

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8603

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SYLVESTER WOLFE, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A 91 CR 011 (1))

(January 6, 1993)

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

I.

On February 4, 1991, while patrolling a high drug-traffic area of Austin, Texas, Officer Duane McNeill of the Austin Police Department observed five men gathered around the open trunk of a late-model car in a parking lot. After driving by the car,

* 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 Pursuant to that rule, the court has determined that this opinion should not be published.

McNeill backed up to see what was going on. He observed a heavy-set male close the trunk, and the group of five walked across the street and sat down on benches at the Jamburger, a hamburger restaurant also known for drug trafficking. McNeill yelled to the men across the street and asked the group who owned the car. The men gave a general response that they did not know. McNeill received an identical response when he asked them who was driving it. McNeill then noticed a rental car sticker on the bumper and asked the group who had the lease on the car. Once again, the men responded that they did not know.

McNeill called for assistance, and Officers James Wolsch and Pete Morin arrived in about ten minutes. Before they arrived, McNeill called the rental company to make sure the car was not stolen and to find out who had rented it. The rental company told him that it would take a few minutes to find out this information. McNeill briefed Wolsch about the situation and Wolsch, recognizing one of the men as Calvin Duracel)) a known crack dealer)) went across the street to talk to the five men, who were still sitting on the benches. Wolsch asked each about the car, and each denied any knowledge of it. Apparently, Wolsch also obtained the identity of the men, including Tyler and Wolfe.

McNeill called the rental company back, and the agent told him that Henry Tyler had leased the vehicle and that Sylvester Wolfe was also on the lease. In addition, the agent stated that the car was due back at noon, which was approaching. Wolsch returned from across the street, and the officers decided to

search the car.

McNeill knew he could pop the trunk open with a lever inside the car. Wolfe and Tyler had left the windows rolled down and the keys on the dashboard. McNeill popped the trunk open, and the officers proceeded to search the trunk. They discovered a white hand towel that appeared to have an object inside of it. The towel rested on top of a clothes bag and a briefcase. Wolsch unwrapped the towel and discovered a .357 magnum pistol. A check revealed that the pistol had been stolen from the police department in a burglary a couple of weeks before.

Wolsch then contacted the narcotics section of the police department to have a dog sent to sniff the briefcase. The dog showed some attention to it but did not give an alert. The officers pryed open the briefcase with a screwdriver and found crack cocaine and bullets, which matched the bullets found in the gun. Inside the car, they found rental car receipts and motel receipts from the Budget Inn, the hotel where Tyler testified Wolfe had been staying.

As the officers popped open the trunk, the five men at the Jamburger began walking away. After the officers found the cocaine in the briefcase, McNeill began patrolling the area to see whether he could locate any of the suspects. He noticed two of the suspects sitting in a car a few blocks away. When McNeill approached the car, Tyler identified himself, while Wolfe gave a fictitious name and attempted to hide his wallet containing identification. McNeill arrested both men.

II.

A grand jury indicted Wolfe on charges of conspiracy to possess with intent to distribute over 50 grams of crack cocaine in violation of 21 U.S.C. § 846, possession with intent to distribute over 50 grams of cocaine base in violation of 21 U.S.C. § 841(a)(1), and use of a firearm in furtherance of the drug-related offenses in violation of 18 U.S.C. § 924(c). Wolfe waived his right to trial by jury, and the district court found him guilty of all three counts.

III.

Wolfe challenges the legality of the search of the rental car. The government contends that Wolfe waived this objection in the district court and that he abandoned the rental car, thereby losing standing to object to the search. The government does not suggest that the police searched the car with probable cause or that one or more exceptions to the warrant requirement justified the search.

Wolfe contends any abandonment was the result of an illegal stop. Were we to conclude an illegal stop occurred that caused Wolfe to abandon the car, Wolfe indeed would have standing to object to the search. See United States v. Santia-Manriquez, 603 F.2d 575, 578 (5th Cir. 1979). We therefore must consider whether McNeill's actions amounted to an illegal stop.

Following a resolution of that issue, we may then address the question of abandonment. Our resolution of these two issues makes

it unnecessary to decide whether Wolfe waived his objection in the trial court.

A.

