IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-8626
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RONNY EARL RHODES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-91-CR-36)

(January 14, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Ronny Rhodes was convicted by a jury of possession of cocaine base (crack) with intent to distribute and use of a firearm during the commission of a felony in violation of, respectively, 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 924(c)(1). He appeals his conviction and sentence. Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In a two-count indictment, a grand jury charged Rhodes with possession of at least fifty grams of cocaine base (crack) with intent to distribute (count one) and the use or carrying of a firearm in the commission of a felony (count two). The following facts were adduced at trial. Officer Gary Greene of the Waco Police Department regularly patrolled Oakwood Park because it was an area frequented by crack dealers and plagued by violence involving guns. On occasion, Greene had found firearms in the park and had been personally involved in 75-100 arrests. On one of his daily patrols, Greene spotted Rhodes sitting in a parked 1991 blue Ford Tempo. The car attracted Greene's attention because he had not seen it before, and it first appeared to him that the car did not have a license plate.

Greene watched as Rhodes got out of the car and walked over to Jason Brown, a suspected drug dealer whom Greene recognized, and decided to speak to the men. As Greene approached Rhodes and Brown, he passed Rhodes's car and noticed a temporary license plate issued to a car rental agency,[1] a cellular mobile phone in the front seat, and a brown paper bag partially sticking out from under the driver's seat.

Greene spoke to Brown, as he had done many times, and asked to see Rhodes's identification. Rhodes produced a Texas driver's

[1] The car was rented in the name of Paul W. Thomas. When the Waco police contacted Thomas after confiscating the car, Thomas stated that he was Rhodes's uncle and that he had loaned the car to Rhodes. In a statement to the police approximately one week before the trial, Thomas stated that he did not know Rhodes and that he had rented the car for a man named "Debo."

license and a student identification card, and Greene used his portable radio to request a records check from the dispatcher. While waiting for the information, Greene engaged Rhodes and Brown in conversation.

Greene was concerned for his safety because Rhodes continuously placed his hands in his pockets in spite of Greene's request that he not do it. When Greene noticed a large bulge in Rhodes's left front pocket, he patted Rhodes down and felt a hard object. Greene reached into Rhodes's pocket and discovered approximately $2,000 wrapped around a paper; he immediately returned the money and the pager to Rhodes. Momentarily, the dispatcher reported that there were confirmed outstanding warrants for Rhodes's arrest for speeding and failure to appear. Greene arrested Rhodes and placed him in the custody of Officer Rozyskie, who had arrived to assist.

Greene attempted to inventory the car before having it towed, but Rhodes did not have the keys. Brown had the keys and wanted Greene to leave the car with him, but Brown did not have a driver's license. While talking to Brown, Greene noticed that Rozyskie had left the squad car and was standing with Rhodes by a swing set. Greene yelled to Rozyskie that he had the keys.

The idea of having his car searched visibly upset Rhodes. Although handcuffed, Rhodes broke away from Rozyskie and tried to escape; but Rozyskie grabbed him by the chest and pushed him to the ground.

Greene unlocked Rhodes's car and began to inventory the contents. In the brown paper sack that was sticking out from under

the seat, he found individual plastic bags with a total of 322.3 grams of "crack" cocaine or 1,289.20 one-quarter-gram dosage units. Moreover, under the driver's seat he discovered a loaded .357 Magnum Ruger pistol and a box of shells.

II.

Rhodes filed two motions to suppress, alleging that he was discriminately detained and interrogated and that his property was searched without a warrant or reasonable suspicion. After a hearing, the district court denied the motions, finding that the initial contact between Greene and Rhodes was not a seizure. Moreover, once Greene learned that Rhodes was wanted, there was probable cause to arrest him. Because Brown did not have a license, the district court concluded that it was proper to impound the car and perform an inventory search.

III.

Following the guilty verdict, the probation officer calculated, on count one, a base offense level of 34 under U.S.S.G. § 2D1.1 and increased three levels for Rhodes's role in the offense and two levels for obstruction of justice. The total offense level was 39, with a criminal history category of 1. There was no guideline score for count two, as the penalty is required by statute.

The district court sentenced Rhodes within the guidelines to a term of imprisonment of 300 months as to count one, a mandatory

consecutive term of imprisonment of 60 months as to count two, consecutive terms of supervised release of five years (count one) and three years (count two), a fine of $5,000, and a special assessment of $100.

