IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7635
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEON BUTCHER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR 92 41 1)

May 25, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.*

PER CURIAM:

Convicted and sentenced to 128 months imprisonment for conspiracy and possession with intent to distribute marijuana, Leon Butcher appeals. He asserts that he did not give consent to the Border Patrol to search his truck in which nearly one and one-half tons of marijuana was concealed; if he did, it was involuntary. He also objects to the court's admission under Fed. Rule Evid. 404(b)

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of an earlier arrest when he was transporting the same product. We find no error and affirm the conviction.

DISCUSSION

Butcher first argues that the district court's finding that he consented to the search of the trailer is clearly erroneous. At the suppression hearing, Agent Qualia, who had been a border patrol agent for less than one year at the time, testified that when he questioned Butcher about his citizenship at the Falfurrias checkpoint, Butcher appeared nervous, because he hesitated in his response, avoided eye contact, and dragged heavily on his pipe with shaking hands. This aroused his suspicions, and so he began a closer inspection of the rig and trailer. At the rear of the trailer, he noticed a bolt on the door handle, and he suspected that the trailer doors could have been opened without disturbing the seals. He asked Butcher, "May I look in the hatch?" Butcher said that he could. When Qualia opened the hatch, he smelled a strong odor of marijuana and saw sheets of cardboard on top of the load. He climbed down, asked Butcher if he could inspect his load, and Butcher said he could. Butcher was not advised of his right to refuse consent.

As the rig was moved into secondary, Qualia shared his findings with Agent Slowinski and asked Slowinski to have a canine inspect the load. Slowinski and the dog went inside the trailer, and the dog alerted to the presence of contraband. Slowinski testified that he smelled the odor of marijuana before the doors to the trailer were opened.

Butcher testified at the suppression hearing that Agent Qualia never asked permission to open the driver's hatch or the rear doors of the trailer. Butcher also testified that the canine never entered the trailer.

The district court denied the motion to suppress. The district court credited the testimony of the two agents over Butcher's testimony and found that Butcher had consented to the search.

Butcher challenges the court's credibility choice. As he did at the suppression hearing, Butcher points to the fact that Qualia's report does not mention obtaining consent to open the hatch. Butcher contends that the court's finding that Qualia has always maintained that he received permission to open the hatch is clearly erroneous, and that the inconsistency between Qualia's report and his testimony makes his story of consent not credible.

This Court will not reverse a district court's finding of consent unless it is clearly erroneous. U.S. v. Kelley, 981 F.2d 1464, 1470 (5th Cir. 1993). "Where the judge bases a finding of consent on the oral testimony at a suppression hearing, the clearly erroneous standard is particularly strong since the judge had the opportunity to observe the demeanor of the witnesses." Id. (internal quotations and citation omitted).

Butcher had the opportunity to make the same argument challenging the credibility of Qualia to the district judge, and the judge, citing Qualia's lack of experience as a possible reason why his report was not as thorough as it should have been, found

that Qualia was credible based on his appearance on the stand, and the fact that Qualia did not need to manufacture consent because he and Slowinski both testified that they could smell the marijuana before the doors of the trailer were opened. The district court's credibility choice should not be disturbed, and its finding of consent is not clearly erroneous.

Butcher also argues that if consent was given, it was not voluntary, but that he merely went along with Qualia's orders. Butcher did not make this specific argument in the district court, and the Government argues that this issue should be reviewed for plain error. Although the Government's observation is correct, the district court did make findings relevant to the issue of voluntariness, and so this Court can review those findings for clear error.

Consent to search must be made freely and voluntarily in order to be valid. U.S. v. Olivier-Becerril, 861 F.2d 424, 425 (5th Cir. 1988). Whether consent is voluntary is a factual question determined from the totality of the circumstances, reviewed for clear error. Id. at 425-26. This determination focuses on six factors: "(1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be

found." Id. at 426 (citations omitted). No one of these factors is dispositive. Id.

Butcher argues that the following factors compel a finding of involuntary consent: 1) that he was stopped at a border checkpoint and did not feel free to leave; 2) that he only cooperated with the agents to the degree that he followed their instructions; 3) Qualia did not inform him of his right to refuse to consent; 4) he is 58 years old with an eighth grade education; and 5) it was inconceivable that a person, knowing that the trailer contained over 3,000 pounds of marijuana, would consent to a search based on a belief that no incriminating evidence would be found.

