IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5303
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL KELLEY,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Louisiana

(91-CR-60059-03)

June 29, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant Michael Kelley appeals his jury conviction for a firearms violation in relation to a drug-trafficking crime, as proscribed in 18 U.S.C. § 924(c)(1) and (2). Kelley alleges a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

number of errors, including constitutional problems with the Ex Post Facto Clause of the United States Constitution and the search and seizure provision of the Fourth Amendment, as well as several problematic jury instructions. Finding no reversible error, we affirm Kelley's conviction and sentence.

I

FACTS AND PROCEEDINGS

In a superseding indictment, Kelley was charged with using and carrying a firearm in relation to a drug-trafficking crime. The predicate offense for the firearms conviction was unlawful conspiracy to possess with intent to distribute approximately 289 marihuana plants, a violation of 21 U.S.C. §§ 841(a)(1) and 846.

Kelley filed a motion to dismiss the indictment, alleging that it violated the Ex Post Facto Clause of the Constitution by charging him with conduct that was not made illegal until after the time of the offense. The magistrate judge recommended denying Kelley's motion to dismiss the indictment, and the district court adopted this recommendation.

Kelley also filed a motion to suppress evidence of the marihuana plants discovered during the execution of a search warrant. Kelley's position was grounded in the fact that the plants were located on property not described in the affidavit used to obtain the search warrant. Following a lengthy hearing on the motion, the magistrate judge recommended that the motion be denied. The district court adopted this recommendation as well, denying the motion.

Kelley was convicted by the jury. Following sentencing, he timely appealed.

II

ANALYSIS

A. Ex Post Facto

Kelley argues that the district court erred by denying his motion to dismiss the superseding indictment on ex post facto grounds. He argues that, even though § 924(c)(2) now defines "drug trafficking crime" as any felony punishable under the Controlled Substances Act, the law in effect at the time of the offense defined that term as the distribution, manufacture, or importation of a controlled substance. He insists that when the offense occurred possession with the intent to distribute was not the equivalent of the distribution, manufacture, or importation of a controlled substance; therefore, he asserts, he was charged with conduct that was not made illegal until after his arrest. Kelley's contention fails.

Possession with the intent to distribute marihuana was a "drug trafficking crime" within the meaning of § 924(c) as it existed prior to its 1988 amendment. See United States v. Coburn, 876 F.2d 372, 375-76 (5th Cir. 1989). Thus, Kelley was charged with conduct that was illegal at the time of the offense. Consequently, the indictment did not violate the ex post facto proscriptions of the Constitution.

B. Suppression of Evidence

Kelley also argues that all of the physical evidence seized

pursuant to the warrant, but from areas outside the boundaries of the tract described in the affidavit and warrant, should have been suppressed. The search warrant authorized a search of approximately eight acres of property belonging to Kelley's co-conspirator, Clifton Carrier. The government acknowledges that the marihuana plants were not actually growing on Carrier's property, but on neighboring property.

The affidavit in support of the warrant was executed by Deputy Sheriff John Beard. In his affidavit he averred that he observed a patch of marihuana plants growing on what he believed was Carrier's property. After observing the demeanor of the deputy, the magistrate judge was convinced that the deputy had made a good faith error regarding the dimensions of the property when he filed for the search warrant. The magistrate judge concluded that Deputy Beard's mistake regarding the old fence line was plausible because the boundary of Carrier's property actually runs along the old fence line on three sides. She also concluded that Beard's fear of alerting the defendants was a plausible reason for not investigating the property more closely to verify its description. Finally, the magistrate judge noted, sua sponte, that the place where the marihuana plants were growing constituted "open fields," exempting the seizure of the plants from the aegis of the Fourth Amendment.

In reviewing a district court's suppression ruling grounded on live testimony adduced at a suppression hearing, we accept the court's factual findings unless they are clearly erroneous or

influenced by an incorrect view of the law. United States v. Gallo, 927 F.2d 815, 819 (5th Cir. 1991). We review the district court's legal conclusions de novo. Id.