IV.

A.

Rhodes asserts that he was detained, seized, and searched in violation of the Fourth Amendment. Implicitly, he argues that the district court erred in denying his motion to suppress.

In an appeal from the denial of a motion to suppress, we review factual findings for clear error and legal conclusions de novo. United States v. Wallace, 889 F.2d 580, 582 (1989), cert. denied, 497 U.S. 1006 (1990). The question whether an officer had reasonable suspicion to stop a person is one of law. See United States v. Casteneda, 951 F.2d 44, 47 (5th Cir. 1992). The Supreme Court carved out the "reasonable suspicion" exception to the requirement of probable cause for searches and seizure in Terry v. Ohio, 392 U.S. 1, 22 (1968): "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."

In an apparent concession to the propriety of the initial investigatory detention, Rhodes contends that Greene exceeded his authority by searching his pockets and prolonging the initial investigation until he could effect a search of the automobile. He

argues that Greene detained him because he was a well-dressed black man in a poor area and not because he or Jason Brown did anything to evoke a belief that they were armed and dangerous.

During an investigation, an officer may conduct a protective patdown when he "observes unusual conduct which leads him reasonably to conclude in light of his experience that original activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . ." Terry, id. at 30. At the suppression hearing, Greene testified that Rhodes presented his driver's license and student identification without protest. As Greene, Rhodes, and Brown waited for a reply from the dispatcher on the records check, Greene asked Rhodes to keep his hands out of his pocket because, based upon his experience as a police officer, coupled with the fact that he was alone, Greene was concerned whether Rhodes had a gun. According to Greene, he patted Rhodes's front pants pocket because he thought that the bulge might be a weapon. Under the circumstances, we agree with the district court's finding that the patdown search was reasonable. See United States v. Rideau, 969 F.2d 1572, 1574-76 (5th Cir. 1992) (en banc).

Momentarily, Greene learned that there were confirmed outstanding warrants for Rhodes's arrest. See United States v. Costner, 646 F.2d 234, 236 (5th Cir. Unit A May 1981) (per curiam) (after a legal stop, facts may develop that create probable cause for arrest). Rhodes does not raise the question of whether, at that point, Greene had probable cause to arrest him. He contends, however, that there was no need to impound and inventory his car.

He argues that the car was safely parked and locked and that Jason Brown was available to take the keys to Rhodes's father.

"[I]nventory searches are now a well-defined exception to the warrant requirement of the Fourth Amendment." Colorado v. Bertine, 479 U.S. 367 (1987). The two principal purposes of the exception are to protect the owner's personal property and to protect the police against claims to property. United States v. Walker, 931 F.2d 1066, 1068 (5th Cir. 1991). Inventories must be "conducted according to standardized criteria." Id. (citation omitted).

Greene testified that the Waco Police Department had an established, written policy regarding vehicles at the site of an arrest. According to the police, Greene could not leave Rhodes's car in the park where it was subject to damage. He was required to inventory it and have it towed to safety. The Waco policy would have permitted Greene to release the car to Jason Brown; Brown did not have a driver's license however, and could not drive the car.

The district court found that "[o]nce he ascertained that Jason Brown[] did not have a license," Greene was forced to impound the car to avoid "damage or loss of the car and police department liability." We agree that Greene conducted the inventory search according to standardized criteria.

Rhodes's argument that Brown could have taken the keys to his father also fails. "[P]olice are not required to provide defendants with an opportunity to make alternative arrangements for the safekeeping of their property." Walker, 931 F.2d at 1069 (citation and internal quotations omitted).

Rhodes further contends that the investigative detention violated state law as well as the federal Constitution. We need not address this argument, as it is raised for the first time on appeal. See United States v. Garcia-Pillado, 898 F.2d 36, 39 (1990).

B.

Rhodes argues that the evidence is insufficient to support the convictions. He moved for judgment of acquittal at the close of the government's case and filed a written motion at the close of the evidence.

> The standard for evaluating the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). In viewing the evidence in the light most favorable to the verdict, we afford the government the benefit of all reasonable inferences and credibility choices. United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), cert. denied, 484 U.S. 1026, 108 S. Ct. 749, 98 L. Ed. 2d 762 (1988).

United States v. Daniel, 957 F.2d 162, 164 (5th Cir. 1992).

