IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4871
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BARNEY LEE WEIMER, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(4:92-CR-4)

(February 17, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Barney Weimer appeals his conviction and sentence for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Finding no reversible 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

A police officer and sheriff's deputy were driving together through Sherman, Texas, during an unrelated investigation when the officer noticed Weimer in possession of two rifles as he stood among a group of about five people. The officer had known Weimer since about 1981 and was aware that at some time earlier he had arrested him for a non-violent felony offense. The officers circled the block in their unmarked vehicle, and as they approached him a second time the police officer noted that Weimer looked like "an auctioneer with something he was attempting to auction." The sheriff's deputy stated that Weimer was holding the rifles above his head "like he was showing them to someone."

The officers confiscated the weapons because the police officer "had a very, very strong belief that [Weimer] was a felon of an aggravated crime." According to the police officer, Weimer told him the day of the incident that he was attempting to sell the rifles to some friends.

The police officer stated that he did not arrest Weimer for being a felon in possession of a firearm in violation of state law because he was unfamiliar with the exact nature of Weimer's criminal record. Under Texas law, a person convicted of a violent felony may not possess a firearm away from his residence. Tex. Penal Code. Ann. § 46.05 (West 1989). The officer testified that he was not aware of the federal-felon-in-possession-of-firearm statute at the time of the incident. Neither of the rifles had a round in its firing chamber, although one of them had a clip

containing two rounds.

II.

A.

Weimer argues that the district court violated his constitutional rights under the Fourth and Fifth Amendments by admitting the firearms into evidence. Under Fed. R. Crim. P. 12(b)(3), a motion to suppress evidence must be raised prior to trial. A defendant who fails to raise a defense that must be raised before trial waives it unless the court for cause shown grants relief from the waiver. Fed. R. Crim. P. 12(f).

Weimer did not object to admission of the two rifles until after the government had called its first witness and was about to introduce them into evidence. Weimer argued that the rifles were seized in violation of his constitutional rights because the officer did not have a warrant and because there were no exigent circumstances. The government responded by arguing that Weimer had waived his right to object to the evidence by failing to file a pretrial motion and, additionally, because the officer had probable cause to seize the rifles. In response to Weimer's objection, the district court simply directed the government to "go ahead."

After the rifles were identified by the witness, Weimer made a second objection, based upon illegal seizure, to any testimony concerning the weapons. The district court stated that it was "overruled at this point in time." When the government moved to admit them into evidence, the trial court overruled Weimer's third

and final objection concerning the weapons, based upon unlawful seizure, without further elaboration.

The district court's denial of an oral motion to suppress evidence that was not raised prior to trial is reviewed for abuse of discretion. United States v. Knezek, 964 F.2d 394, 397 (5th Cir. 1992). Under Fed. R. Crim. P. 12(f), the district court does not abuse its discretion by denying a suppression motion solely because the defendant failed to raise it in a timely manner. Knezek, 964 F.2d at 397.

It is evident that Weimer never filed a motion to suppress. Weimer argues that he made a "timely objection" at trial and cites his third oral objection as support for this proposition. After his initial objection, Weimer's counsel explained that testimony concerning the rifles was inadmissible because the police officer did not have a warrant and was not acting under exigent circumstances. The only way this objection properly could have been sustained is if the district court had determined that Weimer had shown "cause" and granted relief from the waiver.

It is not plain whether the district court overruled defense counsel's objection because the defendant failed to raise it in a timely manner or because the defendant did not show cause for deserving relief from the waiver. If the former, the district court acted properly under Knezek. If the latter, the district court also acted properly, as Weimer did not argue at trial, or now on appeal, that he made a showing that entitled him to relief from his waiver of the suppression issue. Additionally, there is no

indication that a constitutional challenge to the seizure would survive so that the district court's decision could be challenged as plain error.

B.

