

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2096
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BENIGNO RICARDO LOPEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-91-129-2)

April 29, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Benigno Ricardo Lopez appeals his conviction for aiding and abetting in the acquisition of firearms by misrepresentation, and for unlawful possession of a firearm by an illegal alien, contending, *inter alia*, that there was insufficient evidence to support the convictions. He also objects to the court's assessment of a \$22,000 fine. Because the court imposed a § 5E1.2(i) cost of incarceration fine without first imposing a § 5E1.2(a) punitive

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 Pursuant to that rule, the court has determined that this opinion should not be published.

fine, we **VACATE** the fine and **REMAND** for resentencing; otherwise, we **AFFIRM**.

I.

From October 1990 through July 1991, Bureau of Alcohol, Tobacco, and Firearms (ATF) agents learned that Fulton Stevens, a convicted felon, had purchased a minimum of 42 firearms.² On the morning of July 9, Jim's Pawn Mart informed the agents that Stevens, accompanied by Lopez and Oscar Medina Guitierrez (Medina), had purchased three firearms, and were travelling by taxicab in search of more. Accordingly, the ATF agents formed a surveillance team. They went to Don's Pawn Mart and were told that they had just missed Stevens. Advised that Stevens was headed for Mason's Pawn Mart, they called and asked the manager to detain him. After Lopez, Medina, and Stevens exited the store, the agents arrested Stevens, and seized a paper bag containing firearms. Because Stevens incriminated his companions, the agents asked Medina and Lopez to accompany them to the ATF office. For convenience, agent Brown and Lopez travelled in the taxicab. Brown noticed a blue-green notebook on the seat; Lopez explained that it was his "fare book". Brown brought it to an agent in the ATF office. The entries included listings of firearms. A subsequent handwriting analysis verified that all but one of the entries had been written by Lopez.³

² The seller must report multiple purchases of firearms within a short period of time to the ATF.

³ That entry consisted of Medina's address and telephone number.

During his interview, Lopez stated that he was a taxicab driver, who was transporting Stevens and Medina to several "gun shops". He explained that he knew Stevens personally, and had taken him to purchase firearms in the past. He stated that Medina was visiting from New York. Lopez admitted that he was in the United States illegally, having once been previously deported. A computer records check disclosed that Lopez, a native of Honduras, was deported to Mexico in 1982.

Lopez's interview was interrupted because agents learned from Stevens of firearms in Lopez's residence. Lopez, acting surprised, signed a consent form and accompanied agents to his residence. Upon entering the house, Lopez informed the agents that he thought he knew of the location of the firearms, and directed the agents to one of the bedrooms, in which the agents found the firearms and ammunition.

Lopez was charged in a two count indictment with the offense of aiding and abetting the making of a false representation in connection with the acquisition of a firearm, in violation of 18 U.S.C. §§ 2, 922(a)(6), and illegal possession of a firearm by an alien illegally in the United States, in violation of 18 U.S.C. § 922(g)(5). A jury found Lopez guilty on both counts. The court sentenced him, *inter alia*, to concurrent terms of 12 months, a special assessment of \$100, and a fine of \$22,000.

II.

Lopez contends that the court improperly admitted the "fare book"; that there was insufficient evidence to support both convictions; and that the court erred in imposing a \$22,000 fine.

A.

Lopez contends that the "fare book" should not have been admitted into evidence because the search of Lopez's cab and resulting seizure was violative of the Fourth Amendment. Although Lopez was notified that the government intended to offer the "fare book" into evidence, he did not file a motion to suppress, as required by Fed. R. Crim. P. 12(b)(3) or otherwise object to its admission. "[I]ssues raised for the first time on appeal are not reviewable ... unless they involve purely legal questions and failure to consider them would result in manifest injustice". **United States v. Kelly**, 961 F.2d 524, 528 (5th Cir. 1992) (internal quotations and citations omitted). The record does not reflect whether Lopez consented to the search and seizure. Accordingly, unresolved fact questions preclude review.

B.