In order to establish the substantive count of possession with intent to distribute, the government has the burden of proving that the defendant (1) knowingly, (2) possessed cocaine base (3) with the intent to distribute it. See United States v. Diaz-Carreon, 915 F.2d 951, 953 (5th Cir. 1990). "Possession of contraband may be either actual or constructive." United States v. McKnight, 953 F.2d 898, 901 (5th Cir.), cert. denied, 112 S. Ct. 2975 (1992). "[A] person has constructive possession if he knowingly has

ownership, dominion, or control over the contraband itself or over the premises in which the contraband is located." Id.

Because Greene had reasonable suspicion to stop Rhodes and probable cause to arrest him, Rhodes's insufficiency claim falls. The evidence established that a paper sack containing cocaine base was found under the seat of the automobile over which Rhodes had dominion and control. Moreover, the large amount of cocaine base and the presence of over $2,000 in cash were sufficient to infer intent to distribute. See United States v. Munoz, 957 F.2d 171, 174 (5th Cir.), cert. denied, 113 S. Ct. 332 (1992). The verdict of the jury was reasonable.

Rhodes also challenges his conviction for carrying a firearm during the commission of the felony; he does not discuss the question in his brief, however. Given that the evidence was sufficient to support the felony conviction, Rhodes's challenge to his firearm conviction is meritless. It is undisputed that Greene found a gun in Rhodes's car and that the gun belonged to Rhodes.

C.

Rhodes argues that several of the district court's evidentiary rulings were error. Specifically, he challenges the admissibility of Greene's testimony and the government's cross-examination of Kermit Ward. He asserts that the rulings violated Fed. R. Evid. 403 because the prejudicial effects of the evidence outweighed the probative value.

In making evidentiary rulings, the trial court considers

whether the evidence is relevant to an issue other than character and whether the prejudicial effect of the evidence outweighs its probative value. See United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). We reverse a district court's decision only on a showing of clear abuse of discretion. See United States v. Fortenberry, 919 F.2d 923, 925 (5th Cir. 1990), cert. denied, 111 S. Ct. 1333 (1991).

At trial, Rhodes objected on hearsay grounds to Greene's testimony concerning criminal activity in the park. When the district court overruled the objection, Rhodes renewed his opposition to the testimony under rule 403 in a "running objection." On appeal, he argues in a conclusional manner that the evidence of criminal activity in the park served to confuse and mislead the jury. His argument is unconvincing. The government's inquiry established that Greene had personal knowledge of drug trafficking in Oakwood Park, demonstrated by his role in 75-100 arrests involving "crack" cocaine. The district court did not abuse its discretion in admitting Greene's testimony.

Rhodes asserts that rule 403 was further violated when the district court permitted the government to impeach defense witness Kermit Ward, Rhodes's lifelong friend and roommate. Ward testified concerning Rhodes's lifestyle and his good reputation in the community. In particular, Rhodes objected to the government's questions on cross-examination concerning Ward's relationship with individuals involved in drug-related activities. He contends that the government introduced extrinsic evidence to attack Ward's

credibility and to confuse the jury, but he does not identify the extrinsic evidence. Because Rhodes refers to the introduction of extrinsic evidence, he seems to be arguing that the government's cross-examination of Ward was improper under rule 608(b) and the overriding protection of rule 403.

Under rule 608(b), a witness's general character for truthfulness may not be attacked "by using extrinsic evidence of his conduct that has not resulted in conviction of a crime." United States v. Blake, 941 F.2d 334, 338 (5th Cir. 1991) (citation omitted), cert. denied, 61 U.S.L.W. 3400 (Nov. 30, 1992) (No. 92-302). Rule 608(b) does not bar "the admission of evidence introduced to contradict, and which the jury might find disproves, a witness's testimony as to a material issue of the case." Id. (citation omitted).

By testifying as a character witness for Rhodes, Ward placed his credibility in issue. The government questioned Ward concerning his relationship with people in the drug trade and his participation in collecting and transporting large sums of money and renting automobiles to be used by others. There is no showing that the government used extrinsic evidence to impeach Ward.

Rhodes challenges the testimonial evidence of government witness Robert Lee Rounsavell. He does not brief his argument, however, so we consider it abandoned. See Weaver v. Puckett, 896 F.2d 126, 128 (5th Cir.), cert. denied, 111 S. Ct. 427 (1990).

