IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7622
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROGER FRANKLIN HOLTZCLAW,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Mississippi
(CR-H92-00003(P)(R))

(May 19, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant Roger Franklin Holtzclaw appeals his conviction by a jury for bank robbery in violation of 18 U.S.C. § 2113(a). He complains of speedy trial denials under the Speedy Trial Act and the Sixth Amendment, and of the district court's

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

refusal to suppress 1) evidence found in a consensual search and, 2) his confession. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

On September 29, 1989, Holtzclaw was arrested by state officials for a bank robbery that occurred on May 10, 1989, in Gulfport, Mississippi.[1] Late in November that year, after the state prosecution had begun, Holtzclaw contacted FBI Special Agent George Holder, informed Holder of that prosecution, and expressed an interest in providing the FBI with information about "two other federal violations." Early in March 1990, Holtzclaw and the government signed a "memorandum of understanding," in which Holtzclaw allegedly agreed to plead guilty to two federal bank robbery charges.[2]

On April 12, 1990, a federal bill of information was filed charging Holtzclaw with the Gulfport bank robbery and another bank robbery that had taken place in Hattiesburg, Mississippi, on September 7, 1989. During a meeting with Agent Holder on April 23, 1990, Holtzclaw confessed to both bank robberies. Sometime between May 9 and June 15, 1990, however, Holtzclaw's interest in cooperating with the FBI and the government evaporated. According to Agent Holder, the memorandum of understanding had presumably been "vacated."

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[1] Portions of the record indicate that the arrest took place on September 25, 1989.

[2] This "memorandum of understanding" does not appear in the record.

The state prosecution of Holtzclaw for the Gulfport bank robbery ended on January 8, 1991, with a jury verdict of guilty. Holtzclaw received a 25-year prison sentence. On March 19, 1991, the state indictment against Holtzclaw for the Hattiesburg bank robbery was dismissed.

A year later, in January 1992, the district court granted the government permission to dismiss without prejudice the federal information charging Holtzclaw with the two bank robberies. Then on May 6, 1992, Holtzclaw was indicted in federal court for the Hattiesburg bank robbery. On June 9, 1992, he was arraigned, and twenty days later, on June 29, 1992, he filed a pretrial motion to dismiss the indictment for failure to grant him a speedy trial. He also filed two motions to suppress, one regarding evidence obtained from the warrantless search of his residence and the other regarding his April 23, 1990, confession to Agent Holder. All three motions were denied by the district court.

On September 10, 1992, the case went to trial. A jury found Holtzclaw guilty of the Hattiesburg bank robbery, and he received a prison sentence of 120 months. Holtzclaw now appeals his federal conviction and sentence for the Hattiesburg bank robbery.

II

ANALYSIS

A. Speedy Trial Act

Holtzclaw argues that the district court erred in denying his motion to dismiss the indictment, alleging that he was denied a speedy trial as guaranteed by 18 U.S.C. §§ 3161-3174, the Speedy

Trial Act. According to Holtzclaw, the Speedy Trial Act was violated because he did not have a trial or go before a judicial officer after the April 12, 1990, bill of information was filed. Id. But Holtzclaw ignores the significant fact that the bill of information was dismissed without prejudice. As the information was thus dismissed, the government was not improper in charging Holtzclaw a second time. See United States v. Castle, 906 F.2d 134, 139 (5th Cir. 1990) ("But dismissal without prejudice is not an ineffectual remedy, forcing the government to reindict in the face of statute of limitation pressures, among other things."); see also United States v. Taylor, 487 U.S. 326, 342, 108 S.Ct. 2413, 101 L.Ed.2d 297 (1988).

The Speedy Trial Act provides:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. . .

18 U.S.C. § 3161(c)(1). Although the bill of information was filed on April 12, 1990, and the indictment was filed over two years later, on May 6, 1992, Holtzclaw did not go before a judicial officer until June 9, 1992, the date of his arraignment under the indictment. According to § 3161(c)(1), therefore, the seventy-day period did not begin to run in this case until June 9, 1992. See United States v. Snyder, 707 F.2d 139, 142 (5th Cir. 1993) (defendant arraigned after indicted).

In addition, the seventy-day period was tolled by the pretrial motions. Holtzclaw filed three pretrial motions on June 29, 1992, which were not disposed of until September 9, 1992. The period between June 29 and September 9, 1992, therefore, is excluded in computing the time within which the trial should have commenced. 18 U.S.C. § 3161(h)(1)(F). There was therefore no violation of the Speedy Trial Act.

