

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-2864
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DARON DEVON TERRY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(CR-H-91-69-1)

(December 14, 1993)

Before WISDOM, KING, and GARWOOD, Circuit Judges.

PER CURIAM.*

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

Daron Devon Terry appeals his convictions of two counts of being a felon in possession of a firearm¹ and two counts of unlawfully possessing an unregistered firearm.² We AFFIRM.

I.

On November 9, 1988, defendant/appellant Terry, Clarence Joseph Burkes, and Broderick Perkins went to the Houston apartment where April Sapp, Burkes's girlfriend, lived with her sister Felicia. They rode in Terry's Cadillac. When the men knocked on the door, Felicia Sapp told them April was not home. One or more of the men then kicked the door of the apartment off its hinges and entered the apartment. Felicia Sapp called the police.

When two police officers arrived, Felicia Sapp met Officer B.D. Conley outside the apartment and told him the three men were inside the apartment and were armed. April Sapp and Stacey Johnson were also in the apartment. Officer Conley entered the apartment with his gun drawn, identified himself, and ordered the men to come into the living room. The three men entered the living room. Officer Conley summoned his partner, Officer Mario Perez, to the scene, whereupon the two officers patted down the three men, handcuffed them, gave them their Miranda warnings,³ and placed them

¹ 18 U.S.C. §§ 922(g), 924(a)(2).

² 26 U.S.C. §§ 5861(d), 5871.

³ Terry denies receiving a Miranda warning. The police officers and April Sapp, however, all testified at the suppression hearing that the warnings were given. On this appeal from a guilty verdict, we view the evidence in the light most favorable to the Government. United States v. Coleman, 969 F.2d 126, 129 (5th Cir. 1992) (per curiam).

under arrest. The officers recovered two sets of car keys from the pat-down searches of Terry and Burkes. Officer Perez then asked the men if they had a car and Terry said he did. Another officer located Terry's car. Officer Perez then asked Terry whether he minded if the officers looked in his car. Terry replied that he did not mind because the officers would find nothing in the car. Officer Perez and another officer then searched Terry's Cadillac and filled out a standard police inventory. In the trunk they found a stolen 9 millimeter submachine gun⁴ and a .38 caliber pistol. In the passenger compartment, they found another .38 caliber pistol and a set of photographs of Terry, Burkes, and Mike Kimble posing with the submachine gun.⁵ Terry had been seen with the submachine gun and one of the .38 caliber pistols on numerous occasions. The next day, a search of the car by the DEA uncovered a .22 caliber pistol between the back seat and floor board of the car.

Terry, who had two prior felony convictions, was charged with two counts of being a felon in possession of a firearm and two counts of unlawfully possessing an unregistered firearm. He moved to suppress the evidence the police had recovered from his car on the grounds that he had not consented to the search. The district

⁴ The gun had been stolen from a DEA agent on October 13, 1988. Before it was stolen, the submachine gun had a block on it which prevented it from being fired in the fully automatic position. When the officers recovered the gun from Terry's car, the block had been removed.

⁵ These photographs were taken by April Sapp on October 22, 1988.

court overruled his motion. Terry was found guilty on all counts and sentenced to thirty months imprisonment plus three years of supervised release. He appealed to this Court.

II.

A. Terry's Motion to Suppress

At Terry's suppression hearing, the district court denied Terry's motion to suppress the evidence taken from his Cadillac, including the handguns and incriminating photographs. The district court found that Terry had voluntarily consented to the search.⁶ We review the legality of the search de novo, but the district court's finding that Terry voluntarily consented to the search will be upheld absent clear error.⁷

Applying the voluntariness factors of United States v. Phillips,⁸ we conclude that the district court's finding that Terry

⁶ Voluntary consent obviates the need for a search warrant. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

⁷ United States v. Cooper, 949 F.2d 737, 744 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 2945 (1992); United States v. Kelley, 981 F.2d 1464, 1470 (5th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 2427 (1993).