1. Good Faith Exception

In United States v. Leon, 468 U.S. 897, 922-23, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), the Supreme Court held that evidence obtained by law enforcement officials acting in good-faith reliance on a search warrant is admissible even though the affidavit on the basis of which the warrant was issued was insufficient to establish probable cause. The court noted four circumstances in which the good-faith exception would not apply: 1) when a magistrate judge is misled by information known by the affiant to be false or the falsity of which would have been known to the affiant but for his recklessness; 2) when the magistrate judge abandons his duties; 3) when the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and 4) when the warrant is so facially deficient that a presumption of its validity is unreasonable. Id. at 923; United States v. Webb, 950 F.2d 226, 229 (5th Cir.), cert. denied, 112 S.Ct. 2316 (1992). If the good-faith exception is found to apply, we need not reach the question whether probable cause existed to issue the warrant. United States v. Kleinebreil, 966 F.2d 945, 966 (5th Cir. 1992).

At the suppression hearing, the engineer who surveyed the property for the district attorney's office testified that there were two fence lines in the area, one old and the other new.

Deputy Beard testified that he thought that all of the property contained within the old fence line was Carrier's. He applied for the search warrant after he found a patch of marihuana growing within the old fence line.

Kelley argues that the issue should not be analyzed as involving the good-faith exception, but rather as though the search had been executed in the complete absence of a warrant. We have, however, applied the good-faith exception in a case similar to the present one. See United States v. Gordon, 901 F.2d 48, 50 (5th Cir.), cert. denied, 498 U.S. 981 (1990). In Gordon, the officer used an invalid address but searched the location intended to be searched--a residence the affiant had seen while in the company of an undercover officer. In the instant case, the search warrant misstated the dimensions of the property to be searched; however, Beard obviously intended that the warrant encompass the area where the plants were located and that is the area that in fact was searched. The district court's findings were not clearly erroneous, and they support the conclusion that the good-faith exception applies.

2. Open Fields Exception

The magistrate judge alternatively concluded that the area of the search could be classified as an "open field." Such areas are not entitled to the protection of the Fourth Amendment. The rule is well settled that when an area is properly classified as an open field, governmental intrusion does not implicate the Fourth Amendment. See United States v. Eastland, 989 F.2d 760, 764-65

(5th Cir. 1993). Deputy Beard testified that the area he searched was rural and densely wooded, clearly one kind of property that meets the open field definition. Density of the cover is irrelevant.

The evidence was properly admitted under either the good-faith exception or the open fields exception to the warrant requirement.

C. Possession of Marihuana as a "Drug Trafficking Crime"

In discussing the elements of the offense, the district court instructed that "possession of marihuana with intent to distribute is a drug trafficking crime." Kelley contends that the district court's instruction was in error for the same reasons that he advanced in his ex post facto argument. He claims that possession with the intent to distribute marihuana was not a "drug trafficking crime" at the time of the offense, making the court's instruction erroneous.

The government counters that Kelley failed to object to the jury instruction; therefore, the district court's instruction should be upheld unless it amounts to plain error. But we find that Kelley did object "to the language that deals with possession with intent to distribute marihuana as not be included in the definition of drug trafficking crime as it existed in August of 1988."

When reviewing the propriety of a jury instruction, we determine whether the charge as a whole is a correct statement of the law and whether it clearly instructs the jurors regarding the principles of law applicable to the factual issues before them.

United States v. Stacey, 896 F.2d 75, 77 (5th Cir. 1990). As long as the jury charge accurately reflects the law and the facts of the case, the district court is vested with broad discretion in formulating the charge, and we will not lightly disturb its exercise of that discretion. United States v. Casto, 889 F.2d 562, 566 (5th Cir. 1989), cert. denied,. 493 U.S. 1092 (1990).

As discussed previously, possession with the intent to distribute marihuana was a drug-trafficking crime within the meaning of § 924(c) as it existed at the time of the offense. See Coburn, 876 F.2d at 375-76. Thus, the district court's instruction was a correct statement of the law and Kelley's argument is without merit.

D. Definition of Conspiracy

Kelley insists that the district court's jury instruction was erroneous because it expanded the definition of "conspiracy" beyond that charged in the indictment. He urges that the indictment charged him with conspiracy to possess with the intent to distribute under 21 U.S.C. §§ 841 and 846, but the district court gave the definition of conspiracy appearing under 18 U.S.C. § 371, which defines a conspiracy concerning "any offense against the United States." Kelley did not object to this jury instruction in the district court; therefore, the instruction is reviewed for plain error. See United States v. Arky, 938 F.2d 579, 582 (5th Cir. 1991), cert. denied, 112 S.Ct. 1268 (1992). To meet this standard, Kelley must show that the omitted or erroneous instruction was more than reversible error; he must show that it

produced a grave miscarriage of justice. Id.