Although Butcher was not free to leave the secondary inspection area, the district court found that Qualia was not an intimidating figure, that the circumstances were not intimidating, and that Butcher did not indicate that he felt that his freedom of choice was taken away. He credited Qualia's testimony that Butcher was cooperating and so he decided to proceed to search based on his consent. Although knowledge of the right to refuse consent is a factor, it is not required. Olivier-Becerril, 861 F.2d at 426. Lack of freedom to leave a border checkpoint secondary inspection area does not compel a finding of involuntariness. Id. A limited education, in the absence of any evidence of any problems in communication or lack of understanding, is of limited relevance to the determination. U.S. v. Gonzales, 842 F.2d 748, 755 (5th Cir. 1988), overruled on other grounds, U.S. v. Hurtado, 905 F.2d 74 (5th Cir. 1990). Butcher does not claim that he did not understand

what Qualia was asking. Finally, it is conceivable that he could have thought no evidence would be discovered, for the reasons cited by the Government.

The district court's implicit finding that Butcher voluntarily consented is not clearly erroneous.

Butcher also contends that the district court abused its discretion under Fed. R. Evid. 404(b) by admitting evidence of another drug offense committed by him. He argues that the Government did not give sufficient notice of its intention to use such evidence. He also argues that the evidence was irrelevant and that its probative value was substantially outweighed by its prejudicial effect.

At a pretrial conference on June 2, the Government notified Butcher that it had just become aware of his 1991 arrest for possession with intent to distribute marijuana in Louisiana, and that they were investigating the circumstances of that arrest. The next day, after trial had begun, the Government informed Butcher that it had a copy of an offense report showing that on June 2, 1991, Butcher was present in a van stopped for a traffic violation and that the van contained 29 pounds of marijuana. R. 12, 7. The United States Attorney stated that he was attempting to contact the arresting officer and would keep the defendant informed.

The Government offered the testimony of Mark Hebert, the arresting officer, in rebuttal. Hebert testified that he made a traffic stop of a van in which Butcher was a passenger. Janet

Garcia, the driver of the van, consented to a search, and Hebert found 29 pounds of marijuana in a plastic container behind the driver's seat. The van was registered in Butcher's name, but he told Hebert that it was a mistake and that the van actually belonged to Garcia. Butcher denied any knowledge of the marijuana. Butcher was charged with possession with intent to distribute marijuana, but Hebert did not know the disposition of that charge.

Fed. R. Evid. Rule 404(b) provides that upon request by the accused, the prosecution must give reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of evidence of other crimes, wrongs, or acts it intends to introduce at trial.

Butcher's attorney conceded that he did not make an oral or written request for notice of the Government's intention to use Rule 404(b) evidence. Butcher also concedes in his brief that the Government informed defense counsel of its intent to use evidence of this arrest as soon as possible after the evidence was discovered. The district court denied Butcher's objection to the evidence on grounds of lack of notice because Butcher had not filed a request and because there was no evidence that the Government had intentionally delayed notice. The district court did not abuse its discretion in so ruling.

On the merits of admitting the evidence, Rule 404(b) allows the admission of extraneous offenses to prove knowledge or intent. U.S. v. Gonzales-Lira, 936 F.2d 184, 189 (5th Cir. 1991). In U.S. v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc),

cert. denied, 440 U.S. 920 (1979), this Court established a two-part test for determining the admissibility of evidence of other offenses. The district court must determine 1) that the evidence is relevant to an issue other than the defendant's character, and 2) that the probative value of the evidence is not substantially outweighed by its prejudicial effect. Id. This Court reviews the admission of this evidence for abuse of discretion. U.S. v. Moye, 951 F.2d 59, 61 (5th Cir. 1992).

To prove relevance, the government must first show that the defendant actually committed the bad act it seeks to use against him. Gonzales-Lira, 936 F.2d at 189-90. At trial, Hebert testified that he executed a traffic stop of a 1983 Ford van on June 2, 1991, on Interstate Highway 12 in Covington, Louisiana. As he approached the van, the deputy detected the odor of marijuana. The driver, Janet Garcia, was accompanied by Butcher. The deputy discovered that Butcher was the registered owner of the van, although Butcher claimed that Garcia actually owned it. A search of the van revealed 29 pounds of marijuana behind the driver's seat next to Butcher's suitcase. Butcher told Hebert that his suitcase was in the front of the van by him. Butcher denied knowledge of the marijuana. This evidence is sufficient for a reasonable jury to find that Butcher committed the prior offense.

Butcher also argues that the prior offense is not sufficiently similar to this offense, attacking the admissibility of the evidence under the second part of the Beechum test. Disagreeing, the court listed the points of similarity: the

transportation of marijuana on public highways, possession of marijuana with intent to distribute, vehicles in which there was another person, the temporal closeness of the offenses, an attempt to provide an innocent explanation regarding the ownership of the vehicle and the presence of large quantities of cash, and denial of knowledge of the presence of marijuana in a vehicle owned by him. The court found that this evidence was relevant to show Butcher's knowledge and intent. Under these circumstances, the district court did not abuse its discretion in concluding that the probative value of this evidence to prove knowledge was not substantially outweighed by its prejudicial effect. See Moye, 951 F.2d at 62.

For these reasons, the judgment of the conviction is **AFFIRMED**.