IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1671
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES HOWARD HANEY,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas

(CR4-92-061-A)

(June 7, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant James Howard Haney was convicted on his conditional guilty plea for possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1). On appeal he contests the refusal of the district court to suppress evidence of methamphetamine found on his person during a pat-down incident

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[*]Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to a traffic stop, and also contests his sentencing under career offender provisions. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

A. Uncontested Facts

Many of the facts of the incident during which Haney was searched and the methamphetamine seized are not disputed. At 1:42 one morning police officers Juan Smith and Blu Nicholson were on patrol on a highway in Commerce, Texas, when they saw a 1983 Chevrolet pick-up truck make an illegal turn in violation of a traffic law. They signaled the truck's driver (who turned out to be Haney) to stop, and he complied.

Haney got out of the truck and walked back to the police car in which the officers were in the process of calling in the traffic stop. Haney's two companions, Tommy Blake McCary and Kim Dalon Davis, stayed in the truck. Haney stood at the driver's door of the patrol car, and Officer Smith got out. When questioned, Haney stated that he had an Oklahoma driver's license but that he did not have it with him. He gave his name as Kyle Kim Birge. On Smith's instruction, Haney then returned to the pick-up and Smith re-entered the patrol car.

Smith then radioed the police dispatcher to search computer data bases for warrants and for a driver's license in the name of Kyle Kim Birge. The computer searches turned up nothing.

Smith went to the pick-up and told Haney that no driver's license issued in the name of Birge could be located. Haney

repeated that Birge was his name and stated that he had just been stopped down the street by the Texas Highway Patrol. In response to another question, Haney told Smith that the highway patrol officer had not given him a ticket. Smith, though, knew that local highway patrol officers were not on duty after midnight, so he asked McCary and Davis for identification, but they had none either.

Thinking that the truck might be stolen, Smith asked his dispatcher to check its Vehicle Identification Number (VIN). The initial search turned up no such VIN, but a second search did. Smith also asked his dispatcher to call Oklahoma police for a driver's license issued to Birge, but none was found.

The inquiry did reveal, however, that a 1983 Chevrolet pick-up truck with that VIN was registered to a motor vehicle dealership in Oklahoma. Smith was then informed by Haney that he had no documents evidencing ownership of the truck.

Smith then ordered all three occupants out of the truck. McCary possessed two checks with his name on them. Davis possessed no identification but he told his real name to Smith. All defendants were "fidgety and nervous," but Haney testified that the reason he was shaking was that he was cold.

Smith next asked if any weapons were in the truck. Haney responded in the negative, then gave Smith permission to search the truck. Smith searched the truck and found no weapons.

Smith then asked Haney if he had any weapons on his person. Haney said that he did not. Smith nevertheless proceeded to pat-

down Haney, finding a hard object that turned out to be a brick of methamphetamine. Smith promptly called for a back-up.

One of the officers then searched and arrested Davis. A total of 38 minutes elapsed between the initial stop of the truck and the search of Davis. (Haney testified that the time was 30-40 minutes between the initial stop and the search).

B. Contested Facts

Smith testified at the suppression hearing that he stopped the truck because he saw Haney make an illegal U-turn, and that the truck had one taillight out and displayed no license plate. In direct contradiction, Haney testified at the suppression hearing that he had recently checked the taillights and they were working; that a paper license tag was displayed in the window; and that he did not make a U-turn.

Smith testified that he asked Haney's consent to search his person and that Haney gave it. Haney testified that he gave no such consent.

Smith testified that, when he drew the brick of methamphetamine from Haney's clothing, Haney shouted to McCary and Davis, "He's got it, he's got it." Haney testified that he said nothing at that point.

C. Factual Findings

The court made the following findings: (1) Haney consented to the search; (2) Smith had reasonable suspicion to search Haney; (3) Smith articulated specific facts that would lead one to believe that Haney had committed or was in the process of committing a

crime; (4) there was reason to suspect that Haney might have been armed and posing a threat to the officers; (5) Haney committed the three traffic violations described by Smith; (6) Smith had to spend much time attempting to check out the false information that Haney had given him; (7) Haney did shout, "He's got it! He's got it!"; (8) even if Smith had not searched Haney by consent or pursuant to reasonable suspicion, Smith still would have arrested Haney for the traffic violations, incident to which arrest Smith would have searched Haney and found the methamphetamine; i.e., Smith inevitably would have discovered the contraband. The court stated that all the findings were based on a preponderance of the evidence. Based on the foregoing findings, the court denied Haney's motion to suppress.