⁸ 664 F.2d 971, 1023-24 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982), 459 U.S. 906 (1982). These factors are:

[the] voluntariness of the defendant's custodial status, the presence of coercive police procedure, the extent and level of the defendant's cooperation with police, the defendant's awareness of his right to refuse consent to the search, the defendant's education and intelligence, and, significantly, the defendant's belief that no incriminating evidence will be found.

(footnotes omitted).

consented to the search was not clearly erroneous. Terry was a twice convicted felon with an eleventh-grade education who would have been aware of his right to refuse consent to the search. He stated his belief that no incriminating evidence would be found as a result of the search. Furthermore, the police officers gave Terry his Miranda warnings mere moments before the requesting permission to search his car, so Terry would have been aware of his right to remain silent and the legal consequences of failing to do so.

B. Terry's Sixth Amendment Challenge

Terry next contends that the delay between his November 9, 1988 arrest by Houston police on state trespassing charges and his May 2, 1991 indictment on federal firearms charges constituted a violation of his Sixth Amendment right to a speedy trial. His argument is frivolous.

[T]here is no sixth amendment right to a speedy indictment. . . . The primary safeguard of appellants' rights is the statute of limitations. . . . Because the delay alleged in this case occurred before the indictment, the sixth amendment is inapplicable.⁹

C. Terry's Rule 404(b) Challenge

At Terry's trial, April Sapp testified that she had seen Terry in possession of a .38 caliber pistol matching the description of Government's Exhibit No. 3 on many occasions. The district court

⁹ United States v. Harrison, 918 F.2d 469, 473-74 (5th Cir. 1990).

admitted that testimony over Terry's objection that it was relevant only to show action in conformity with his character.¹⁰ The district court concluded that Terry's prior possession of the handgun was relevant to prove that he intentionally possessed it on November 9, 1988. We review the district court's admission of the testimony over Terry's Rule 404(b) objection under a heightened abuse of discretion standard.¹¹

This is Terry's strongest challenge to his conviction. Even if we might have made a different decision from the district court's in the first instance, however, that alone is an insufficient basis on which to reverse Terry's conviction. We find that two factors weigh against a conclusion that the district court abused its discretion. First, April Sapp's testimony was relevant to prove the identity of one of the weapons recovered from Terry's car, to establish that it belonged to Terry and not one of the other men who rode in Terry's car that night. Second, the district court gave the jury a limiting instruction¹² stating that Sapp's

¹⁰ Fed. R. Evid. 404(b) provides in part that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes

¹¹ United States v. Carrillo, 981 F.2d 772, 774 (5th Cir. 1993).

¹² "A limiting instruction mitigates the risk of unfair prejudice from the admission of Rule 404(b) evidence". United States v. Dent, 984 F.2d 1453, 1462 (7th Cir.), cert. denied, ___ U.S. ___, 114 S. Ct. 169 (1993), 114 S. Ct. 209 (1993); accord United States v. Willis, ___ F.3d ___, ___, 1993 WL 416487, slip op. at 812 (5th Cir. Oct. 20, 1993).

testimony could not be used to infer Terry's guilt from his character.¹³ We conclude that the district court did not abuse its discretion in admitting April Sapp's testimony.

D. Terry's Sentencing Challenge

Terry's final challenge to the district court's decision is based on the district court's refusal to give him a downward sentencing adjustment for "minor participation" in the crimes with which he was charged. We review for clear error the district court's decision not to award a downward sentence adjustment under the Sentencing Guidelines.¹⁴ We find no error here. Contrary to his assertion, Terry was not less involved in the crimes of possession of a firearm by a felon or possession of an unregistered firearm than was Clarence Joseph Burkes.

III.

We find no error in the district court's decision, and accordingly Terry's conviction and sentence are AFFIRMED.

¹³ 2 Rec. 172.

¹⁴ United States v. Vaquero, 997 F.2d 78, 88 (5th Cir. 1993); United States v. Bethley, 973 F.2d 396, 401 (5th Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 1323 (1993).