IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4845
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHARLES JEROME BAKER,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
CR1 92 29 1

May 31, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Charles Baker appeals his conviction of possession with intent to distribute cocaine and carrying a weapon during a drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1) and 21 U.S.C. § 841(a)(1) and (b)(1)(C). Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In the afternoon of January 24, 1992, troopers Jerry Moore and Ben Bean stopped a 1975 Dodge van, driven by Baker, for changing lanes without signaling and for failing to wear a seat belt. Baker acted nervous. He told them that he had been on a one-week vacation in Houston. His van, however, did not contain any visible luggage.

Upon questioning, Baker admitted that he had a .45 caliber gun in the van. He gave his consent for the troopers to retrieve the gun, telling them it was in the back seat. The back of the van contained an automobile dashboard, other car parts, sleeping bags, jackets, a tool box, and a cardboard box, but no factory-installed back seat. Upon searching, Bean could not find the weapon, and Baker had to direct Bean to the weapon's location, a zippered pouch on the back of the front seat.

While Moore checked the gun's serial number, Baker gave Bean permission to search the van again. Detecting the odor of marihuana, Bean opened the cardboard box and its contents: an ice cooler containing a bag of marihuana and a bag of cocaine. The troopers arrested Baker. Subsequently, Baker made inculpatory statements, and the troopers found smaller quantities of drugs.

II.

The grand jury indicted Baker for possession of cocaine with the intent to distribute and for carrying a weapon in relation to a drug trafficking crime. At trial, Baker testified that he was

traveling from Houston to Memphis with a delivery of car parts and that he believed the box, part of the delivery, contained parts. The jury convicted him on both counts.

II.

A.

Baker argues that the district court erred in denying his motion to suppress the drugs found in the van on the basis of Bean's and Baker's statements made subsequent to the search. The district court denied the motion based upon Baker's consent to the search.

At the suppression hearing, Moore testified that the two officers initiated the traffic stop of Baker for his failure to signal when changing lanes and for failure to wear a seat belt. The officers and Baker agreed that the conversation was casual and non-threatening. Baker told the officers that he had been on vacation in Houston for one week, but Bean, upon walking around the van and looking in the windows, did not see any luggage.

Both officers described Baker as being nervous. Upon questioning, Baker admitted that he had a .45-caliber gun in the van and gave permission for Bean to retrieve the gun from the van. After some difficulty in locating the weapon, Bean retrieved the gun from a pouch on the back of the seat, and Moore ran a check on the weapon's serial number.

While Moore ran the check, Bean and Baker conversed. Bean asked Baker whether he had other weapons, and Baker mentioned a

.25-caliber gun that he hesitantly believed he had left at home. Bean asked Baker whether he could search the van or look around some more. Bean testified that Baker said, "Sure, go ahead" or "Yes, sure." Baker testified that he was not able to answer before Bean jumped back into the van and began to search. Bean testified that, in the back of the van, he found a bulging cardboard box with loose tape, that he could see a plastic container like an ice cooler inside the box, that the odor of the box indicated the presence of marihuana, that he broke the tape to open the box and to open the ice cooler, and that the ice cooler contained a bag of green leafy substance and a bag of white powder.

The district court found the traffic stop to be lawful and "that consent to search the van was given by [Baker] and it was given freely, voluntarily, knowingly, and without coercion." "The Supreme Court has stated that whether consent is voluntary is `a question of fact to be determined from the totality of all the circumstances.' The trial court's finding of voluntariness will not be overturned on appeal unless clearly erroneous." United States v. Olivier-Becerril, 861 F.2d 424, 425-26 (5th Cir. 1988) (citation omitted). The district court heard the testimony of the three men and accorded more credibility to Bean's version of the conversation than to Baker's. See United States v. Sutton, 850 F.2d 1083, 1086 (5th Cir. 1988) (noting that the district court has opportunity to evaluate demeanor).

