UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-4301
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RANDALL GENE WALSH,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(4 91 CR 19)

(November 19, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Randall Gene Walsh ("Walsh") appeals his conviction and sentence imposed after a jury trial in which he was found guilty of possession of a firearm by a felon. See 18 U.S.C. § 922(g)(1) (Supp. 1992) Finding no error in either the trial court's conduct of the proceedings or in the imposition of an enhanced sentence, we affirm.

Background and Procedural History

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

In January 1991, Officer Michael Tater of the Grayson County, Texas Sheriff's Office received information alerting him to possible drug activity. Pursuant to this information, Officer Tater began observing the residence at 2430 West Bond Street in Denison, Texas. See R. 3, at 76-77. Tater observed Walsh coming and going from this residence in a car that matched the description of a vehicle involved in a series of burglaries in the Denison area. On January 24, 1991 Tater and his supervisor, Officer Harrison French, were watching the suspect residence when a call came over the radio reporting another burglary. Shortly thereafter, Walsh drove past the officers in a vehicle similar to the one observed near the most recent burglary. See R. 3, at 79-80 (testimony of Michael Tater); Id. at 146-47 (testimony of Harrison French).

Walsh pulled into the residence's driveway[2] and stepped out of the car; but upon seeing the approaching police car he jumped back into his vehicle and began retreating down the narrow road. Walsh collided head-on with Officers Tater and French, and was detained only after Officer Tater succeeded in pinning his car against a third vehicle. This present appeal is premised in large part upon the seizure of a firearm discovered on the front seat of Walsh's vehicle.

Walsh was charged with violating 18 U.S.C. § 922(g)(1) (Supp. 1992) -- the unlawful possession, by a previously convicted felon,

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[2] The record refers to this private road as both a lane and a driveway. The nomenclature is not dispositive; the road where Walsh was arrested is on private property.

of a firearm that was shipped in interstate commerce. Walsh also entered guilty pleas on two counts of violating 18 U.S.C. 922(a)(6) (Supp. 1992) -- knowingly making false statements in the acquisition of a firearm. A jury in the Eastern District of Texas convicted Walsh of the possession of a firearm violation. A § 922(g) violation triggers a sentence enhancement provision, see 18 U.S.C. § 924(e)(1) (Supp. 1992).[3] Pursuant to this statute the district court sentenced Walsh to fifteen years imprisonment.

Discussion

Walsh raises three issues on appeal: first, he contends that the trial judge erred in not suppressing the firearm's admission into evidence. Second, Walsh alleges that his sentence was improperly enhanced; and finally, Walsh raises a double jeopardy challenge stemming from the circumstances surrounding his state and federal prosecutions. We will address these contentions in reverse order.

1. Double Jeopardy Claim.

Walsh argues on appeal that his federal conviction fits into the double-jeopardy provision carved out in Bartkus v. Illinois, 359 U.S. 121 (1959). It is well settled that dual sovereigns can both prosecute a defendant for one act which violates each entity's

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[3] 18 U.S.C. 924(e)(1) states in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony . . . committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, notwithstanding any other provision of law. . . .

laws. See, e.g., Heath v. Alabama, 474 U.S. 82, 89 (1985) (fifth amendment violation does not occur where defendant prosecuted first in state court and later in federal tribunal on similar charges); United States v. Moore, 958 F.2d 646, 650 (5th Cir. 1992) (same reasoning). The Supreme Court in Bartkus stated that a double-jeopardy violation may occur where the initial state prosecution is a "sham," or a "tool of the federal authorities." 359 U.S. at 123-24. Close cooperation between federal and state authorities does not give rise to a sham prosecution. See, e.g., United States v. Paul, 853 F.2d 308, 311 (5th Cir. 1988), cert. denied, 488 U.S. 1012 (1989) (the mere presence of a government agent during state proceedings does not implicate double jeopardy); United States v. Bernhardt, 831 F.2d. 181, 182 (9th Cir. 1987) ("It is clear that the Bartkus exception does not bar cooperation between prosecuting sovereignties.").

Walsh bases his double-jeopardy argument on the fact that the Grayson County prosecuting attorney, Robert Jarvis, was appointed as a Special Assistant United States Attorney after being involved in negotiating Walsh's plea agreement at the state level.[4] In order for Walsh to succeed on his sham prosecution argument he must show that the state proceedings were merely a cover for the federal charges, and that a federal agent actively participated in the state proceedings. See United States v. Paul, 853 F.2d at 311.

[4] Walsh entered guilty pleas to state charges of burglary, assault on a police officer, unauthorized use of a motor vehicle and escape. In return for his plea, the state dropped its possession of a firearm by a felon charge.

Walsh does not offer any evidence to support his allegation that Jarvis' subsequent appointment influenced his federal or state prosecution. The Grayson County plea negotiations were completed before Jarvis Received his appointment. See R. 3, at 126. Moreover, Walsh does not offer any evidence that Jarvis actively participated in his federal prosecution.

Walsh did raise the double jeopardy issue in a pretrial motion which was denied. R. 1, at 27-32. He did not, however, raise the Bartkus-based sham prosecution argument, despite having knowledge of the predicate facts which he now uses as support for this line of attack (i.e., Jarvis' appointment, and the shredding of the Grayson County Attorney's original file on Walsh's plea agreement[5]). By not raising this argument below, Walsh has waived his ability to assert the sham prosecution argument on appeal. See Fed. R. Crim. P. 12(b), (f); United States v. Moore, 958 F.2d. 646, 650 (5th Cir. 1992).