Pursuant to Fed.R.Crim.P. 11(a)(2), Haney reserved the right to appeal the district court's denial of his motion to suppress evidence. The court accepted Haney's conditional guilty plea to one count of possession with intent to distribute methamphetamine, and sentenced him to serve 360 months in prison and five years on supervised release. Haney timely appealed, insisting that the district court should have granted his motion to suppress the evidence of the methamphetamine seized from his person by the arresting officer.

II

ANALYSIS

A. Standard of Review

In reviewing the denial of a motion to suppress, we accept the

district court's factual findings unless they are clearly erroneous or influenced by an incorrect understanding of the law. The evidence is viewed in the light most favorable to the prevailing party. The ultimate question of the legality of the search is a question of law and is subject to de novo review. United States v. Cooper, 949 F.2d 737, 744 (5th Cir. 1991), cert. denied, 112 S.Ct. 2945 (1992).

A clearly erroneous finding is one that is not plausible in light of the record viewed in its entirety. Anderson v. City of Bessemer City, 470 U.S. 564, 573-76, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). We have "long pitched the standard of review for a motion to suppress based on live testimony at a suppression hearing at a high level." United States v. Randall, 887 F.2d 1262, 1265 (5th Cir. 1989).

B. Exclusionary Rule

The government argues that the motion to suppress was properly denied on three alternative grounds: (1) Haney gave his consent to the search; (2) the officers stopped Haney for a lawful investigation of three traffic violations, during which investigation the officers had reasonable suspicion to believe that Haney was engaged in criminal activity and patted down Haney, pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), for their own protection; (3) even if Smith had not found the methamphetamine in the way that he did, Haney would have been arrested for the traffic violations and, in a search incident to that arrest, the officers inevitably would have discovered the

methamphetamine. We consider these arguments seriatim.

1. Consent

The government must prove consent by a preponderance of the evidence. United States v. Hurtado, 905 F.2d 74, 76 (5th Cir. 1990) (en banc). A district court's finding of consent is reviewed for clear error, taking into account six factors that indicate whether the consent was knowing and voluntary. They are

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

United States v. Galberth, 846 F.2d 983, 986-87 (5th Cir.), cert. denied, 488 U.S. 865 (1988).

First, Haney acceded to Smith's signal to stop the truck, and the three occupants sat in the truck while Smith investigated. Second, there was no evidence of coercion on the part of the officers. Third, Haney attempted to appear cooperative, giving a false name and a false tale of an encounter with a highway patrol officer, and giving consent to search the truck. Fourth, no evidence was adduced to show that Haney was not aware of his right to refuse consent. Fifth, nothing indicates that Haney has any intellectual deficiency.

Although the district court obviously did not have the benefit of Haney's presentence investigation report (PSR) at the time of the motion to suppress, the PSR confirms that Haney had no record of mental or emotional disorders. He did not drop out of high

school until sometime during the twelfth grade, after which he operated his own automobile body and mechanic shop. Nothing indicates that he would have failed to understand the consequence of giving consent.

The record contains little information on Haney's belief that the methamphetamine would or would not have been found. When Smith first felt the methamphetamine through Haney's clothing, Smith asked what it was and Haney said that it was "him."

Perhaps the most compelling factor is the extent and level of Haney's cooperation. He gave the appearance of being compliant and helpful. A refusal to consent to the search of his person would have been inconsistent with the appearance of cooperation that he attempted to give. All things considered, the finding of consent is not clearly erroneous.

2. Reasonable Suspicion

An officer may conduct an investigatory detention and protective pat-down search when he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the person with whom he is dealing may be armed and presently dangerous. . . ." Terry v. Ohio, 392 U.S. 1, 30. The district court found that Haney committed three traffic offenses. Given the disputed live testimony at the suppression hearing, this finding is not clearly erroneous.

