IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7408
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

NATHANIEL CHEW, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
CRG 91 120 B O

May 13, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

I.

On October 2, 1991, Nathaniel Chew, Jr., sold ten rocks of crack cocaine for $200 to Mississippi undercover agent Elbert Craig at Chew's place of business, Chew's Washateria. A police informant arranged the deal and accompanied Craig to the sale. After being

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 Pursuant to that rule, the court has determined that this opinion should not be published.

introduced to Craig, Chew retrieved the cocaine from his office and consummated the sale. A tape recording of the transaction was inaudible because of noise in the washateria.

Craig returned to the Washateria on October 9, 1991, and purchased twenty-two more rocks of crack from Chew for $500. Unlike the previous sale, this one took place in Chew's office, where there was less noise, allowing Craig successfully to tape-record the sale. Chew tried to convince Craig to buy an ounce of cocaine and stated that he could have it within a few minutes. Chew also told Craig that he could keep him supplied with ounces of crack and could convert cocaine in powdered form to crack.

Craig arranged another sale for October 15, 1991. After arriving at the washateria, Craig attempted to give Chew $1,500, but Chew directed Craig back into the office, telling him to stand in a doorway to the outdoors while Chew went to his truck. Chew returned with a green army jacket containing a jar of 16.42 grams of cocaine base. The men went back inside and completed the sale at Chew's desk.

Chew had a loaded .38 caliber pistol in a leg holster on the desk next to him during the sale. He stated that the crack was still wet because he had just cooked it up, and he boasted that the cocaine was ninety-two percent pure. Craig also tape-recorded this sale.

After Craig left the washateria, the police arrested Chew and obtained search warrants for Chew's residence and the washateria. In the office, they found 2.75 grams of cocaine base in the green

army jacket, triple beam scales, a razor blade, and food stamps.[1] At Chew's house, the police discovered 13.62 grams of cocaine base and 74.87 grams of cocaine powder. Most of the cocaine was in a briefcase, in the bedroom closet, that also contained documents in Chew's name. In addition, the police found two firearms in the house)) a loaded .32 caliber pistol near the door to the bedroom and an unloaded .32 caliber pistol in a chest in the bedroom across the hall.

II.

After a timely motion to suppress evidence was denied, Chew was tried before a jury. He was convicted on the following counts: possession with intent to distribute and distributing, in violation of 21 U.S.C. § 841(a) and (b)(1)(c), 1.61 grams (count 1), 3.11 grams (count 2), and 16.42 grams (count 3) of cocaine base)) a Schedule II controlled substance; possession with intent to distribute, in violation of 21 U.S.C. § 841(a) and (b)(1)(c), 2.75 grams of cocaine base (count 4), 13.62 grams of cocaine base (count 5), and 74.87 grams of cocaine base (count 6); and knowingly and intentionally carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1).

III.

Chew first argues that the district court erred in denying his motion to suppress as to the evidence found during the search of

[1] Food stamps often are used as payment for drugs.

his residence. He alleges that the search warrant did not plainly identify his house as his residence and that the police did not have probable cause to search the house. Neither claim has any merit.

The search warrant states that "the place described above is occupied and controlled by: NATHANIEL CHEW JR., MILDRED CHEW OR PERSON OR PERSONS TRUE NAME UNKNOWN." We need not decide whether this statement, in combination with the rest of the information contained in the warrant, would lead a reasonable person to conclude that the warrant properly identified the house as Chew's residence. Testimony given to the magistrate judge sufficiently identifies the house as Chew's residence.

Officer Joe Hart testified to the magistrate judge that he and another officer observed Chew leaving the property on October 15, 1991. Under Mississippi law, unrecorded oral testimony may be considered with the affidavit in determining probable cause. Wilborn v. State, 394 So. 2d 1355, 1357 (Miss.), cert. denied, 454 U.S. 839 (1981). Mississippi law obviously is contrary to the federal `four corners' rule that requires the information necessary to support probable cause to be contained in the affidavit or in recorded oral testimony. Because federal requirements do not apply to state search warrants, the district court properly considered Hart's testimony. United States v. McKeever, 905 F.2d 829, 832 (5th Cir. 1990) (en banc). We believe Hart's testimony sufficiently identified the house in question as Chew's residence.

The police also had probable cause to search Chew's house.

The government may establish the required nexus between the place to be searched and the evidence sought through normal inferences as to where the articles sought would be located. United States v. Thomas, 973 F.2d 1152, 1557 (5th Cir. 1992). The affidavit accompanying the warrant notes that drug traffickers often conceal drugs, contraband, proceeds of drug transactions, records of these transactions, firearms, and the like within their residence. Where the suspect's home is in reasonable proximity to the point of sale, the police reasonably may infer that evidence is likely to be found in his home. See United States v. Pace, 955 F.2d 270, 277-78 (5th Cir. 1992); United States v. Green, 634 F.2d 222, 226 (5th Cir. Unit B Jan. 1981). We conclude that the police had probable cause to search Chew's home.[2]

IV.

Chew next challenges his conviction as to counts 5 and 6 for possession with intent to distribute. He argues that there is insufficient evidence linking him with the cocaine seized at his residence. Another known drug trafficker, Danny Bew, also lived in the house and was under investigation for drug trafficking. Police checked bags of drugs seized at the house for Chew's fingerprints but located none.