In determining whether police action constitutes a stop, we must determine whether "a reasonable person would feel free to `disregard the police and go about his business.'" Florida v. Bostick, 111 S. Ct. 2382, 2386 (1991) (quoting California v. Hodari D., 111 S. Ct. 1547, 1551 (1991)). Mere police questioning does not constitute a seizure. Id. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a `seizure' has occurred." Id.

We conclude that McNeill did not make a stop when he stopped his patrol car and backed up to see what was going on.¹ McNeill did not attempt to restrain the five men in any way as they walked across the street to the Jamburger: He only yelled questions to them across the street and gave no indication that they were not free to leave. Even after the officers suspected criminal activity, they allowed the men to walk away while the officers searched the car. McNeill and Wolsch never made any show of force or suggested in any way that the men had to answer questions.

Under these circumstances, we believe a reasonable person

¹ Wolfe does not suggest that Wolsch's questioning amounted to a stop. See Bostick, 111 S. Ct. at 2386 (officers may ask questions without implicating the Fourth Amendment).

would have felt free to terminate the encounter. Id. at 2387.² Because we hold that McNeill's actions did not constitute a stop, we need not decide whether McNeill had adequate suspicion to justify a stop.

B.

We now must address the government's claim that Wolfe has no standing to object to the search. In other words, we must determine whether Wolfe's actions amounted to an abandonment of any reasonable expectation of privacy he may have had in the car. Wolfe has the burden of establishing that he has a "privacy or property interest in the premises searched or items seized which is sufficient to justify a reasonable expectation of privacy therein." United States v. Pierce, 959 F.2d 1297, 1303 (5th Cir. 1992) (citations and internal quotation marks omitted).

A defendant who abandons property before it is seized forfeits any expectation of privacy in the property and cannot object to its search. United States v. Berd, 634 F.2d 979, 987 (5th Cir. Unit B Jan. 1981). "Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts All relevant circumstances existing at the time of the alleged abandonment should be considered." United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973) (en banc). "The issue is not abandonment in

² Whether Wolfe would have felt free to leave in the car is irrelevant. The issue is whether Wolfe would have felt free to terminate the encounter with the police. See Bostick, id. at 2387.

the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." Id.

On several previous occasions, we have decided that a defendant had abandoned property, thereby losing his right to object to a search of that property. Before deciding whether Wolfe abandoned the rental car, we briefly review our prior cases addressing abandonment.

In United States v. Edwards, 441 F.2d 749 (5th Cir. 1971), we found abandonment of an automobile. The police began to chase Edwards because he was driving his car twenty miles per hour over the speed limit. Edwards led police on a high-speed chase, finally running partially off the road. Id. at 750. After coming to a stop, he jumped from the car, leaving the lights on and the engine running. The police chased Edwards, but he escaped. The police then searched the trunk of the car and found untaxed whisky.

Edwards moved to suppress the whisky as the fruits of an illegal search. We held that Edwards lost his right to Fourth Amendment protection when he abandoned his car to the police on a public highway with engine running, keys in the ignition, and lights on. Id. at 751. Importantly, we noted that abandonment in the "strict property-right sense is not the issue." Id. at 753.

In United States v. Colbert, 474 F.2d 174 (5th Cir. 1973) (en

banc), we held the defendants had abandoned two briefcases. Police officers observed two men walking down a city street carrying the briefcases. An officer recognized one of the men as wanted for a felony. After being approached by the officers, each defendant set down his briefcase. The officers asked to see the contents of the briefcases, but the defendants denied they owned the briefcases. Id. at 175.

We held that the defendants abandoned the briefcases by disclaiming ownership of them and beginning to walk away from them. Id. at 177. We noted that a court should consider all relevant circumstances in determining whether the defendant intended to abandon the property. Id. at 176.

Similarly, in United States v. Anderson, 500 F.2d 1311 (5th Cir. 1974), we held that a defendant abandoned luggage in an airport. After stopping the two defendants, the officer had retrieved three pieces of checked luggage for which one of the defendants held claim checks. The defendants each acknowledged ownership of one suitcase, but both disclaimed ownership of the third. We held that the defendants, like those in Colbert, had abandoned the third suitcase by disclaiming knowledge of it. Id. at 1318.

Finally, in both United States v. Canady, 615 F.2d 694 (5th Cir. 1980), and Berd we held that the defendant had abandoned his suitcase by disclaiming ownership of it in response to police inquiries. As a result, the defendant lost any legitimate expectation of privacy. Canady, 615 F.2d at 697; Berd, 634 F.2d

at 987. In Berd, we were careful to note that abandonment had occurred before seizure of the briefcase. Id. at 987.³ In Canady, as required by our prior cases, we observed that the disclaimers were voluntary. 615 F.2d at 697 n.3.