Lopez maintains that the evidence was insufficient to support a conviction on either count. Lopez moved for a judgment of acquittal at the close of the government's case; however, he failed to renew his motion at the close of the evidence in accordance with Fed. R. Crim. P. 29(a). Accordingly, we review only for plain error, see **United States v. Pruneda-Gonzalez**, 953 F.2d 190, 193 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2952 (1992),

reversing only if the record is "devoid of evidence pointing to guilt, or ... because the evidence on a key element of the offense was so tenuous that a conviction would be shocking". **United States v. Pierre**, 958 F.2d 1304, 1310 (5th Cir.) (en banc) (internal quotations and citations omitted), *cert. denied*, **Harris v. United States**, ___ U.S. ___, 113 S. Ct. 280 (1992).

1.

Violation of 18 U.S.C. § 922(g)(5) requires that (1) the defendant knowingly possessed a firearm that had been shipped or transported in interstate commerce; and (2) at the time of possession, the defendant was residing in the United States illegally. **United States v. Munoz-Romo**, 947 F.2d 170, 176 (5th Cir. 1991), *vacated*, 113 S. Ct. 30 (1992) (remanded for resentencing only). The parties stipulated that the pawn shops were federally licensed dealers and that the firearms in controversy had been shipped or transported in interstate commerce. Moreover, Lopez admitted that he was an illegal alien; and, an agent with the Immigration and Naturalization service confirmed his status. Accordingly, the only issue that merits attention is whether Lopez knowingly possessed the firearms.

Possession may be actual or constructive. **United States v. Knezek**, 964 F.2d 394, 400 (5th Cir. 1992). The exercise of dominion or control over the contraband or over the premises in which it is located constitutes constructive possession. **United States v. McKnight**, 953 F.2d 898, 901 (5th Cir. 1992), *cert.*

denied, ___ U.S. ___, 112 S.Ct. 2975 (1992). It need not be exclusive, and it may be proven with circumstantial evidence. **Id.**

Lopez contends that the record is devoid of evidence directly linking him with the firearms in his home or taxicab. We disagree. During a consensual search of Lopez's home, three firearms and ammunition were retrieved from a closet in the back bedroom. Although Medina testified that he was staying in that room, and placed the firearms there, Stevens testified that Lopez instructed Medina and Stevens to bring the bag containing the firearms into the house.⁴ That Lopez led the agents to the concealed weapons corroborates his control as does the "fare book" containing listings of firearms in his handwriting.⁵ Additionally, a brown bag containing pistols was taken from the back seat of the taxicab jointly occupied by Lopez, Medina, and Stevens, and driven by Lopez. We conclude that the record contains evidence from which the jury could reasonably infer that Lopez exercised joint control over the firearms with Medina and Stevens. Accordingly, the evidence was far more than sufficient to withstand scrutiny for plain error.

2.

To establish the offense prohibited by 18 U.S.C. § 922(a)(6), the government must prove (1) that a person knowingly made a false statement while acquiring a licensed firearm from a licensed

⁴ Stevens and Medina pleaded guilty and agreed to testify fully and truthfully at grand jury proceedings, or trials.

⁵ The "fare book" is only circumstantial evidence because the entries were dated prior to the purchase of the firearms seized.

dealer; and (2) the misrepresentation was intended or was likely to deceive the dealer with respect to any fact material to the lawfulness of the sale. **United State v. Chambers**, 922 F.2d 228, 230-31 (5th Cir. 1991). To establish that Lopez aided and abetted Stevens's violation of § 922(a)(6), in violation of 18 U.S.C. § 2, the government must prove that (1) Lopez committed an act that contributed to acquisition of firearms by false statement; and (2) Lopez intended to aid Stevens in acquisition of firearms by false statement. See **United States v. Martiarena**, 955 F.2d 363, 366 (5th Cir. 1992). The judge instructed the jury that it may find that Lopez had knowledge of a fact if it found "that [Lopez] deliberately closed his eyes to what would otherwise have been obvious to him".