We consider six factors when evaluating the voluntariness of consent:

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

United States v. Kelley, 981 F.2d 1464, 1470 (5th Cir.), cert. denied, 1993 U.S. LEXIS 3668 (May 24, 1993). by Baker's own admission, he was not wearing a seat belt, thus making the traffic stop lawful. See Kelley, 981 F.2d at 1469. Baker testified that the officers' behavior was non-coercive before the arrest and that he completely cooperated with them. He also testified that he had a two-year associate's degree and that he believed that no incriminating evidence would be found. Although Baker was not informed of his right to refuse consent, this deficiency among the six factors is not dispositive. See Olivier-Becerril, 861 F.2d at 426. Therefore, the district court did not err. See id.

Baker argues that the scope of his consent to Bean did not reasonably extend to the taped box and the ice cooler. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of `objective' reasonableness)) what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 111 S. Ct. 1801, 1803-04 (1991).

"In this case, the terms of the search's authorization were simple. [Baker] granted [Bean] permission to search his [van], and did not place any explicit limitation on the scope of the search." Id., 111 S. Ct. at 1804. Immediately prior to the consent, Bean

and Baker had been discussing a .25-caliber gun, thus creating the reasonable assumption that the consent to search included looking for the weapon. Prior to this consent, Bean had searched the van with Baker's consent, looking for a .45-caliber gun. There were no guns in plain view, and Baker had to point out the location of the .45-caliber gun in a pouch.

Under these circumstances, it is reasonable to assume the consent to search extended to the box. Further, Bean's testimony is unrefuted that he smelled marihuana emanating from the box. Because firearms are known as tools of the drug trade, it would be reasonable to believe that the box contained a weapon also. See United States v. Coleman, 969 F.2d 126, 131 n.20 (5th Cir. 1992). Moreover, Baker does not argue that Bean used the search for the gun as a pretext.

Alternatively, once Bean smelled the marihuana in the box, he had probable cause to search inside the box and ice cooler. United States v. Marshall, 878 F.2d 161, 163 (5th Cir. 1989); see California v. Acevedo, 111 S. Ct. 1982, 1991 (1991) ("the police may search [a vehicle stopped on a road] without a warrant if their search is supported by probable cause"). For these reasons, the district court did not err in denying Baker's motion to suppress.

B.

Baker argues that the evidence was insufficient to convict him of possession with intent to distribute and of carrying a firearm in relation to a drug-trafficking crime. The record supports

Baker's concession that his trial attorney failed to move for judgment of acquittal at any time. In this light, our review of the sufficiency of the evidence is limited to determining "whether affirmance of [Baker's] convictions would result in a `manifest miscarriage of justice.' This occurs only if the record is `devoid of evidence pointing to guilt.'" United States v. Pruneda-Gonzalez, 953 F.2d 190, 193-94 (5th Cir.) (citations omitted), cert. denied, 112 S. Ct. 2952 (1992).

"Three elements must be proven to sustain a conviction for the crime of possession of cocaine with intent to distribute: (1) the knowing (2) possession of cocaine (3) with intent to distribute it." Olivier-Becerril, 861 F.2d at 426. Bean testified that he found a bag of white powdery substance within the cardboard box in Baker's van. The amount of substance weighed 281.55 grams, less than ten ounces, and the substance tested positive for cocaine.

"Knowledge of the presence of a controlled substance often may be inferred from the exercise of control over a vehicle in which the illegal substance is concealed." United States v. Diaz-Carreon, 915 F.2d 951, 954 (5th Cir. 1990). We "have allowed such an inference against the driver where the contraband is in a vehicle compartment at least as inaccessible . . . as . . . the [ ] trunk . . . ." United States v. Richardson, 848 F.2d 509, 513 (5th Cir. 1988). Baker does not contest that he was the owner and sole occupant of the van.

The inference is supported by more than that one fact. At trial, Bean and Sergeant Investigator McElroy testified that Baker

told them that he did not know the quantity of drugs or the type of drugs in the ice cooler but that he was not stupid and did suspect drugs were present. As for the element of intent, the intent to distribute may be inferred from the large quantity of drugs possessed. United States v. Gonzalez-Lira, 936 F.2d 184, 192 (5th Cir. 1991). Therefore, there is evidence pointing toward guilt on the possession-with-intent-to-distribute count.