Smith observed Haney making an illegal U-turn in a truck that had a taillight out and no license plate. Haney gave Smith a name

that could not be located in any data base of licensed drivers; had no papers showing ownership of the truck, which was registered to someone else; and told Smith that he (Haney) had been stopped by the highway patrol at a time when Smith knew that the highway patrol would not have been on the road in that county.

These instances of suspicious conduct and unverifiable answers occurred throughout the duration of the traffic stop. By the time of the pat-down, a reasonable officer would have suspected that criminal activity was afoot.

3. Inevitable Discovery

The district court held that inevitably the contraband would have been discovered. The government argues the inevitable discovery doctrine as an alternative to the two bases for affirmance analyzed above. That doctrine applies only when evidence is seized unlawfully. United States v. Seals, 987 F.2d 1102, 1108 (5th Cir. 1993); United States v. Cherry, 759 F.2d 1196, 1205-06 (5th Cir. 1985), cert. denied, 479 U.S. 1056 (1987). But, as shown above, the evidence in the instant case was not seized unlawfully. Accordingly, this argument need not be addressed. We nevertheless observe in passing that we agree with the district court's ruling on inevitable discovery as an alternative ground for its refusal to suppress the evidence.

C. Career Offender

Haney insists that he should not have been sentenced as a career offender because two prior felony convictionsSQone in Howard County, Arkansas, and the other in Miller County, ArkansasSQwere

related and thus should have been treated as one sentence only. At sentencing for the instant offense, Haney introduced an exhibit purporting to be a copy of the judgment of conviction in a Howard County case, as well as a purported copy of the information in that case. The district court also had before it some material about a Miller County sentence. Haney has filed a copy of a Miller County judgment as an exhibit but does not state whether that judgment is the same one that the district court had before it. Haney has not filed a similar exhibit regarding the Howard County judgment.

We will not consider an issue about which the record on appeal is insufficient. Powell v. Estelle, 959 F.2d 22, 26 (5th Cir.), cert. denied, 113 S.Ct. 668 (1992). Even if we were to accept the exhibit that Haney has provided, though, his argument has no merit.

We review de novo findings on the relatedness of prior convictions. United States v. Fitzhugh, 984 F.2d 143, 147 & n.16 (5th Cir. 1993). One of the criteria for career offender status is that the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. United States v. Garcia, 962 F.2d 479, 480 (5th Cir.), cert. denied, 113 S.Ct. 293 (1992); U.S.S.G. § 4B1.1. "`[P]rior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing.'" Garcia, 962 F.2d at 480 (quoting U.S.S.G. § 4A1.2, comment. (n.3)). Prior sentences imposed in unrelated cases are to be counted separately; prior sentences imposed in related cases are

to be treated as one sentence. U.S.S.G. § 4A1.2(a)(2).

Even though cases may be tried together and result in concurrent sentences of the same length, they are not necessarily consolidated for the purposes of the career offender provision. United States v. Ainsworth, 932 F.2d 358, 360-61 (5th Cir.), cert. denied, 112 S.Ct. 327, 346 (1991). Similarly, contemporaneous sentencing in two distinctly separate cases does not mandate a finding that the cases were consolidated. Id. A state court's entry of separate sentences, judgments, and plea agreements supports a finding that the cases were not consolidated for trial. See Garcia, 962 F.2d at 483.

Haney states the facts as follows:

> Appellant was convicted in Howard County [sic] Arkansas and Miller County, Arkansas. The Miller County case was specifically referenced by the Howard County Judge when the Judge entered the sentence. The Arkansas Judge determined that these sentences should run concurrently. Thus by these actions these cases were consolidated by sentencing.

The copy of the Miller County judgment that Haney has supplied states nothing about consolidation. It states only that the sentence is to "run concurrent with TX sentence & Howard County sentence & be served in TX." The judgment states nothing about any relationship between the Miller and Howard County offenses. We have before us no evidence that the two cases are related. We thus find no error in the district court's sentencing of Haney as a career offender.

CONCLUSION

For the reasons explained above, Haney's conviction and

sentence are

AFFIRMED.