Weimer next argues that the district court committed reversible error because the predicate conviction for the felon-in-possession count was void because the state record did not contain a written jury waiver. Under Texas law, a defendant may waive a jury trial in a non-capital felony case if he does so in writing in open court with the consent and approval of the court and the attorney for the state. Tex. Code Crim. Proc. Ann. art. 1.13 (West Supp. 1993).

A defendant entering a plea cannot be convicted of a felony until the requirements of article 1.13 are satisfied. The defendant's waiver of his rights and consent to establish evidence of guilt by alternative means "must be approved by the court in writing, and be filed in the file of the papers of the cause." Tex. Code Crim. Proc. Ann. art. 1.15 (West Supp. 1993).

At trial, the government established evidence of only one of Weimer's prior convictions. This was accomplished by showing that his fingerprints taken at the time of his arrest matched the prints contained in his penitentiary packet, which included a 1988 judgment of conviction against Weimer for robbery in No. 35380.

Weimer did not contest this evidence at trial. Instead, he called the chief deputy of the district clerk's office for the

state courts in Grayson County, Texas, to testify that Weimer's signed waiver-of-trial-by-jury document could not be located in No. 35380. The district court struck all the testimony establishing that no signed waiver existed in the state court files. Weimer contended at trial, and renews his objection on appeal, that the state's failure to produce the signed waiver form for the trial for robbery demonstrates that the earlier conviction was void. As a result, he argues there was insufficient evidence to convict him of being a felon in possession of a firearm. The document containing the signed waiver form in No. 35380 was located prior to sentencing, and a certified copy was entered into evidence at the sentencing hearing.

While the penitentiary packet did not contain the signed waiver form, it did contain a duplicate of the judgment (described as a "Judgment on Plea of Guilty Before Court)) Waiver of Jury Trial") signed by the presiding state court judge. The judgment stated that Weimer understood the rights he was waiving and the consequences of his actions and that his plea was voluntary. The judgment further specified that the defendant, his counsel, and the county attorney "announced in open Court that they, and each of them, agreed in writing to waive a jury in this cause and to submit this cause to the Court, and the Court having consented to the waiver of a jury . . . ." Id.

A certified copy of judgment is an admissible self-authenticating document. Fed R. Evid. 902, 1003. Since Weimer does not raise a genuine question as to the authenticity of the original

document, the duplicate is admissible to the same extent as the original. Fed. R. Evid. 1003. Because the document entered into evidence at trial was a copy of a certified copy of a dated document containing a seal, the signature of the presiding judge, and a deputy clerk, it is authentic for purposes of Fed. R. Evid. 902(1), (4).

The rule does not require that Weimer's signed waiver form be part of the record in order for the judgment to be self-authenticating. See United States v. Dancy, 861 F.2d 77, 79 (5th Cir. 1988). A prior criminal proceeding is treated as a conviction if the jurisdiction that conducted the proceedings treats it as one. Id.; see United States v. Darveaux, 830 F.2d 124, 126 (8th Cir. 1987); Reed v. State, 811 S.W.2d 582, 584-88 (Tex. Crim. App. 1991).

C.

Weimer also argues that the conviction was improper because there was insufficient evidence that he was in possession of the firearms at the time of his arrest. Weimer did not move for a judgment of acquittal at the close of the government's case or renew the motion at the conclusion of all the evidence, as required by Fed. R. Crim. P. 29(a). Further, Weimer's motion for judgment of acquittal was not made within seven days after the jury returned a guilty verdict as specified in Fed. R. Crim. P. 29(c).

When a defendant fails to move for a judgment of acquittal at the time the government rests its case or at the close of all the

evidence, we review only for plain error or a manifest miscarriage of justice. United States v. Pierre, 958 F.2d 1304, 1310 (5th Cir.) (en banc), cert. denied, 113 S. Ct. 280 (1992). Justice is frustrated only if the record contains no evidence pointing to guilt or if crucial evidence on a key part of the offense was so attenuated that a conviction would be shocking. Id. (citations omitted).

