UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-3464

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

THEODORE HATHEWAY,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
CR 90 509 A

(June 2, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant, Theodore Hatheway, pleaded guilty to (1) carrying and using firearms in the course of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) (1988); (2) possessing an unregistered silencer, in violation of 26 U.S.C. § 5861(d) (1988); (3) possessing a silencer without a serial number, in violation of 26 U.S.C. § 5861(i) (1988); and (4) possessing an unregistered machine gun, in violation of 26 U.S.C. § 5861(d) (1988). Hatheway

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeals his conviction, arguing that the district court erred by (a) denying his motion to suppress the weapons which formed the basis for his conviction, because they were seized pursuant to a warrant which did not describe them with sufficient particularity; (b) denying his motion to suppress the firearms, because the affidavit in support of the search warrant was inaccurate and untrustworthy; and (c) denying his motion to dismiss the indictment. We affirm.

I

Drug Enforcement Administration (DEA) Special Agent Arthur Richards, acting undercover, bought cocaine from Hatheway. Richards discussed drug deals with Hatheway over the telephone. Richards called Hatheway at his residence, at 283-1225; and at his mother's home, at 282-7166. Richards purchased approximately one ounce of cocaine from Hatheway in the garage of Hatheway's residence. When Hatheway opened his safe to retrieve the drugs, Richards observed a number of handguns inside the safe.

Approximately a month after Richards observed the pistols in the safe, Detective Weicks of the New Orleans Police Department prepared an affidavit in support of a search warrant for Hatheway's residence. Weicks based the affidavit partly on information provided by Richards, including the two phone numbers at which Richards had contacted Hatheway. In preparing the affidavit, Weicks stated incorrectly that the phone number at Hatheway's residence was 282-7166 (Hatheway's mother's number). Weicks also stated that Hatheway had "had numerous arrests which included

arrests for weapons violations." *See* Record on Appeal, vol. 1, at 57. In fact Hatheway had had only one arrest for a weapons violation. *See id.* at 61. In his affidavit Weicks mentioned the firearms which Richards observed in Hatheway's safe, but the search warrant did not specifically mention firearms. The warrant authorized the seizure of "all contraband, controlled dangerous substances, more particularly Cocaine, along with any concomitant physical evidence, either substantive or trace, associated with its use, possession, packaging, and/or distribution." *See* Record on Appeal, vol. 1, at 55.

Law enforcement officers executed the search warrant and seized from the safe in Hatheway's garage several bags of marijuana and a number of firearms. Hatheway was indicted for two counts of distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1) (1988), and one count of using and carrying firearms in the course of a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1) (1988). Hatheway pleaded guilty to all three counts, but later withdrew his plea to the firearms charge. Thereafter, Hatheway was re-indicted, and pleaded guilty to the four firearms counts which are the subject of this appeal.[1]

[1] As a term of the plea agreement, Hatheway reserved his right to appeal the district court's denial of his motion to suppress and his motion to dismiss the indictment. *See* Supp. Record on Appeal at 7-8.

II

A

Hatheway first claims that the district court erred by denying his motion to suppress the guns which formed the basis for his conviction. Hatheway contended in his motion before the district court, and contends again on appeal, that the seizure of the firearms from his residence violated the Fourth Amendment, because the guns were not listed with particularity in the search warrant as items to be seized.

Because the guns seized from Hatheway's residence were in plain view of the executing officers when they conducted a lawful search of Hatheway's safe, the seizure of the guns was authorized by the plain view doctrine. *See Horton v. California,* 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). Evidence seized without the authority of a valid search warrant is nonetheless admissible if it is seized when in the plain view of law enforcement officers, so long as (1) "the officer[s] did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed;" (2) the "incriminating character" of the evidence is "immediately apparent;" and (3) the officers "have a lawful right of access to the object itself." *See id.* at ___, 110 S. Ct. at 2308. All of those requirements were satisfied by the seizure of the weapons from Hatheway's safe.

