. Possession is supported by her dominion over the vehicle, see **United States v. Warren**, 594 F.2d 1046, 1050-51 (5th Cir. 1979), and her possession of the key to the trunk, see **United States v. Martinez**, 588 F.2d 495, 498-99 (5th Cir. 1979).

Aside from the circumstantial evidence, Phillips' knowledge and possession of the marijuana are amply supported by his admissions that all of the marijuana belonged to him and that he was in the drug business.

Intent to distribute may be inferred against both based upon their possession of a large amount of drugs, see **Prieto-Tejas**, 779 F.2d at 1101, which, in this case, was over 55 kilograms.

2.

Phillips contends that the government failed to prove that the five .32 caliber rounds found with the gun were "ammunition" under federal law and that Bock's testimony that he test-fired the gun and found it to be "functional" did not prove that the gun was a weapon able to "expel a projectile by the action of an explosive", as required by 18 U.S.C. § 921(a)(3). We find these contentions wholly meritless; a gun capable of being test-fired is a firearm, and bullets constitute ammunition.

3.

Phillips next contends that the evidence does not support the jury's finding that he used in gun *in relation to* the drug trafficking, as required by 18 U.S.C. § 924(c). This contention is also without merit. Not only were the gun and ammunition located in a suitcase easily accessible to Phillips while he and Haskins were transporting the marijuana, but Phillips *admitted* that he bought the gun for use in his drug business.

D.

Finally, Haskins contends that the district court erred in sentencing her by adding two-levels to her base offense level for possession of a firearm, as prescribed by U.S.S.G. § 2D1.1(b)(1), on the basis that Phillips, not she, possessed the firearm.

Haskins ignores the commentary to § 2D1.1(b)(1), which provides that the upward adjustment is proper "if the weapon was *present*, unless it is clearly improbable that the weapon was connected with the offense". U.S.S.G. § 2D1.1(b)(1), comment.(n.3)

(emphasis added). A defendant's sentence may be enhanced under this section for a co-defendant's knowing possession of a firearm during a drug trafficking offense if the defendant were involved in a joint undertaking involving a quantity of narcotics sufficient to support an inference of intent to distribute and it was reasonably foreseeable that the co-defendant would be in possession of a weapon. **United States v. Aguilera-Zapata**, 901 F.2d 1209, 1215-16 (5th Cir. 1990). The district court is permitted to infer that the defendant should have anticipated the co-defendant's possession of a gun if the above factors were present. **Id.** We review a district court's factual findings regarding imposition of sentences only for clear error. **United States v. Hooten**, 942 F.2d 878, 880 (5th Cir. 1991).

In overruling Haskins' objection at her sentencing hearing to the adjustment, the district court noted that although the gun was in Phillips' possession, he had been her companion for more than 20 years; that the firearm was a tool of the drug trade; and that one in Haskins' position should have anticipated that a gun would be present. These findings satisfy the requirements for imposition of the enhancement, and they were not clearly erroneous.⁵

⁵ Because Haskins' bare assertions that her Sixth Amendment and equal protection rights were violated by the adjustment, unsupported by any authority, fail to meet the requirements of Fed. R. App. P. 28(a)(5), we do not address them. See Fed. R. App. P. 28(a)(5) ("The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on").

III.

For the foregoing reasons, the convictions and sentence are
AFFIRMED.