UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-7766

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALVIN MAGEE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(CR J92-00067-L)

(April 22, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Defendant Alvin Magee pleaded guilty to conspiring to possess with intent to distribute cocaine base, in violation of 21 U.S.C. § 846 (1988), and to using a firearm during the commission of a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1) (1988 & Supp. IV 1992). The district court sentenced Magee to consecutive terms of imprisonment of 175 months for the conspiracy

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

count and 60 months for the firearms count.[1] Magee now appeals his conviction and sentence, contending that: (a) the district court improperly accepted his guilty plea to the charge of using a firearm in relation to a drug trafficking offense; (b) the district court improperly calculated his criminal history category; and (c) the district court utilized an unconstitutionally vague sentencing guideline and statute in sentencing him. Finding no error, we affirm.

I

On May 6, 1992, agents of the Drug Enforcement Administration ("DEA") observed the delivery of a package containing crack cocaine to a residence in Jackson, Mississippi.[2] Subsequently, the agents obtained a warrant, entered the residence, and found the package, a pipe bomb, a semiautomatic handgun, $22,691.00 in cash, and a radio scanner receiver unit set to monitor law enforcement frequencies. The agents then arrested Magee, who was charged with conspiring to possess with intent to distribute cocaine base and with using a firearm during the commission of a drug trafficking offense. Magee and the government entered into a Memorandum of Understanding whereby Magee agreed to plead guilty to the charges.

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[1] The district court also sentenced Magee to a five-year term of supervised release and imposed a $100 special assessment.

[2] DEA agents received information from employees of Airborne Express indicating that an individual fitting the profile of a drug courier sent a package to a residence in Jackson, Mississippi. Drug-sniffing canines obtained from the Jackson Police Department alerted to the package. Based upon that information, DEA agents obtained a search warrant and discovered that the package contained eleven pounds of crack cocaine. The agents then began surveillance outside the residence and delivered the package.

At the subsequent rearraignment hearing, Magee testified that the government's recitation of the factual basis for the plea was correct and admitted his guilt. The district court accepted Magee's plea and sentenced him to a 235 month term of imprisonment. Magee now appeals his conviction and sentence.

II

Magee initially contends that the district court erroneously accepted his guilty plea to using or carrying a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1). Magee asserts that the government failed to demonstrate that the weapon was connected in any manner to the underlying drug offense. Consequently, according to Magee, the record provides an insufficient factual basis for the guilty plea, and the district court therefore was obligated under Federal Rule of Criminal Procedure 11(f) to disregard the plea.

Rule 11(f) requires that "notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Fed. R. Crim. P. 11(f). Accordingly,"[t]he sentencing court must satisfy itself, through an inquiry of the defendant or examination of the relevant materials in the record, that an adequate factual basis exists for the elements of the offense." *United States v. Adams*, 961 F.2d 505, 508 (5th Cir. 1992). Thus, the "record must reveal specific factual allegations supporting each element of the offense." *Id*. at 508. To support a conviction in the instant case, the record

must demonstrate "that the accused `used' or `carried' a firearm `during and in relation' to a prosecutable drug trafficking crime." *United States v. Pace*, 10 F.3d 1106, 1117 (5th Cir.); *see also Adams*, 961 F.2d at 505.

"`Use' does not require the government to prove actual use such as the discharging of or brandishing of the weapon. [Instead, t]he government may meet its burden by simply showing that the weapons facilitated, or could have facilitated, the drug trafficking offense." *Pace*, 10 F.3d at 1117. "Weapons in the home may facilitate a drug crime because the defendants could use the guns to protect the drugs." *United States v. Capote-Capote*, 946 F.2d 1100, 1104 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2278, 119 L. Ed. 2d 204 (1992). Furthermore, "the presence of loaded firearms at a defendant's home containing drugs, money and ammunition . . . may be sufficient to establish [that a] firearm" was used "during and in relation to" a drug trafficking offense. *Pace*, 10 F.3d at 1117. We consider the acceptance of a guilty plea to be a factual finding by the district court that an adequate factual basis exists for the plea))i.e., that the defendant used or carried a firearm in the prohibited manner. *Id*. at 509. We review such a finding under the clearly erroneous standard. *Id*.