2. Sentence Enhancement.

An 18 U.S.C. § 922(g) conviction triggers a sentence enhancement provision. See 18 U.S.C. § 924(e)(1) (Supp. 1992);

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[5] In an effort to shore up his double jeopardy argument, Walsh offered evidence that the original Grayson County prosecutor's file was shredded prior to the federal trial. Walsh contends that the shredded file may have contained exculpatory information, and that its destruction is illustrative of the close relationship between the state and federal authorities. See Appellant's Brief at 20.

The employee responsible for the Grayson County Attorney's records testified that it is routine to shred the case files when plea agreements are entered into. R. 3, at 122-23. This is done to free up space for active files. Id. Walsh did not offer any rebuttal evidence that his file was shredded as a result of collusive efforts between federal and state officials.

United States v. Garza, 921 F.2d 59, 60 (5th Cir.), cert. denied, 112 S.Ct. 91 (1991). If a defendant has three prior convictions for violent felonies, 18 U.S.C. § 924(e)(1) mandates a minimum sentence of fifteen years imprisonment. Walsh argues that the government failed to offer sufficient evidence of previous convictions to support his sentence enhancement.

A presentence investigation report (PSR) was filed with the court without objection from Walsh. The district court properly relied on its contents in determining Walsh's sentence, including taking into account the references to Walsh's prior criminal activities. See United States v. Fields, 923 F.2d 358, 361 (5th Cir.), cert. denied, 111 S.Ct. 2066 (1991); United States v. Ruiz, 580 F.2d 177, 177-78 (5th Cir.), cert. denied, 439 U.S. 1051 (1978). Walsh has more than enough prior convictions to support the enhancement of his sentence. The record lists eleven prior offenses committed by Walsh. See R. 1, at 5-6. Even conceding (as the government does) that the unlawful possession of a firearm by a felon counts are not "violent crimes" per 18 U.S.C. § 924(e)(1), Walsh has enough prior burglary convictions to support the enhanced sentence that the district court imposed. See United States v. Silva, 957 F.2d 157, 161-62 (5th Cir. 1992) (holding that "three Texas burglary convictions [are] sufficient predicate convictions for enhancement of his sentence pursuant to 18 U.S.C. § 924(e).").

3. Suppression Motion.

The trial court denied Walsh's motion to suppress evidence of

the firearm after a hearing held in open court. See R. 3, at 28-44. Because the district court did not enter specific findings in support of its decision, this matter is freely reviewable on appeal. See United States v. Kye Soo Lee, 962 F.2d 430, 435 n.17 (5th Cir. 1992).

Walsh argues that the firearm was seized after a warrantless arrest which was not supported by probable cause. Generally, arrests must be made after a valid warrant has been issued authorizing the seizure of the individual. However, a warrantless arrest may be effected by law enforcement personnel if they have probable cause to believe that the arrestee has committed, or is committing, a crime. See, e.g., United States v. Garza, 921 F.2d 59, 60 (5th Cir. 1991); Trejo v. Perez, 693 F.2d 482, 485-86 (5th Cir. 1982). Probable cause is defined as "facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'" Gerstein v. Pugh, 420 U.S. 103, 111 (1975) (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)).

The record amply supports the district court's implicit decision that Officers Tater and French had probable cause to arrest Walsh without a warrant.[6] While Walsh's attempted flight

[6] On appeal, Walsh challenges the reliability of the police informant who provided information to Officer Tater. See Appellant's Brief at 14. Walsh did not raise this issue in the district court. This court will not consider such a fact-sensitive matter for the first time on appeal unless failure to do so would result in a manifest injustice. See United States v. Sherbak, 950 F.2d 1095, 1101 (5th Cir. 1992). In light of the "totality of the circumstances" test we use in ascertaining if sufficient probable cause to arrest existed, see Illinois v. Gates, 462 U.S. 213, 232-

standing alone may not be sufficient to merit probable cause for an arrest, see United States v. Silva, 957 F.2d 157, 160 (5th Cir. 1992), when it is coupled with the facts that: (1) the officers' had received information connecting the residence with criminal activity; (2) a car matching the description of the one driven by Walsh was observed near a recent burglary; and, perhaps most importantly, (3) after seeing the lights and hearing the siren of the approaching law officers' car, Walsh drove into it head first in an attempt to elude capture; it was clearly not error for the trial judge to find that there existed probable cause to arrest Walsh.[7] See Illinois v. Gates, 462 U.S. 213, 233 (1983) ("[P]robable cause is a fluid concept -- turning on the assessment of probabilities in particular contexts -- not readily, or even usefully reduced to a neat set of legal rules."); Silva, 957 F.2d at 160 (The presence or absence of probable cause "must be determined in light of the totality of the circumstances confronting a police officer. . . .").

Conclusion

Based on the foregoing reasons, the judgment and sentence

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33 (1983), failure to consider the credibility issue does not rise to the level of a manifest injustice.

[7] Walsh raises the argument that since his arrest took place on private property, a warrant is an indispensable necessity. Appellant's Brief at 15. This argument also fails, as the arrest was made with adequate probable cause, and the officers did not cross the fourth amendment's firm line drawn at the entrance to the house. See Kirkpatrick v. Butler, 870 F.2d 276, 281 (5th Cir. 1989), cert. denied, 493 U.S. 1051 (1990). In Kirkpatrick, this court held that a warrantless arrest made on the suspect's porch did not raise fourth amendment concerns. 870 F.2d at 281.

imposed by the district court is AFFIRMED.