D.

Rhodes contends that he was denied his right to impeach his own witness under rules 607.3 and 607.5. The witness in question is Jason Brown, who asserted his Fifth Amendment right against self-incrimination.

Assuming that Rhodes is referring to Fed. R. Evid. 607, his contention is facially absurd. Rule 607 provides, "The credibility of a witness may be attacked by any party, including the party calling the witness." Brown's election to invoke his Fifth Amendment rights has no relevance to rule 607, and Rhodes has not shown that the district court deprived him of his right to impeach Jason Brown.

E.

Rhodes alleges that the district court erred in imposing his sentence by increasing his offense level for his role in the offense and obstruction of justice and by failing to grant a reduction for acceptance of responsibility. The sentencing court's findings of fact are reviewed under the "clearly erroneous" standard, and the application of those facts to the guidelines is a question of law subject to de novo review. See United States v. Shell, 972 F.2d 548, 550 (5th Cir. 1992).

1.

Following the recommendation of the probation officer, the district court increased the offense level by three levels under

U.S.S.G. § 3B1.1(b) because of Rhodes's role in the offense.[2] Section 3B1.1(b) provides, "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." In applying section 3B1.1, the sentencing court may consider relevant conduct as discussed in § 1B1.3. United States v. Rodriguez, 925 F.2d 107, 111 (5th Cir. 1991).

The probation officer determined that Rhodes was a "supervisor/manager in a large drug-trafficking organization, which distribute[d] drugs from Georgia to Texas, and [was] extensive in the number of participants." Significant to the determination was the large amount of cocaine base involved in the present offense.

At the sentencing hearing, Sergeant Reese Knight of the Waco Police Department testified that he was assigned to investigate Rhodes and the people associated with him. From police reports, Reese discovered that two of Rhodes's associates, Kedric McCarter and Chedrick Cox, had been arrested for possession of "crack" cocaine and weapons in a car rented by Ward, Rhodes's roommate. Further, there was a similarity in texture and color between the "crack" recovered from Rhodes and that of his associates. Additionally, Reese learned through two confidential informants

[2] The district court stated as follow: "The Court finds that he was a leader in an otherwise significant offense, regardless of the number of people who might have been involved." While this language seems to track § 3B1.1(a), which provides for a four-level increase, the sentence imposed by the district court is otherwise consistent with the probation officer's recommendation under § 3B1.1(b) which has a three-level increase. The discrepancy is of little significance.

that Rhodes was the supplier for Jason Brown, Willis Slaughter, and Robert Slaughter. Rhodes denied his involvement in a drug deal with any of these persons.

Of further significance in the determination that Rhodes was a manager or supervisor was the manner in which the cocaine base was packaged. Two methods of packaging indicated that some would be distributed to large suppliers and others to street-level dealers. Based upon Reese's experience, he concluded that Rhodes was dealing with 20-30 street-level people. We conclude from the record that the factual findings regarding Rhodes's role in the offense were not clearly erroneous and that the district court did not err in applying the guidelines to the factual findings.

2.

"Section 3C1.1 provides for an enhancement `[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense.' Though the court may not penalize a defendant for denying his guilt as an exercise of his constitutional rights, enhancement based upon perjury is permissible." United States v. Goldfaden, 959 F.2d 1324, 1331 (5th Cir. 1992) (citations omitted). "[T]he district court's finding of obstructive conduct is a factual conclusion subject to a more limited review which turns upon whether the conclusion is clearly erroneous." United States v. Rogers, 917 F.2d 165, 168 (5th Cir. 1990) (citation omitted), cert. denied, 111

S. Ct. 1318 (1991).

The district court increased Rhodes's offense level by two points under U.S.S.G. § 3C1.1 for giving materially false statements at trial. Rhodes's objection to the increase was overruled based upon the presentence report and application note 3(b) of section 3C1.1: "committing, suborning, or attempting to suborn perjury." In the presentence investigation report, the probation officer determined that Rhodes had lied under oath concerning the $2,084 in his possession when arrested and his reasons for carrying a mobile phone and pager.