Magee argues that the gun was not connected to the drug offense because a large quantity of firearms was not found in Magee's house.[3] We conclude, however, that a sufficient factual

[3] Magee cites primarily to cases reviewing convictions under § 924(c) using the so-called "fortress theory." "In a nutshell, the `fortress theory' line of cases states that `the

basis exists in the record to support the district court's acceptance of Magee's guilty plea. After the package containing the cocaine was delivered to Magee's residence, DEA agents searched the residence and found the package concealed behind the fence in the rear of the residence. In the room occupied by Magee, the agents discovered a safe containing cash in the amount of $22,691, a semiautomatic pistol, and a pipe bomb. In addition, a radio scanner receiver unit set to monitor law enforcement frequencies was found. Moreover, Magee admitted in open court that this factual recitation was correct. Based upon this factual scenario, the district court's finding that Magee "used" a firearm "during and in relation to" a drug offense is not clearly erroneous. The weapon at issue was available to protect the drugs had Magee chosen to do so. *See Pace*, 10 F.3d at 1118-20 (collecting cases); *see also Capote-Capote*, 946 F.2d at 1104 (evidence that a machine gun was contained in a zipped bag in a closed drawer sufficient for a jury to conclude that it could have facilitated a drug transaction); *United States v. Beverly*, 921 F.2d 559, 563 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2869, 115 L. Ed. 2d 1035 (1991) (evidence of two revolvers found in a safety deposit box under a mattress sufficient to allow a jury to conclude that the firearms were used "during and in relation to" the drug

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sheer volume of weapons and drugs makes reasonable the inference that the weapons involved were carried in relation to the predicate drug offense since they increase the likelihood the drug offense will succeed.'" *Pace*, 10 F.3d at 1117 (quoting *United States v. Wilson*, 884 F.2d 174, 177 (5th Cir. 1989)). The facts of this case do not support application of the fortress theory.

trafficking offense). Accordingly, the district court did not clearly err in accepting of Magee's guilty plea.

III

Magee next challenges the manner in which the district court determined his sentence. Prior to Magee's arrest for the instant federal offense, he had pleaded guilty in Mississippi state court to a cocaine possession charge. Pursuant to the Mississippi statutory scheme, the state court did not enter a judgment of guilty. Instead, the state court deferred further proceedings and placed Magee on probation for eighteen months. When sentencing Magee for the instant federal offenses, the district court assessed one criminal history point as a result of Magee's prior guilty plea in state court. *See* United States Sentencing Commission, *Guidelines Manual*, §§ 4A1.1(c) & 4A1.2(f) (Nov. 1991). Additionally, because Magee committed the federal offenses while on probation from the state plea, the district court imposed two criminal history points.[4] *See* U.S.S.G. § 4A1.1(d). Consequently, the district court placed Magee in Criminal History Category II. *See* U.S.S.G. Chapter 5, Part A.

Magee does not challenge the facts underlying the imposition of the three criminal history points. Rather, he complains that the district court both misinterpreted the guidelines and misapplied the guidelines to the facts. We review the district court's application of the guidelines *de novo*. *See United States*

[4] Magee objected to the imposition of all three criminal history points in his written objections to the Presentence Investigation Report and orally at the sentencing hearing.

v. Fitzhugh, 984 F.2d 143, 146 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 259, 126 L. Ed. 2d 211 (1993). A sentence assessed under the guidelines may be disturbed only if the sentence was "imposed in violation of law, as a result of an incorrect application of the sentencing guidelines, or . . . outside of the applicable guideline range and . . . unreasonable." *Id*. (citation omitted).

A

Magee contends that the district court erred in determining that the diversionary disposition resulting from the state court drug charge was a prior sentence under U.S.S.G. § 4A1.1(c).[5] He asserts that the diversionary disposition created by Miss. Code. Ann. § 41-29-150(d)(1) (1993)[6] is excluded from the category of

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[5] Section 4A1.1(c) provides for the imposition of one criminal history point "for each prior sentence" involving less than 60 days imprisonment.

[6] This section provides, in pertinent part:

> If any person who has not previously been convicted of violating section 41-29-139, or the laws of the United States or of another state relating to narcotic drugs . . . *is found to be guilty* of a violation of subsection (c) or (d) of section 41-29-139, after trial or upon a plea of guilty, the court may, without entering a judgment of guilty . . . defer further proceedings and place him on probation upon such reasonable conditions as it may require and for such period, not to exceed three (3) years, as the court may prescribe.