The search of Hatheway's residence, including the safe in his garage, was authorized by a valid search warrant.[2] *See* Record on Appeal, vol. 1, at 55. As a result, the officers' entry into Hatheway's residence and safe did not violate the Fourth Amendment. Furthermore, the incriminating character of the guns was immediately apparent to the officers, because the guns were kept in a safe with illegal drugs, and because it is commonly known that drug dealers use firearms in the course of their illegal activities. *See United States v. Ivy,* 973 F.2d 1184, 1187 (5th Cir. 1992) (holding that seizure of "gun, cocaine test kit, and slips of paper" found in open brief case was valid under plain view doctrine (citing *Horton*)), *cert. denied,* 1993 WL 58534, 61 U.S.L.W. 3683 (U.S. Apr. 5, 1993) (No. 92-7747); *United States v. Matthews,* 942 F.2d 779, 783 (10th Cir. 1991) (holding that incriminating character of firearms was immediately apparent, because "it has become common knowledge that drug operators frequently acquire weapons for use in connection with drug activities" (citing *Horton*)); *United States v. Hughes,* 940 F.2d 1125, 1127 (8th Cir.) (holding that incriminating nature of gun was immediately apparent where gun was found with contraband (citing *Horton*)), *cert. denied,* ___ U.S.___, 112 S. Ct. 267, 116 L. Ed. 2d 220 (1991). Finally, the officers had a lawful right of access to the guns, because they were entitled by the search warrant to search the safe where the guns were found. *See Hughes,* 940 F.2d at 1127 (holding that

[2] We reject Hatheway's attack on the validity of the search warrant. *See infra* II.B.

officers had lawful right of access to gun and cocaine where "warrant authorized the officers' search of the places [where] they found" those items (citing *Horton*)); *United States v. Barnes,* 909 F.2d 1059, 1070 (7th Cir. 1990) (holding that officers had a lawful right of access to evidence where "warrant authorized the agents to search the premises for cocaine wherever it might be concealed" (citing *Horton*)). Therefore, the firearms seized from Hatheway's safe were admissible under the plain view doctrine, even if they were not particularly listed in the search warrant.

Hatheway appears to concede as much. *See* Brief for Hatheway at 9 ("We concede, generally, that if these firearms had been discovered pursuant to the execution of the search for drugs, that they might have lawfully been seized."). Hatheway contends, however, that the firearms should have been suppressed, because the officers were aware of the guns (by virtue of Special Agent Richards's observations) when they applied for the search warrant. *See id.* at 10 ("[The guns'] presence was known prior to the application for the warrant. They were not fortuitously *discovered* as a result of the search."). Because counsel for Hatheway failed to comply with Fed. R. App. P. 28(a)(5), Hatheway's argument is waived. Rule 28(a)(5) requires that the argument section of an appellant's brief "contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, *with citations to the authorities, statutes and parts of the record relied on.*" The section of Hatheway's brief pertaining to the instant claim does not contain a single citation to the record or

to authority of any kind. Therefore, Hatheway's claim is waived.[3] *See Friou v. Phillips Petroleum Co.,* 948 F.2d 972, 975 (5th Cir. 1991) ("A party who inadequately briefs an issue is considered to have abandoned the claim.").

We also note that counsel's brief with respect to Hatheway's first two claims is merely a verbatim reproduction of a memorandum submitted to the district court in support of Hatheway's motion to suppress. *See* Brief for Hatheway at 8-12; Record on Appeal, vol. 1, at 159-63. The district court's opinion denying that motion thoroughly explained the district court's reasoning and cited authority supporting the denial of the motion. Counsel's brief before this Court completely ignores the district court's opinion. Counsel should be aware that briefs of this quality may be met in the future with sanctions and/or dismissal of the appeal.

B

Hatheway contends that the district court erred by denying his motion to suppress the firearms because the affidavit in support of the search warrant was inaccurate and untrustworthy. Hatheway

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[3] Even if Hatheway's first claim was not waived, it apparently would fail on its merits. Counsel appears to rely on the now-defunct rule that the plain view doctrine is not applicable unless the evidence is discovered inadvertently. *See Coolidge v. New Hampshire,* 403 U.S. 443, 469, 91 S. Ct. 2022, 2040, 29 L. Ed. 2d 564 (1971) ("[T]he discovery of evidence in plain view must be inadvertent. . . . If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of `Warrants * * * particularly describing * * * [the] things to be seized.'"). The inadvertence requirement was discarded by the Supreme Court in *Horton v. California*, nearly two years before Hatheway's motion to suppress. *See Horton,* ___ U.S. at ___, 110 S. Ct. at 2304.

argues that the affidavit failed to establish probable cause because Detective Weicks knowingly misstated Hatheway's home phone number in the affidavit, and because Weicks knowingly misstated that Hatheway had been arrested more than once for weapons violations. *See* Brief for Hatheway at 10-11.