At trial, Rhodes testified that he was carrying such a large amount of money on the day of his arrest because he intended to pay all of his bills for the month: rent, phone, electricity, cable television, and automobile. He stated that the source of the money was his father, his roommate's mother, and his grandmother. Further, he explained that the cellular phone, which was in his name, was used in conjunction with his father's business. Its use was not strictly for business, however; several people had access to it. Similarly, he alleged that he had the pager so that his father could contact him for business purposes.

Prior to Rhodes's testimony, his roommate, Kermit Ward, testified that Rhodes had not worked since his arrival in Waco. Rhodes asserted that Ward did not know that he worked for his father.

Viewing the record as a whole, the district court's finding that Rhodes gave perjured testimony at trial is fairly supported.

The perjury ruling alone warrants enhancement under section 3C1.1. See Goldfaden, 959 F.2d at 1331.

3.

Rhodes argues that the district court erred in declining to reduce the offense level by two for acceptance of responsibility. He contends that he should not be penalized for maintaining his innocence.

A finding of obstruction of justice does not preclude a reduction for acceptance of responsibility under section 3E1.1. Nonetheless, application note 4 of section 3E1.1 "suggests that contemporaneous adjustments for both obstruction of justice and acceptance of responsibility still will be rare and will occur only in `extraordinary cases.'" United States v. Edwards, 911 F.2d 1031, 1034 (5th Cir. 1990). The standard of review is more deferential than the "clear error" standard because of the sentencing judge's unique position in determining acceptance of responsibility. Id. (citation omitted).

The probation officer reported that Rhodes had acknowledged that the gun found in the car was his but insisted that he carried it for his personal protection on the advice of his father. Also, Rhodes stated that he obtained the $2,084 from his father, grandmother, and Ward's mother for their monthly bills. He continued to disavow any knowledge of the cocaine base found in the car and expressed a belief that he was "set up." The district court found that Rhodes had not admitted his guilt or expressed

remorse and refused to grant the two-level adjustment. We conclude that Rhodes has not carried his burden of demonstrating that the district court's evaluation was erroneous. See United States v. Mourning, 914 F.2d 699, 705 (5th Cir. 1990) (The burden is on the defendant to demonstrate acceptance of responsibility.).

Rhodes argues that Sergeant Knight's testimony and the presentence investigation report should not be relied upon. He contends that they are hearsay and violate his Sixth Amendment right of confrontation. Rhodes's constitutional challenge need not be addressed on appeal, as the issue was not presented in the district court. The Court has "stated repeatedly that issues raised for the first time on appeal are not reviewable by this Court unless they involve purely legal questions and failure to consider them would result in manifest injustice." United States v. Sherbak, 950 F.2d 1095, 1101 (5th Cir. 1992) (internal quotations and citations omitted). Although the question raises a legal issue, failure to consider it would not result in manifest injustice, as Rhodes's confrontation argument has been explicitly rejected. See, e.g., United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990) (presentence investigation report may be considered as evidence because it bears sufficient indicia of reliability).

F.

Rhodes contends that he was tried before an all-white jury, thus depriving him of his right to a fair trial before an impartial

jury that represented a fair cross-section of the community. He alleges that black jurors would have been better able "to understand and would have been familiar with the area and the representative [sic]."

To establish a violation of the Sixth Amendment fair-cross-section requirement, Rhodes must show

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979). Unquestionably, Rhodes meets the first prong of Duren, since blacks are a distinctive group in the community. Although there were no blacks represented on Rhodes's panel, it is not evident whether blacks were represented in the venire from which the panel was chosen. Assuming, arguendo, that Rhodes also meets the second prong of Duren, his argument still fails. Rhodes makes conclusional allegations of racial prejudice and bias, but he offers no facts to show that there was a "systematic exclusion" of blacks in the jury-selection process.

G.

Rhodes contends that the district court erred in limiting the time allocated to defense counsel for closing argument to 25 minutes. He argues that defense counsel required 40 minutes to combat the effect of the prejudicial evidence admitted at trial.

Because of the curtailment, defense counsel was ineffective because he was not able to present his arguments regarding the charges in count two.

"The period of time allocated for the attorney's closing argument is ordinarily within the discretion of the district judge." United States v. Moye, 951 F.2d 59, 63 (5th Cir. 1992). The district court stated that he normally allowed 20 minutes for closing argument for a two-day trial. However, the district court compromised and allowed an extra five minutes, cautioning defense counsel to make his arguments succinct. Rhodes has failed to show that the district court abused its discretion.

AFFIRMED.