To prove the other count, the government had to establish that Baker "`carried' a firearm `during and in relation' to a drug trafficking crime." United States v. Raborn, 872 F.2d 589, 595 (5th Cir. 1989) (footnote omitted). Because Baker was properly convicted of possession with intent to distribute cocaine, "the sole remaining element was proof that he had carried his pistol during and in relation to the commission of that crime." Id.

"When a vehicle is used, `carrying' takes on a different meaning from carrying on the person because the means of carrying is the vehicle itself." United States v. Pineda-Ortuno, 952 F.2d 98, 104 (5th Cir.), cert. denied, 112 S. Ct. 1990 (1992). Because Baker had the weapon in his van, and because testimony at trial revealed that Baker told Bean and McElroy that he suspected the box contained drugs, there is a sufficient connection between the carrying of the weapon and the commission of the drug crime. Therefore, there is evidence pointing toward guilt, and no manifest injustice has occurred. Pruneda-Gonzalez, 953 F.2d at 194-95.

C.

Baker argues that the district court erred in the instructions it gave to the jury. He first asserts that the district court erred in giving the "deliberate ignorance" instruction.[1] Baker concedes that his trial attorney failed to object to the instruction, thus triggering the plain error standard of review. See Fed. R. Crim. P. 52(b). Plain error is "error which, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of judicial proceedings." United States v. Breque, 964 F.2d 381, 388 (5th Cir. 1992) (citation and internal quotation marks omitted), cert. denied, 113 S. Ct. 1253 (1993).

For the deliberate-ignorance instruction to be proper, evidence "must raise two inferences: (1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct." United States v. Lara-Velasquez, 919 F.2d 946, 951 (5th Cir. 1990). "[I]f there is no evidence indicating the defendant subjectively knew his act to be illegal,

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[1] The instruction was as follows:

> The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident.
>
> You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

a deliberate ignorance instruction `poses the risk that a jury might convict the defendant on a lesser negligence standard)) the defendant should have been aware of the illegal conduct.'" Breque, 964 F.2d at 388 (citation omitted).

At trial, Bean and McElroy testified that Baker told them that, although he didn't know what kind or the quantity of the drugs in the box, he knew there had to be drugs in the box. Further, Baker admitted to them that this was his third run from Houston to Memphis and that he was paid $300 plus expenses per trip. Moreover, Moore testified that Baker, upon being handcuffed by More and upon being told the charge was possession of cocaine, said "yea, yea, it's in there." With this evidence, any error in giving the instruction did not arise to the level of plain error. See Breque, 964 F.2d at 388.

Baker also argues that plain error occurred by the jury's not receiving instruction that Baker's possession of the .45-caliber gun was lawful. The legality of possessing a weapon, however, is not relevant to Baker's weapon conviction, carrying a firearm during and in relation to a drug-trafficking offense. See Raborn, 872 F.2d at 595 ("That carrying the gun itself was legal under state law is of no moment to the federal offense.").

D.

Baker argues that his trial counsel's performance amounted to ineffective assistance of counsel.

> [C]ontrolling precedent directs that a claim of ineffective assistance of counsel generally cannot be addressed

> on direct appeal unless the claim has been presented to the district court; otherwise there is no opportunity for the development of an adequate record on the merits of an adequate record on the merits of that serious allegation. . . . [This court] "resolve[s] claims of inadequate representation on direct appeal only in rare cases where the record allow[s this court] to evaluate fairly the merits of the claim.

United States v. Navejar, 963 F.2d 732, 735 (5th Cir. 1992) (citations omitted). Because the record lacks necessary details to evaluate the trial counsel's strategy and reasons, we decline to review the merits of this argument, without prejudice to Baker's right to raise the issue in a 28 U.S.C. § 2255 proceeding. See United States v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991).

AFFIRMED.