At trial, the government established that Weimer was in possession of the rifles when the officers first noticed him and after they drove around the block, that Weimer admitted that he was attempting to sell the rifles, and that none of the people near Weimer claimed possession of the weapons. The record sufficiently demonstrates that there was neither plain error nor a miscarriage of justice in the jury's determination that Weimer, as a felon, knowingly possessed the weapons.

D.

Finally, Weimer argues that the district court mistakenly applied the sentencing guidelines in ruling that he was an armed career criminal under U.S.S.G. § 4B1.4 (Nov. 1992). An armed career criminal is a person who is subject to an enhanced sentence under 18 U.S.C. § 924(e). U.S.S.G. § 4B1.4. Under section 924(e), a person convicted of being a felon in possession of a firearm who has three previous convictions for violent felonies or serious drug offenses, or a combination of the two that are committed on different occasions, will be sentenced to a term of not less than

fifteen years and a fine not exceeding $25,000.

After the jury returned a guilty verdict, the government entered into evidence three 1981 state convictions of Weimer's that included two for burglary of a building (Nos. 31525 and 32018) and one for burglary with intent to commit a felony (No. 32167). The government also offered evidence of several state amphetamine convictions and the robbery conviction that was the predicate conviction for the felon-in-possession count.

Weimer objected, prior to sentencing, to being scored as an armed career offender on the ground that the robbery and drug convictions took place without waiver of jury trial and were therefore invalid. He also argued that his drug convictions were not crimes of violence. At the sentencing hearing, Weimer stated that his only objection was to the absence of the signed waiver forms.

During the sentencing hearing, the government provided a certified copy of Weimer's signed waiver of trial by jury for the 1988 convictions that included robbery (No. 35380), three different amphetamine charges (Nos. 34529, 34852, and 36503), and unauthorized use of a motor vehicle (No. 35704). All the amphetamine charges involved less than twenty-eight grams and were described as unlawful possession of a controlled substance. Weimer pleaded guilty to Nos. 34529, 34852, 35380, 35740, and 36503 in the same sentencing hearing.

The district court adopted the findings of fact and recommendations concerning the applicable guideline range contained in the

presentence investigation report. The district court asked Weimer's counsel whether "assuming that we count the previous convictions, then, you don't have any objections to the manner in which the guidelines were calculated." Defense counsel responded that he did not. While the district court made no statement explaining its actions at sentencing, it is plain that it discounted Weimer's argument on the ground that the government had sufficiently established Weimer's previous convictions.

On appeal, Weimer changes the thrust of his objection. He now claims that his possession offenses are not tantamount to serious drug offenses as defined by section 924(e) and that he did not have a sufficient number of prior convictions to merit armed career offender status. We will not consider issues raised for the first time on appeal unless they involve purely legal questions and failure to consider them would result in manifest injustice. United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990).

There is no manifest injustice in this case. Weimer is correct in pointing out that his state drug convictions do not qualify as serious drug offenses under section 924(e)(2)(A)(ii), because that section refers to state offenses "involving manufacturing, distributing, or possessing with intent to manufacture or distribute." Although the maximum term of imprisonment for each of Weimer's three amphetamine offenses was ten years in accordance with one requirement of section 924(e)(2)(A)(ii), they were for possession and did not involve manufacture or distribution and thus did not fulfill the other requirement of that section. See Tex.

Health Code Ann. art. 4476-15 §§ 4.02(b)(3), (c), 4.04(b)(3) (West 1976).

There is no such question, however, regarding Weimer's burglary convictions or his robbery conviction. The statute unequivocally establishes that a burglary punishable by a term of imprisonment exceeding one year is a violent felony. § 924(e)(2)(B). Weimer was sentenced to a minimum of two years on each of his three burglary convictions. Further, the robbery qualified as a violent felony under section 924(e)(2)(B), as Weimer concedes, because the offense carried a minimum sentence of two years. Thus, contrary to Weimer's claims, his burglaries alone, or two of the burglaries and the robbery conviction, add up to the requisite three previous violent felony offenses that trigger the armed career criminal section of the guidelines.

AFFIRMED.