Under *Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), a criminal defendant sometimes is allowed to challenge the veracity of statements made in an affidavit supporting a search warrant after the search warrant has been issued. *See id.* at 155-56, 98 S. Ct. at 2676. If the defendant makes a substantial preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, made a false statement in the affidavit; and if the removal of the allegedly false statement from the affidavit would render the affidavit insufficient to establish probable cause, the defendant is entitled to a hearing. *See id.* If, at the hearing, the defendant proves perjury or reckless disregard by a preponderance of the evidence, and if the affidavit minus the false information is insufficient to establish probable cause, then evidence obtained pursuant to the warrant must be suppressed. *See id.*

The district court held an evidentiary hearing concerning Hatheway's motion to suppress. *See* Record on Appeal, vol. 2, at 2-37. At the hearing Detective Weicks testified that his misstatement of Hatheway's home phone number was a mistake, and that he believed his statement to be correct when he made it. *See id.* at 6. The district court found that "at all pertinent times .

. . Weicks believed in good faith that he had listed Hatheway's residence telephone number correctly." *See id.*, vol. 1, at 79-80 n. 20. We review the district court's factual finding for clear error, viewing the evidence in the light most favorable to the district court's ruling. *See United States v. Muniz-Melchor,* 894 F.2d 1430, 1433-34 (5th Cir.) ("[I]n reviewing a trial court's ruling on a motion to suppress based on live testimony at a suppression hearing, the trial court's purely factual findings must be accepted unless clearly erroneous, . . . and the evidence must be viewed most favorable to the party prevailing below."), *cert. denied,* 495 U.S. 923, 110 S. Ct. 1957, 109 L. Ed. 2d 319 (1990). Because the district court's finding was directly supported by Weicks' testimony, that finding was not clearly erroneous. Therefore, under *Franks* Weicks' misstatement of Hatheway's phone number did not entitle Hatheway to the suppression of the firearms.

Hatheway also alleged that Weicks knowingly misstated that Hatheway had been arrested more than once for weapons violations. The affidavit in support of the search warrant stated that Hatheway "had numerous arrests which included arrests for weapons violations, theft, and battery." *See* Record on Appeal, vol. 1, at 57. Although the language "weapons violations" suggests that Hatheway had been arrested for such violations more than once, the record reveals only one such arrest. *See id.* at 61. The district court did not determine whether this inaccuracy was committed knowingly and intentionally or with reckless disregard for the truth. However, even assuming *arguendo* that the use of the plural

"violations" was reckless or intentional, the removal of that data from the affidavit would not seriously undermine the ample showing of probable cause made by the affidavit. The affidavit recounts in detail law enforcement officers' observations of Hatheway's drug dealings at his residence, including one instance in which Hatheway sold cocaine to an undercover agent. *See id.* at 57-58. Because the use of the plural "weapons violations" was not necessary to a showing of probable cause, Hatheway was not entitled to the suppression of the firearms seized from his safe. *See Franks,* 438 U.S. at 155-56, 98 S. Ct. at 2676.

C

Hatheway also contends that the district court erred by denying his motion to dismiss the indictment. Hatheway's argument is premised on a claim of double jeopardy, and on a claim that the indictment was sought in retaliation for his withdrawal of a guilty plea to one count of a previous indictment. Because Hatheway has not presented an argument in support of his claims, *see* Brief for Hatheway at 12-13, they are both waived.[4] *See* Fed. R. App. P. 28(a)(5) (requiring that the appellant's brief contain an argument); *Friou,* 948 F.2d at 975 ("A party who inadequately briefs

[4] In his brief Hatheway "prays for leave to file a supplemental brief amplifying [his] position." *See* Brief for Hatheway at 12-13. Hatheway's request is not properly presented, and will not be entertained. *See* Fed. R. App. P. 26 (b) ("The court for good cause shown may *upon motion* enlarge the time prescribed by these rules . . . for doing any act . . . .") (emphasis supplied); Fed. R. App. P. 27(a) ("Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties.").

an issue is considered to have abandoned the claim."); *United States v. Valdiosera-Godinez,* 932 F.2d 1093 (5th Cir. 1991) ("[A]ny issues not raised or argued in the appellant's brief are considered waived and will not be entertained on appeal."), *petition for cert. filed,* (Jan. 7, 1992) (No. 92-8039).

III

For the foregoing reasons, we **AFFIRM**.