To convict Chew for possession with intent to distribute, the

[2] Our conclusion is buttressed by several facts. First, Chew had to have advance notice to have a given quantity of cocaine ready to sell Craig. Second, when Chew sold Craig the cocaine he had just "cooked," he retrieved the army jacket from his truck, indicating that he had "cooked" the cocaine elsewhere.

government must show that he (1) possessed illegal drugs (2) knowingly and (3) intended to distribute them. United States v. Onick, 889 F.2d 1425, 1429 (5th Cir. 1989). Possession may be actual or constructive. "Constructive possession is defined as ownership, dominion, or control over illegal drugs or dominion over the premises where drugs are found." Onick, 889 F.2d at 1429. We review the sufficiency of the evidence in a light most favorable to the government, making all reasonable inferences in favor of the verdict. United States v. Beverly, 921 F.2d 559 (5th Cir.), cert. denied, 111 S. Ct. 2869 (1991).

The record contains ample evidence to support the verdict. Police observed Chew leaving his house on the day of the final sale. He later gave them a key to the house and told them that no one was home. The telephone and power services for the house were in Chew's name. His two automobiles were parked at the house. Most importantly, the briefcase found in the bedroom closet contained documents bearing Chew's name. The fingerprint expert testified that ninety-five percent of the time, a person does not leave identifiable fingerprints on plastic bags. Chew's argument on appeal is without merit, and the jury obviously rejected Chew's suggested inferences.

V.

Chew also challenges the sufficiency of the evidence supporting his conviction on count 8)) using and/or carrying a weapon during and in relation to a drug trafficking offense. This count

relates to the firearms found in Chew's house during the search. Chew argues that these guns were separated from the drugs at the house, and one was unloaded. He alleges that they were not in a strategic location to make them quickly available for use. Moreover, Chew contends that there is insufficient evidence linking him to the guns and that he certainly did not have these guns within reach while selling drugs at the washateria.

To find Chew guilty on count 8, the government must prove that he (1) committed a drug trafficking crime and (2) knowingly used or carried a firearm during and in relation to his commission of a drug trafficking offense and (3) that the firearm played a role in or facilitated the commission of the drug trafficking offense. Onick, 889 F.2d at 1431. We again find ample evidence in the record to support Chew's conviction. One pistol was found just outside the bedroom where the drugs were located, while the other one was discovered across the hall.

As we previously have noted, "the weapons in the house could facilitate the commission of a crime because [the defendant] could use the guns to protect the drugs and drug paraphernalia." Onick, id. at 1432; see also United States v. Robinson, 857 F.2d 1006 (5th Cir. 1988); United States v. Smith, 978 F.2d 171, 174 (5th Cir.), cert. denied, 113 S. Ct. 1620 (1992). Chew could have used the weapons to ward off threats to his drug operation. Id. As a result, the evidence is sufficient to sustain Chew's conviction.

VI.

Chew next alleges that the district court erred in failing to suppress certain pieces of evidence seized from the washateria. Specifically, he challenges the seizure of $207 worth of food stamps, triple beam scales, and razor blades. The police testified that these items generally are considered drug paraphernalia or evidence of participation in drug-related activity. Chew argues that the police had no authority to seize these items because the search warrant did not identify drug paraphernalia as items for which the police were searching.

Chew's argument has no merit. The police may seize objects they discover in plain view in conducting a valid search. United States v. Whaley, 781 F.2d 417, 419 (5th Cir. 1986). The police found the scales in a brown paper bag, the food stamps in a cash box, and the razor blades in a potato chip can. Obviously, the police legally could search these containers. The warrant authorized a search for cocaine and other controlled substances. Because cocaine easily could have been concealed in all of the containers in question, the police lawfully searched them. See United States v. Giwa, 831 F.2d 538, 543-44 (5th Cir. 1987). After searching the containers, the police lawfully seized evidence that was in plain view and appeared incriminating. See Horton v. California, 496 U.S. 128 (1990) (plain view seizure justified where officer had probable cause to believe he had discovered incriminating evidence).

VII.

Chew also challenges the sufficiency of the evidence supporting his conviction on count 4)) possession with intent to distribute 2.75 grams of cocaine base. He alleges that he was a user of cocaine and that this cocaine was for his personal consumption. Again, we find ample evidence in the record to support Chew's conviction. Although his explanation is plausible, the jury chose not to believe it.

The 2.75 grams of cocaine were discovered in the same green army jacket from which Chew had retrieved the cocaine he had sold to Craig. A jury reasonably could believe that Chew kept his cocaine to sell in that jacket. Chew made three sales to Craig, and the police discovered ample additional evidence of drug trafficking activity in the washateria. From this evidence, the jury reasonably could conclude that Chew intended to sell this cocaine.

VIII.

Finally, Chew argues that his conviction on count 7, of knowingly and intentionally carrying a firearm during and in relation to a drug trafficking crime, is against the overwhelming weight of the evidence. He alleges that he kept the gun in the washateria only for self protection. Again, we find no merit to Chew's argument and find ample evidence supporting the conviction.

The gun was sitting on the desk in plain view during the transaction with Craig. Chew stood not more than two feet from the

pistol and placed the proceeds of the transaction next to the gun. Chew could have used this weapon to protect the drugs. See United States v. Beverly, 921 F.2d 559, 563 (5th Cir.), cert. denied, 111 S. Ct. 2869 (1991) (finding sufficient evidence to support conviction where gun was available to protect drugs). Moreover, the fact that the gun was sitting in plain view had the potential to intimidate a buyer of drugs. See United States v. Coburn, 876 F.2d 372 (5th Cir. 1989) (holding that the statute is violated where the actor had the opportunity to display the weapon to intimidate others).

The judgment of conviction is AFFIRMED.