UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5692
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALTA LEE KEMPER,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(SA-92-CR-13)

June 16, 1993

Before POLITZ, Chief Judge, DUHÉ and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:[*]

Alta Lee Kemper appeals his conviction by a jury of possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1), challenging the admission in evidence of crack cocaine and inculpatory statements, and complaining of a remark by the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

prosecutor in closing argument. He also raises a **Batson**[1] objection. Finding no error, we affirm.

Background

While executing a search warrant of Kemper's residence and any vehicle located on the premises or under Kemper's control, agents found 489 grams of cocaine in the console of a pickup truck parked in front of the residence. The truck had been seen in front of Kemper's house on at least three occasions prior to the search. The search disclosed a receipt indicating Kemper had purchased the vehicle a few months earlier. Kemper denied the truck was his but after the agent made entry through the sliding rear window and found the cocaine in the console, Kemper told the agent that the "crack" was his.

At trial Kemper objected to the introduction in evidence of the cocaine and the inculpatory statement. The court overruled the objection, concluding that probable cause supported the search warrant and that the warrant authorized a search of the truck. The jury returned a guilty verdict of guilty, the trial court imposed an enhanced penalty of life imprisonment, and Kemper timely appealed.

Analysis

Kemper maintains that agents unlawfully searched the truck and therefore the trial court should not have admitted into evidence the cocaine found therein and his inculpatory statements made with

[1] **Batson v. Kentucky**, 476 U.S. 79 (1986).

respect thereto. Under Fed.R.Crim.P. 12(b)(3) & (f), defendants must advance motions to suppress evidence prior to trial. Failure to do so is typically deemed a waiver unless the court grants relief therefrom. By granting Kemper a continuing objection to the introduction of this evidence, and deferring its ruling thereon, the district court implicitly granted the relief envisioned in Rule 12(f). We proceed on that assumption.

In reviewing rulings on the admissibility of evidence in a setting as here presented, we accept factual findings unless clearly erroneous or influenced by an incorrect view of the law, and review legal conclusions *de novo*.[2]

The warrant authorized the search of, *inter alia*, "any vehicle under the control of Alta Lee Kemper." During the search of Kemper and his residence, agents found in Kemper's wallet a receipt for the purchase of the truck. The truck was parked immediately in front of the residence and had been seen there before on several occasions. A confidential informant who provided information underlying the search warrant had indicated that Kemper owned a "Chevy truck, license 3765 TW." This information matched. These facts adequately support the determination that this truck was under Kemper's control and, accordingly, was subject to the search warrant. The court did not err in admitting the fruit of this search.

Kemper complains that the district court erred in denying his

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[2] **United States v. Capote-Capote**, 946 F.2d 1100 (5th Cir. 1991), cert. denied, 112 S.Ct. 2278 (1992).

motion to strike the jury because the prosecutor used a peremptory challenge to strike a black juror in violation of the teaching of **Batson**. He contends that the strike was made solely on the basis of race, an action which violates the equal protection component of the fifth amendment.

Confronted with the **Batson** challenge, the prosecutor stated that he struck the juror because he appeared to be in his thirties yet said he was retired. The prospective juror was inattentive, looked very sleepy, and appeared to be on some type of pain medication. The district court agreed with the prosecutor's assessment that the juror looked a bit young to be retired and accepted his explanation for the strike. This conforms to **Batson** and progeny, including **United States v. Moreno**[3] and **Moore v. Keller Industries, Inc.**[4] The government need not provide a quantitiable race-neutral explanation for a strike in the absence of proscribed racial motivation.[5] We note that two black jurors served on the jury panel. We cannot find the district court's acceptance of the prosecutor's explanation clearly erroneous.[6]

Finally, Kemper complains of an unfair statement by the

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[3] 878 F.2d 817 (5th Cir.), cert. denied, 493 U.S. 979 (1989).

[4] 948 F.2d 199 (5th Cir. 1991), cert. denied, 112 S.Ct. 1945 (1992).

[5] **United States v. Clemons**, 941 F.2d 321 (5th Cir. 1991).

[6] E.g., **id.** (appellate court reviews district court acceptance of race-neutral explanation for peremptory strikes only against clearly erroneous standard).

prosecutor who stated in closing argument:

> We hear about confidential informants. Well, I submit to you that confidential informants are needed by our law enforcement to do their job. Drug dealers aren't out there doing their drug deals in front of bishops, in front of priests, in front of honest citizens. They're out doing business in front of other drug dealers, in front of other crooks, in front of other people that have criminal records, and these are the people that for one reason or another come to the police, quite often for money, quite often for other reasons. They come to the police and they tell what they know. And this is essential to law enforcement. Why are they confidential informants? Because they're out risking their lives. If -- if Mr. Kemper knew who these confidential informants are, we don't know what would happen.

Kemper unsuccessfully objected to this statement.

Improper prosecutorial comments require reversal only if the comments substantially affect a defendant's right to a fair trial.[7] To determine the potential prejudicial effect we must consider the context in which the statement is made.[8] In closing argument defense counsel argued that the government's proof was weak because the identity of the confidential informants had not been made known, saying: "They want to talk about confidential informants, but you don't know their names." Although rhetorically excessive, for which we caution the prosecutor, we do not perceive the statement as calculated to inflame or prejudice the jury. The trial court did not err in its ruling.

AFFIRMED.

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[7] **United States v. Diaz-Carreon**, 915 F.2d 951 (5th Cir. 1990).

[8] **United States v. Pierre**, 958 F.2d 1304 (5th Cir. 1992) (*en banc*), cert. denied, 113 S.Ct. 280 (1992).