

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-1692
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WAYNE EDWARD ALLEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:92 CR 013 Y)

April 21, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Defendant Wayne Allen (Allen) challenges his jury conviction for carrying a firearm during the commission of a drug-trafficking offense in violation of 18 U.S.C. § 924(c), claiming it is not supported by sufficient evidence. Allen also argues that United States Sentencing Guidelines (U.S.S.G.) §§ 4A1.3(d) and 4A1.3(e) violate his right to due process under the Fifth Amendment. Finally, Allen contends that the district court erred during sentencing when it relied on information lacking a sufficient

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

inducium of reliability to support its probable accuracy. We affirm his conviction and sentence.

ANALYSIS

I. Sufficiency of the Evidence

We review Allen's challenge of insufficient evidence by reviewing the evidence presented at trial in a light most favorable to the verdict. See U.S. v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988). Furthermore, because Allen failed to move for acquittal at the close of all evidence, we review his claim under a stricter standard limited to the determination of whether a manifest miscarriage of justice occurred. See U.S. v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988); U.S. v. Pierre, 958 F.2d 1304, 1310 (5th Cir. 1992) (en banc), cert. denied, 113 S.Ct. 280 (1992). A manifest miscarriage of justice exists if the record is devoid of evidence pointing toward guilt. Pierre, 958 F.2d at 1310 (citation omitted).

Just prior to pulling Allen's vehicle over, Officer Charles Hamilton saw a bag of crack cocaine thrown from the passenger side of the vehicle. After Allen's arrest, Officer Hamilton found one loaded firearm on the left side of the drivers seat, and another loaded firearm under the passenger seat. Allen argues that no evidence exists that he owned the vehicle containing the firearms, or that he knew the firearms were in the vehicle.

Use of a firearm in violation of 18 U.S.C. § 924(c) does not require discharging or brandishing the weapon; it requires only that the weapon facilitate or could have facilitated, the drug

trafficking charge. U.S. v. Blankenship, 923 F.2d 1110, 1114 (5th Cir. 1991), cert. denied, 111 S.Ct. 2262 (1991) (emphasis added) (citations omitted). In United States v. Coburn, 876 F.2d 372, 375 (5th Cir. 1989), this Court held that a jury could reasonably conclude that a shotgun in the rear window of a pickup truck used to distribute marijuana, served as protection in the drug trafficking crime.

In the present case, Allen carried two loaded weapons in his vehicle, one of which was in easy reach of his left hand, while trafficking 158 grams of crack cocaine. We hold that a jury could reasonably conclude that these weapons served to protect Allen in relation to his trafficking of crack cocaine. We affirm his conviction.

II. Constitutionality of Sentencing Guidelines

U.S.S.G. § 4A1.3 (d) and (e) provide:

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

- (d) whether the defendant was pending trial or sentencing on another charge at the time of the instant offense;
- (e) prior similar adult criminal conduct not resulting in a criminal conviction.

Allen argues that these U.S.S.G. sections violate his due process rights under the Fifth Amendment because they allow the court to partially base his sentence on crimes for which he has been charged but not convicted, and upon unsubstantiated "street

rumor."

In considering Allen's claim that his sentence may not be based upon crimes for which he was not convicted, we first note that the United States Sentencing Commission Guidelines have been upheld by the Supreme Court. See Mistretta v. U.S., 488 U.S. 366, 384, (1989). In Mistretta, the Court noted that Congress set forth numerous factors for the Sentencing Commission to consider when formulating categories for defendants, including criminal history and the number of prior criminal acts, regardless of whether or not they resulted in criminal convictions. Mistretta v. U.S., 488 U.S. at 376.

We next note that U.S.S.G. § 4A1.3 outlines information that a court may use in departing from the guidelines when the court believes that a departure is warranted. In Allen's case, the court overruled his objections to the § 4A1.3 information included in the presentence investigation report (PSI), but then told Allen that it did not intend to depart upward despite its potential justification for doing so. The court sentenced Allen within the guideline range, and did not use the § 4A1.3 information of which Allen complains.

Regarding Allen's claim that his sentence was partially based on unsubstantiated "street rumor," and that he was denied the opportunity to refute the information contained in the PSI, we first note that a defendant's confrontation rights at a sentencing hearing are "severely restricted." United States v. Rodriguez, 897 F.2d 1324, 1328 (5th Cir. 1990), cert. denied, 111 S.Ct. 158

(1990). Furthermore, "[a] court may rely upon uncorroborated hearsay testimony . . . and even on an out-of-court statement by an unidentified informant . . . [so long as] there is some additional corroboration of the statement." Id. (citations omitted).

Finally, we note that Allen called three witnesses to rebut the information in the PSI, and was afforded the opportunity to cross-examine a police officer called as a prosecution witness to testify regarding Allen's reputation. In light of Allen's restricted rights at his sentencing hearing, and considering that he had the opportunity to present his witnesses and to cross-examine the prosecution witness, we conclude that his due process rights under the Fifth Amendment were not violated.

III. Application of the Sentencing Guidelines

We will uphold Allen's sentence unless he shows that it was imposed in violation of the law, as a result of an incorrect application of the guidelines, or was unreasonable. 18 U.S.C. § 3742(e).

Allen's final argument is that the district court erred by partially basing his sentence on information that lacked a sufficient indicium of reliability to support its probable accuracy. Specifically, Allen points to the inclusion in the PSI of his arrest record, and a "street rumor" that he had sprayed an apartment complex with bullets in retaliation for his sister being shot.

Sentencing judges have wide discretion in considering information at sentencing so long as the information has some

"minimal indicium of reliability" and bears "some rational relationship" to the sentence imposed. U.S. v. Angulo, 927 F.2d 202, 204 (5th Cir. 1991). The sentencing judge must determine factual findings by a "preponderance of the relevant and sufficiently reliable evidence." U.S. v. Alfaro, 919 F.2d 962, 965 (5th Cir. 1990). If the defendant objects to information presented to the sentencing court, "the defendant bears the burden of demonstrating that the information cannot be relied upon because it is materially untrue, inaccurate or unreliable." Angulo, 927 F.2d at 205 (citations omitted).

Regarding Allen's arrest record, we have already noted that the court did not rely on the record when calculating his sentence. Allen's sentence was based on his criminal history and his offense conduct, therefore he lacks standing to dispute the inclusion of the arrest record in the PSR.

Regarding the rumor that Allen had shot at an apartment complex, we note that Allen called two witnesses to rebut this allegation, but the sentencing court ultimately adopted the findings of the probation officer in the PSR. We review factual findings regarding sentencing factors under the "clearly erroneous" standard. United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991). We find no indication that the court's finding is clearly erroneous, or that the court misapplied the guidelines.

CONCLUSION

For the foregoing reasons, Allen's conviction and sentence are AFFIRMED.