The district court charged the jury that:

> Title 18 of the United States Code Section 371 makes it a crime for anyone to conspire with someone else to commit an offense against the law of the United States. In this case, Michael Kelley and others are charged with the unlawful use and carrying of a firearm while committing a drug trafficking crime.
>
> A conspiracy is an agreement between two or more persons to join together to accomplish some unlawful person [sic]. . . . For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt: First, that two or more persons made an agreement to commit the crime of drug trafficking as charged in the indictment; second, that the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is with the intent to further the unlawful purpose.

Although the court used a definition of conspiracy that applies to "any offense against the United States," the context of the statement makes it clear that the court accurately charged the jury that the conspiracy was related to the drug-trafficking offense. Given the numerous occasions in which the court referred to the drug trafficking offense, there is no realistic possibility that the jury could have misconstrued the district court's statement.

E. Wrong Statute Number

Kelley also complains that the district court's jury instructions were erroneous because the court cited the wrong statute number in giving the conspiracy instructions. The court stated that "[t]itle 21 of the United States Code, Section

834(a)(1) makes it a crime for anyone knowingly or intentionally to possess a controlled dangerous substance with the intention to distribute it." As correctly noted by Kelley, 21 U.S.C. § 834(a)(1) does not exist.

Kelley does not suggest how the court's clerical error might have affected the jury's verdict; neither is it evident that it did so. Although the district court cited the wrong statute number, the court's language substantially tracks 21 U.S.C. § 841, the statute under which Kelley was indicted. We are satisfied that the district court's error did not affect the instruction of the elements of the offense. Therefore, the mistake made in giving the incorrect statute number was totally harmless. See United States v. Laury, 985 F.2d 1293, 1300 (5th Cir. 1993).

Kelley also suggests that the instruction containing the incorrect statute number resulted in a constructive amendment of the indictment. He argues that he has a substantial right to have the jury instructed solely on the charges contained in the indictment. He also argues that a jury instruction which allows a defendant to be convicted of a crime not charged in the indictment amounts to plain error.

A constructive amendment "occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged." United States v. Baytank, 934 F.2d 599, 606 (5th Cir. 1991) (internal quotation and citations omitted). When, as here, no objection is made, review is limited to plain error. Id. "[I]t is plain error

to give instructions that permit a jury to convict for a crime not charged in the indictment because a court may not substantially amend an indictment through its jury instruction." Id.

In the instant case, the questioned instruction does not constructively amend the indictment. The trial court instructed the jury that, in order to convict Kelley, it must find, among other things, that "two or more persons made an agreement to commit the crime of drug trafficking as charged in the indictment[.]" Thus, the jurors needed to conclude that Kelley conspired to possess and distribute marihuana if they were to convict him. The instruction defining a general conspiracy did not alter an essential element of the offense charged and did not broaden the possible basis for conviction.

F. Knowledge of Presence of the Firearm

Finally, Kelley argues that the district court improperly instructed the jury that he need not have knowledge that the co-conspirators had possession of the gun in order to find him guilty under § 924(c)(2). He argues that the instruction impermissibly shifted the burden to him to prove that he did not have knowledge of the guns, thereby intruding on the jury's deliberation process.

Even a defendant who does not know that his co-conspirator possessed a weapon during a drug trafficking offense may be convicted under § 924(c)(2) if the government shows that the defendant was a member of the conspiracy and that the co-conspirator carried the weapon in furtherance of the conspiracy. See United States v. Raborn, 872 F.2d 589, 595-96 (5th Cir. 1989).

The cases cited by Kelley as requiring knowledge as a prerequisite to convict a defendant under § 924(c)(2) are inapposite. They do not involve the offense of conspiracy, which allows a defendant to be held responsible for acts committed in furtherance of the conspiracy. Because the jury instruction adequately explained the law as applicable to the facts, the jury instruction was not erroneous.

III

CONCLUSION

We find no merit in Kelley's assignments of error or in his arguments proffered in support of them. For the foregoing reasons, Kelley's conviction and sentence are

AFFIRMED.