

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5736
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RICARDO MENDIOLA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-92-CR-179)

(January 26, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Ricardo Mendiola challenges his conviction for using a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c). We **AFFIRM**.

I.

Having conducted surveillance of Mendiola's residence over a two-week period, and observing in the course of such surveillance activity consistent with the transfer of drugs, detectives with the

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

San Antonio Police Department were to execute a search warrant at the residence. Just prior to doing so, Mendiola left his home. As he drove away, a police officer stopped him. After being advised of his rights, Mendiola agreed to cooperate with the police, returned to his home, and began to show police officers the location of narcotics in his home.

As Mendiola approached a shelf in his bedroom where he stated cocaine was stored, the detectives asked if a gun was there also. Mendiola acknowledged that there was, and the detectives recovered a loaded .22 caliber Ruger semi-automatic handgun and six plastic bags containing more than 417 grams of cocaine. On the same shelf, detectives discovered a canister containing ten bags with more than 14 grams of cocaine (total), a scale with cocaine residue, and an unloaded .25 caliber Astra semi-automatic handgun.

Pursuant to a plea agreement, Mendiola pled guilty to possession with intent to distribute cocaine, a violation of 21 U.S.C. § 841(a)(1). After a bench trial, Mendiola also was found guilty of the firearms offense.

II.

Mendiola contends that there was insufficient evidence to sustain the firearms conviction. Section 924(c) is violated if a defendant "uses or carries a firearm" in relation to any crime of violence or drug trafficking crime. 18 U.S.C. § 924(c)(1). Because Mendiola was convicted following a bench trial, our review of the sufficiency of the evidence is guided by a "substantial evidence" standard; we will sustain the conviction if the district

court's finding is supported by "any substantial evidence". **United States v. Cardenas**, ___ F.3d ___ (5th Cir. Dec. 9, 1993, No. 92-8660) 1993 WL 503257 at *15.

Mendiola contends that the government failed to prove that the possession of the firearms was related to drug trafficking, relying primarily upon **Smith v. United States**, ___ U.S. ___, 113 S. Ct. 2050 (1993). Mendiola admits that the weapons could have facilitated the possessory offense, thereby satisfying § 924(c)'s "use" requirement; but, he asserts that "[i]n view of **Smith**, however, the Government was obligated to prove substantially more."

We do not read **Smith** as requiring "more"; indeed, **Smith** recognized that "the gun at least must facilitate or have the potential of facilitating the drug trafficking offense." **Id.** at 2059 (internal quotations and alterations omitted; citations omitted). Because Mendiola admits that the guns could have facilitated the possessory offense, his contention lacks any merit.² The trial court had the opportunity to assess Mendiola's assertion that the guns were for home protection only. We cannot say that it lacked any substantial evidence to conclude that the

² Our court has sustained § 924(c) convictions when loaded guns are present in a home in proximity to drugs. *E.g.*, **United States v. Robinson**, 857 F.2d 1006, 1010 (5th Cir. 1988). In such cases, the fact-finder, whether judge or jury, could reasonably conclude that the defendant "used" the firearms as a means of safeguarding his possession of the cocaine. See **United States v. Chew**, No. 92-7408, p. 6-7 (5th Cir. May 13, 1993) (unpublished) (holding that loaded gun near bedroom where cocaine was located and loaded gun across the hall sufficient evidence for § 924(c) conviction); **Robinson**, 857 F.2d at 1010; see also **United States v. Coburn**, 876 F.2d 372, 375 (5th Cir. 1989) (unloaded gun may be basis for § 924(c) conviction).

guns facilitated -- or had the potential to facilitate -- the drug trafficking offense.³

III.

For the foregoing reasons, the conviction is

AFFIRMED.

³ As discussed *supra*, officers conducted surveillance of Mendiola's residence for two weeks preceding the execution of the search warrant. In the course of such surveillance, officers observed "people approaching the house" who would "stay for a short time, and then leave the house. They would park maybe a block or two blocks away, walk to the house, and walk back to their car within ten or fifteen minutes." An officer testified that such activity is consistent with that accompanying drug dealing. Furthermore, as discussed *supra*, Mendiola's residence contained packages of cocaine, a scale with cocaine residue, and, in addition, officers found over \$1,600 in cash in the same room. From this evidence, the district court could reasonably infer that drug transactions actually took place in the home, and that the firearms were readily available to facilitate these transactions. And, even if Mendiola's assertion that the people seen coming and going from his house "were simply making arrangements with ... Mendiola to engage in a drug transaction at some future time and place, away from [his] residence" were true, the firearms were still useful to protect Mendiola's supply of cocaine and the proceeds from his sale of it.