Count One specifically charged that Stevens acquired firearms by false statement from Mason's Pawn Shop and Jim's Pawn Mart, in that Stevens represented that he was the purchaser of the guns when in fact he was buying the guns for Lopez and Medina, and that Lopez aided and abetted same. The evidence at trial established that Lopez was aware that Stevens was purchasing the firearms for others; that Lopez saw Medina give Stevens \$1000 for the purchase of firearms; that Lopez accompanied Stevens into Mason's and Jim's; that Stevens represented on ATF forms in both places that he was the sole purchaser; that, in addition, Stevens was asked several times for the identity of the intended recipient, and responded orally that the firearms were for his own use; that Lopez was present in the store during this questioning; and that Lopez was

actively involved in the purchase of a minimum of 17 guns, providing transportation, aiding in the selection of the weapons, serving as a conduit for communications between Stevens and Medina, and acting as a contact person for others interested in the purchase of weapons. Accordingly, there is certainly "some evidence" upon which the jury could reasonably infer Lopez's participation in and knowledge of Stevens's purchase of firearms by false statement. In sum, there is no plain error.

C.

The court sentenced Lopez to a fine of \$22,000, stating "[t]hat's basically the cost of keeping you in prison and the cost of paying for your supervised release once you get out of prison". Lopez asserts that the court erred, contending that the fine is violative of the Eighth Amendment. Lopez's counsel objected to the imposition of this fine at sentencing, stating "[i]n view of the fact that my client has been in custody for seven months, and the fact that he will continue in custody for approximately another three to four months, the ability to pay a fine of that magnitude, I would argue, is unconstitutional". In response, the court stated, "[w]ell, when he gets out, he can earn a job and pay it then. As opposed to whether he should pay for his imprisonment or the taxpayers should pay, I find he should pay for it". The court additionally responded in a supplemental sentencing memorandum, reiterating Lopez's future ability to pay the fine on an installment schedule. The court emphasized, "[t]he fines assessed were intended by the Court to represent a portion of each

defendant's cost of imprisonment and supervised release pursuant to Guidelines § 5E1.2(i)".

Pursuant to U.S.S.G. § 5E1.2(a), the court is required to impose a fine, "except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine". Pursuant to U.S.S.G. § 5E1.2(i), the court may impose "an *additional* fine amount" to offset the cost of incarceration, probation or supervised release. (Emphasis added.) Here, the record clearly reflects that the court singularly applied § 5E1.1(i)⁶; accordingly, *United States v. Fair*, 979 F.2d 1037 (5th Cir. 1992), is controlling. We held:

[T]he imposition of a cost of incarceration fine, U.S.S.G. § 5E1.2(i), is not proper absent an initial punitive fine, *Id.* § 5E1.2(a). To impose a cost recovery fine alone is a misapplication of the sentencing guidelines. The trial court in the instant case characterized Fair's \$20,000 fine as § 5E1.2(i) cost of incarceration fine, and did not delineate any portion of it as a § 5E1.2(a) punitive fine. We must therefore vacate the fine and remand the case for further consideration and resentencing.

Id. at 1042.

Because the court misapplied the guidelines by failing to delineate any portion of Lopez's fine as a § 5E1.2(a) punitive

⁶ The government urges that we read the record to reflect the court's intent to impose a punitive fine, pursuant to § 5E1.2(a), stating "[w]hen the court's judgment and sentence and the sentencing memorandum are read together, the court's intent to impose a punitive fine a portion of which is dedicated to the costs of imp[r]isonment and supervision is manifest". We cannot so construe the court's plain language.

fine, we must follow the panel's decision in *Fair*, and vacate the fine.⁷

III.

For the foregoing reasons, we **VACATE** the fine and **REMAND** for resentencing on that issue. Lopez's conviction and sentence are otherwise **AFFIRMED**.

⁷ We recognize that it is questionable whether Lopez properly raised this issue in his primary brief. There he stated that a fine was impermissible under either § 5E1.2(a) or "as an additional fine under § 5E1.2(i)", and that the record showed the court applied § 5E1.2(i). But, he did not argue that such was a misapplication of the guidelines. The government, however, so construed appellant's statements and maintained that the court did not misapply the guidelines as the record reflects its intent to impose a punitive fine. In his reply brief, Lopez directly raised the issue, stating that "the trial court's failure to impose a punitive fine precludes it from assessing an 'additional fine'". Because both parties had adequate opportunity to brief the issue, we choose to address it. In any event, the issue is a purely legal one and to not consider it would be manifest injustice.