B. Sixth Amendment Speedy Trial

Holtzclaw also argues that the district court erred in denying his motion to dismiss the indictment for violation of the Sixth Amendment. He insists that, in addition to violation of the Speedy Trial Act, the government violated his right to a speedy trial as guaranteed by the Sixth Amendment. A literal reading of the Sixth Amendment suggests that the right to a speedy trial under that amendment attaches only when a formal charge is instituted and a criminal prosecution begins. United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). We have ruled, however, that the Sixth Amendment right to a speedy trial attaches at the time of arrest or indictment, whichever comes first, and continues until the date of trial. United States v. Walters, 591 F.2d 1195, 1200 (5th Cir.), cert. denied, 442 U.S. 945 (1979).

Constitutional speedy trial claims are resolved by examining four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertions of his rights; and (4) the prejudice to the defendant resulting from the delay. Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In

assessing prejudice, we look to three interests of the defendant: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern; and (3) limitation of the possibility that his defense will be impaired. Millard v. Lynaugh, 810 F.2d 1403, 1406 (5th Cir.), cert. denied, 484 U.S. 838 (1987).

The threshold consideration is whether the delay is of sufficient length to be deemed "presumptively prejudicial," thus requiring an inquiry into the other Barker factors. Millard, 810 F.2d at 1406. Here, the delay from the time of the first formal federal charge against Holtzclaw to the time of trial amounts to more than twenty-four months; the delay from the time of the original arrest to the time of trial amounts to almost three years. We have held that a thirteen-month delay between indictment and trial is "presumptively prejudicial." See Davis v. Puckett, 857 F.2d 1035, 1040-41 (5th Cir. 1988). We find that the delay in this case was "presumptively prejudicial." We therefore must examine the other Barker factors, i.e., the reason for the delay, the defendant's assertions of his rights, and the prejudice to the defendant resulting from the delay. See 407 U.S. at 530.

Regarding the first of the remaining Barker factorsSQthe reason for delaySQthe record reflects that Holtzclaw was involved in a state prosecution for the Gulfport bank robbery from the time of his arrest in September 1989 until early January 1991. The record further reflects that between March 1991 and January 21, 1992 (the date the information was dismissed), the FBI was collecting evidence from the Hattiesburg Police Department, trying

to locate witnesses, interviewing witnesses, and conducting fingerprint analyses. The time between January 21, 1992, and May 6, 1992 (the date the indictment was filed), is thus excluded from the computation. See MacDonald, 456 U.S. at 7 n.7. The record reflects that between May 6, 1992, and September 10, 1992 (the date of trial), Holtzclaw was arraigned, he filed three pretrial motions, and a hearing on the motions was held. Nothing in the record indicates that the government intentionally delayed going to trial, so the "reason" factor from Barker was not violated.

Regarding the next remaining Barker factor, the only evidence that Holtzclaw complained of the delay is a letter he wrote to the clerk of the federal district court asking for an adjudication on the information. This letter, however, was not filed until April 27, 1992, several months after the information was dismissed.

And as to the last remaining Barker factor, Holtzclaw has also failed to show prejudice. The record reveals that he was arrested in September 1989 and that in January 1991 he began serving a 25-year state prison sentence for the Gulfport bank robbery. The delay in beginning the federal trial for the Hattiesburg bank robbery charge, therefore, did not subject Holtzclaw to "oppressive pretrial incarceration." In addition, Holtzclaw has not shown how the delay subjected him to anxiety and concern.

Holtzclaw alleges that his defense was impaired by the inability to locate Shirley Mount Pearson. According to Holtzclaw, he was prejudiced by not being able to attack "the truth and

credibility of the statements which she gave to police officers which constituted their probable cause to arrest, search and interrogate the Defendant relative to the bank robbery." Holtzclaw's inability to attack Pearson's "truth" and "credibility," however, did not invalidate the police officers' probable cause to arrest Holtzclaw. See Illinois v. Gates, 462 U.S. 213, 230, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The "totality of the circumstances" indicates that the police officers had probable cause to arrest Holtzclaw. See id. at 230-31. Holtzclaw's argument, therefore, fails to establish prejudice.

Based on the entire Barker test, Holtzclaw's Sixth Amendment argument, although not necessarily frivolous, clearly fails. In addition, Holtzclaw has failed to show that the district court erred in denying his motion to dismiss the indictment.

