

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7201

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUCKEY RICHARDSON, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(CR-B-90-84-01)
(November 19, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Luckey Richardson, Jr., was found guilty by the district court of being a felon in possession of firearms.

In conducting a search pursuant to a warrant of Richardson's residence, an agent asked Richardson if he had any weapons. Richardson said, "'Yes, I do' [and] . . . pointed to one part of the house." Officers found the weapons in the master bedroom: a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

rifle and a sixteen-gauge shotgun in Richardson's closet and a revolver in the drawer of a nightstand next to the bed.

At the bench trial, Richardson testified that the weapons belonged to his wife, Maria Estella. Other witnesses included Maria Estella and ATF special agent Newell. Newell testified that ATF's gun-tracing process revealed the revolver to be stolen. The district court disallowed it as hearsay.

The probation officer recommended two points be added to Richardson's offense level because the revolver was stolen. Richardson objected to this and the district court overruled the objection. The court sentenced Richardson to twenty-one months imprisonment, three years of supervised release, and a \$50 special assessment. Richardson filed timely notice of appeal.

Richardson argues that his constitutional right to trial by a jury was violated because the record does not contain a written waiver of this right and the record does not provide adequate evidence of an oral waiver. "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." Fed. R. Crim. P. 23(a).

In writing, Richardson waived his right to trial by a jury. Further, the district court advised Richardson of his right to a jury trial and, under oath, Richardson waived this right. The record refutes the factual foundation of Richardson's argument.

Richardson argues that the evidence was insufficient to show that he knowingly possessed the firearms. The parties stipulated

that Richardson was a convicted felon and that the firearms had moved in interstate commerce. See U.S. v. Yi Chang Ho, No. 91-2154 (5th Cir. Oct. 11, 1991) (unpublished) (listing the three elements that the Government must prove to convict under 18 U.S.C. § 922(g)(1)) (copy attached).

[I]n reviewing the findings of guilty by a trial court in a non-jury trial, the standard of review of the appellate court "is to determine whether such findings are supported by any substantial evidence. . . . The test is whether the evidence is sufficient to justify the trial judge, as trier of the facts, in concluding beyond a reasonable doubt that the defendant was guilty"

U.S. v. Jennings, 726 F.2d 189, 190 (5th Cir. 1984) (citation omitted).

"Illegal possession of firearms may be either actual or constructive." U.S. v. Knezek, 964 F.2d 394, 400 (5th Cir. 1992).

In general, a person has constructive possession if he knowingly has ownership, dominion, or control over the contraband itself or over the premises in which the contraband is located. Constructive possession need not be exclusive, it may be joint with others, and it may be proven with circumstantial evidence.

U.S. v. McKnight, 953 F.2d 898, 901 (5th Cir.), cert. denied, 112 S. Ct. 2975 (1992). "[T]his Court . . . prefers a 'commonsense, fact-specific approach' to the constructive possession problem. . . . [Therefore,] 'we examine the merits of each constructive possession case independently; previous cases serve as illustration only.'" Id. at 902.

Richardson and Maria Estella testified that all three weapons were her property, not his. She inherited the rifle from her father. Maria Estella testified that upon receiving it in 1983, she wrapped it in clothing and placed it behind large boxes in

Richardson's closet. She also said that she retrieved Richardson's clothes from the closet for him and that "[h]e might have taken out a shirt but it was on top." The agent testified that he found the firearm behind some shirts.

As for the shotgun, Richardson said that he bought his wife a twenty-gauge shotgun as protection while he was away. When shown by the prosecutor that the shotgun admitted into evidence was sixteen-gauge, Richardson insisted that his purchase was a twenty-gauge shotgun. Maria Estella testified that he instructed her on its use after he purchased it, but that she had never fired this gun or the others. Richardson denied knowledge of the handgun's existence. Maria Estella said that she traded for the handgun in the course of conducting their autoparts business. She could not remember if she told her husband about the transaction. She also testified that she kept the guns for her children's future and for the weapons' appreciating value.

Five people lived at the Richardson residence: Richardson, Maria Estella, and their three children, ages eleven, seven, and five. The master bedroom had two closets, and two of the weapons were found in Richardson's closet. All three were found in the bedroom shared by Richardson and Maria Estella.

Although Richardson denied knowing the location of the weapons, he was able to point to their location when the police conducted their search. Maria Estella testified that she knew very little about guns and that she did not use them. This testimony was buttressed by Maria Estella's demonstration of the shotgun's

operation. "The [district c]ourt [w]as not satisfied that the defendant's wife ha[d] any notions on how to use the weapon that was put in her confines to protect her family."

From the evidence presented to the district court judge as trier of fact, the evidence was sufficient to justify the judge in concluding beyond a reasonable doubt that Richardson had dominion and control over the guns and, therefore, that he knowingly possessed the weapons. See Jennings, 726 F.2d at 190-91; U.S. v. Smith, 930 F.2d 1081, 1086 (5th Cir. 1991) (sufficient evidence under joint constructive-possession theory).

Two levels are added to the offense level "[i]f any firearm was stolen." U.S.S.G. § 2K2.1(b)(4). Richardson argues that the district court used unreliable information in finding that the weapon was stolen and adding the two levels to his offense level. This court reviews for clear error. U.S. v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990) ("'plausible in light of the record viewed in its entirety'").

"In sentencing determinations, the court is not bound by the rules of evidence and may consider any relevant information without regard to its admissibility provided the information considered has sufficient indicia of reliability." U.S. v. Shacklett, 921 F.2d 580, 584 (5th Cir. 1991) (emphasis in original). "Any information may be considered, so long as it has 'sufficient indicia of reliability to support its probable accuracy.' Reliable hearsay evidence may be considered." § 6A1.3, p.s., comment. (citations omitted).

Under oath, the AFT agent said:

the trace showed that th[e] firearm was stolen out of Gibson's in Weslaco. And investigation showed that it was stolen between August of 1986 and November of 1986. They could not be sure--the Gibson's store could not be sure. They were positive that it was between August '86 and November '86.

In response to Richardson's objection to the PSR, the probation officer wrote:

Special Agent William D. Newell also provided a statement which indicates the . . . revolver . . . was subsequently checked through the NCIC computer system and found that it had been reported stolen by the Weslaco, Texas, Police Department. Furthermore, . . . he subsequently contacted the Weslaco, Texas, Police Department and was informed that this firearm had been stolen from the local Gibson's Store during the time period between August and November of 1986.

Based upon the testimony at trial and the PSR, the evidence at sentencing was sufficiently reliable to find that the gun was stolen. The district court did not clearly error. See Alfaro, 919 F.2d at 966 ("presentence report generally bears sufficient indicia of reliability").

AFFIRMED.