We read these cases as establishing the rule in this circuit that voluntarily disclaiming ownership of property before the police seize that property constitutes abandonment, thereby depriving the defendant of any legitimate expectation of privacy in the abandoned property. Considering all the facts and circumstances of this case, we think Wolfe abandoned the car, thus depriving him of any expectation of privacy. Wolfe twice denied ownership or knowledge of the car and voluntarily walked away from the car when McNeill first stopped his patrol car. He left the windows of the car down and the keys on the dashboard. These facts amount to abandonment.

We also hold that Wolfe abandoned the contents of the car when he abandoned the car. Where a defendant has no reasonable expectation of privacy in a car, he has no such expectation in its contents. See Anderson, 500 F.2d at 1315 (police may legally search containers found in a car during a legal automobile search).

Wolfe argues that a car is not like a suitcase and that he did not abandon it by parking it and walking away from it. We agree. But where a driver walks away from a rental car, disclaims

³ Wolfe does not argue that the search occurred before he abandoned the car.

any knowledge of it to the police, and leaves the keys on the dashboard with the windows rolled down, we think he has abandoned that car for Fourth Amendment purposes. Moreover, Wolfe ignores Edwards, in which we found abandonment of a car.

Finally, Wolfe relies upon United States v. Santia-Manriquez, 603 F.2d 575, 578 (5th Cir. 1979), and United States v. Beck, 602 F.2d 726, 728-29 (5th Cir. 1979). In those cases, we held that abandonment resulting from an illegal police stop is involuntary. Here, we have concluded that no police stop occurred, thus making these cases irrelevant.

C.

Finally, Wolfe argues that the government cannot contend that he possessed the contraband for purposes of proving an element of the charged offense yet deny that he had possession for purposes of contesting the illegal search. Our decision in Colbert, 474 F.2d at 177, answers Wolfe's argument: No inconsistency exists where the defendant abandoned the property before the search. Here, the government proved, using the hotel and rental car receipts and Tyler's testimony, for example, that Wolfe possessed the contraband prior to the time when McNeill stopped his patrol car. This evidence proves that Wolfe had possession before abandoning the property. "[T]he government may argue without self-contradiction that a defendant had possession at one time for purposes of conviction, but at a later time lacked sufficient possession to confer standing to object to search and seizure."

Id.

IV.

Wolfe next contends that the record provides insufficient evidence to convict him of using a firearm in furtherance of a drug offense. In reviewing a claim of insufficient evidence where the defendant chose a bench trial, we look to see whether the verdict was supported by substantial evidence. United States v. Jennings, 726 F.2d 189, 190 (5th Cir. 1984). We defer to all reasonable inferences drawn by the district court and view the evidence in a light most favorable to the verdict. United States v. Reeves, 782 F.2d 1323, 1326 (5th Cir. 1986).

To sustain its burden, the government must prove that the defendant used or carried a firearm in relation to an underlying drug trafficking crime. United States v. Munoz-Fabela, 896 F.2d 908, 911 (5th Cir.), cert. denied, 111 S. Ct. 76 (1990). The government need only show that the firearm was present at the drug-trafficking scene, could have been used to protect or facilitate the operation and the weapon was in some way connected with drug trafficking. Id. We previously have found sufficient evidence of possession where a gun was found in a car where defendant was seated, even though he claimed no knowledge of the gun and there was no other evidence to connect him to the gun.

Id.

We think the record contains ample evidence to sustain the conviction. Tyler testified that he and Wolfe were using the car

to sell cocaine. Tyler testified that the briefcase belonged to Wolfe. The police found a bag of bullets, in that briefcase, that matched the bullets found in the gun. The gun was located on top of the briefcase in the trunk, thus giving Wolfe easy access to the gun during the drug transaction. Wolfe signed the rental agreement for the car and was listed on that agreement. This evidence is sufficient to sustain Wolfe's conviction.

V.

Wolfe claims ineffective assistance of counsel if we hold that he waived any of his points of error. Because our holding does not rest on waiver, and because Wolfe did not raise an ineffective assistance of counsel claim in the district court, we will not address this claim here.

The judgment of conviction is AFFIRMED.