C. Suppression of Evidence - Warrantless Search

Holtzclaw contends that a hat and bag obtained from his residence should have been suppressed because the officers who searched the residence did not have a search warrant. The district court found that the fruits of the search were admissible because there was a consent to search and no coercion. We review the district court's factual findings on a motion to suppress for clear error. United States v. Harrison, 918 F.2d 469, 472 (5th Cir. 1990).

Consent is one of the recognized exceptions to the requirement that searches by the government must be conducted pursuant to a warrant. United States v. Koehler, 790 F.2d 1256, 1259 (5th Cir.

1986). When more than one person has authority over the place or object of the intended search, consent to search may be given by any one person who exercises common authority over premises or effects. Id. Common authority rests on whether there was mutual use of the property by persons generally having joint access or control for most purposes. Id.

In September 1989 Holtzclaw and his former wife, Mickie Hofferbert, lived together in an apartment in Gulfport. Both Hofferbert and Holtzclaw had signed the lease to that apartment. On September 25, 1989, Hofferbert gave the police permission to search the apartment. The evidence establishes that Holtzclaw and Hofferbert shared control over the apartment. There is no record evidence that Hofferbert was coerced to grant consent to search. Accordingly, the district court's finding that the police had consent to search Holtzclaw's residence is not clearly erroneous.

D. Suppression of Evidence - Confession

Holtzclaw argues that the district court erred in denying his motion to suppress the confession he made to Agent Holder on April 23, 1990. Holtzclaw alleges that the confession was the product of an illegal arrest and of undue coercion. According to Holtzclaw, his arrest in September 1989 was illegal, thereby rendering his confession illegal.

Holtzclaw's argument fails for several reasons. First, the police officers had probable cause to arrest him. Probable cause consists not of weighing each individual piece of information but rather of considering the information as a "laminated total."

United States v. Espinoza-Seanez, 862 F.2d 526, 532 (5th Cir. 1988). Probable cause also consists of a synthesis of what the police "have heard, what they know, and what they observed as trained officers." Id. at 532-33.

The record reflects that Clarence S. Vance, Jr., then a detective with the Gulfport Police Department, received a verbal and taped statement from Shirley Mount Pearson on September 25, 1989, in which Pearson indicated that a person by the name of "Roger" and one John Sharpe Williams had "done a bank job in Hattiesburg." According to Vance, Williams showed Pearson the bank that he and "Roger" had robbed. Pearson also told Vance that she and Williams had gone to a residence in Gulfport, and that she had given Vance directions to that address.

Vance received confirmation that a robbery had taken place in Hattiesburg. Police officers then located the exact address about which Pearson had spoken. When the police went to this residence, a woman later identified as Mickie Hofferbert came to the door. The police officers asker her if "Roger" lived there. She confirmed that a Roger Holtzclaw lived at that residence, then consented to the search of the residence. During the search, Hofferbert told the police officers that one day Holtzclaw returned with "some money" and that he had told her that "he had robbed something." During the search, moreover, the police officers found Holtzclaw "in the bathroom hiding in a cabinet like, laundry bin type thing." The evidence thus establishes that the police officers had probable cause to arrest Holtzclaw when they found

him.

Second, even if we assume arguendo that the arrest was illegal, sufficient intervening events broke the causal connection linkage between the arrest and the confession. See Taylor v. Alabama, 457 U.S. 687, 690, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982). The record reflects that the confession Holtzclaw gave to Agent Holder, a federal officer, took place almost seven months after his state arrest. In addition, the record shows that Holtzclaw did not show any hesitancy toward cooperating with the FBI. During the interview that resulted in the confession, moreover, Holtzclaw never asked for a lawyer and never requested that the questioning stop.

Third, the evidence indicates that Holtzclaw voluntarily made the confession to Agent Holder.[3] Holtzclaw contends that he was coerced into giving the confession by the oppressive conditions in which he found himself after receiving medical treatment. At the suppression hearing, however, Holtzclaw testified that Agent Holder did not coerce or threaten him into confession. Neither does the record otherwise reflect any coercion. Holtzclaw's argument that his confession was not voluntary therefore fails. See Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (coercive police activity is a necessary predicate to a finding that a confession was not voluntary); Raymer, 876 F.2d at 386-87.

[3] The government bears the burden of proving by a preponderance of the evidence that the confession was voluntary; the ultimate issue of voluntariness is a question of law. United States v. Raymer, 876 F.2d 383, 386 (5th Cir.), cert. denied, 493 U.S. 870 (1989).

For the foregoing reasons, Holtzclaw's conviction and sentence are

AFFIRMED.