Miss. Code Ann. § 41-29-150(d)(1) (emphasis added). Although the record and the briefs are unclear as to whether Magee's deferred prosecution occurred pursuant to Miss. Code Ann. § 41-29-150(d)(1) or Miss. Code Ann. § 99-15-26(1) (Supp. 1991), the state court order placing Magee on probation recites that it was entered pursuant to § 41-29-150. In any event, Magee concedes that the legal consequences are identical regardless which statute the state court utilized. Accordingly, we analyze

prior sentences by § 4A1.2(f).[7] Thus, according to Magee, the district court improperly assessed one criminal history point, which incorrectly placed him in Criminal History Category II.

We have previously determined that a diversionary disposition resulting from an admission of guilt is properly counted as a prior sentence under § 4A1.1(c). *See United States v. Giraldo-Lara*, 919 F.2d 19, 22-23 (5th Cir. 1990). The record affirmatively indicates that Magee entered a guilty plea in the state prosecution. Moreover, the Mississippi statute only applies if a defendant "is found to be guilty . . . after trial or upon a plea of guilty." Miss. Code Ann. § 41-29-150(d)(1). Thus, under the terms of § 4A1.2(f), the diversionary disposition at issue was properly counted as a "prior sentence" under § 4A1.1(c). *See Giraldo-Lara*, 919 F.2d at 22-23; *see also United States v. Vela*, 992 F.2d 1116 (10th Cir. 1993) (construing a similar Oklahoma statute); *United States v. Hatchett*, 923 F.2d 369, 376-77 (5th Cir. 1991) (following *Giraldo-Lara*). Accordingly, the district court correctly assessed one criminal history point for Magee's prior state court sentence.

B

Magee also challenges the district court's decision to assess two criminal history points because Magee committed the instant offenses while on probation for the state drug offense. *See*

Magee's arguments using the language of § 41-29-150.

[7] Section 4A1.2(f) states, "Diversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt . . . in a judicial proceeding is counted as a sentence under § 4A1.1(c) even if a conviction is not formally entered . . . ."

U.S.S.G. § 4A1.1(d) (providing for the imposition of two criminal history points "if the defendant committed the instant offense while under any criminal justice sentence, including probation"). Magee contends that because the diversionary disposition in state court is not a sentence under § 4A1.2(f) and § 4A1.1(c), criminal history points may not be assessed under § 4A1.1(d).

The Commentary to § 4A1.1(d) defines the term "criminal justice sentence" as a sentence "countable" under § 4A1.2. *See* U.S.S.G. § 4A1.1, comment. (n.4). Because the prior diversionary disposition in state court was countable under § 4A1.2(f), we conclude that the district court properly assessed two criminal history points under § 4A1.1(d). *See United States v. Arellano-Rocha*, 946 F.2d 1105, 1107 (5th Cir. 1991).

IV

Magee next asserts that § 4A1.2(f) is unconstitutionally vague. Magee also contends that the firearms statute that he violated))18 U.S.C. § 924(c)(1)))is void for vagueness.

> "It is a fundamental tenet of due process that `[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.' A criminal statute is therefore invalid if it `fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.' So too, vague sentencing provisions may post constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute."

United States v. Batchelder, 442 U.S. 114, 123, 99 S. Ct. 2198, 2203, 60 L. Ed. 2d 755 (1979) (citations omitted). Whether a sentencing guideline or a criminal statute is void for vagueness is a question of law that we review *de novo*. *See United States v.*

Nevers, 7 F.3d 59, 61 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1124, ___ L. Ed. 2d ___ (1994).

A

Magee contends that an individual who is sentenced pursuant to the diversionary program established by Miss. Code Ann. § 41-29-150(d)(1) cannot predict what consequences, if any, he might suffer if later sentenced under the Guidelines. According to Magee, his guilty plea did not result in a "finding of guilt" by the state court because the state court refused to accept it. Thus, Magee concludes that the first sentence of § 4A1.1(f))"[d]iversions from the judicial process *without a finding of guilt* (*e.g.*, deferred prosecution) is not counted"))barred the district court from considering his state court guilty plea. Magee argues that because the second sentence of § 4A1.1(f))"[a] diversionary disposition resulting from *a finding or admission of guilt* . . . is counted as a sentence"))conflicts with the first, a person of ordinary intelligence cannot determine which criminal dispositions fall under the two provisions in the section.

As applied here, § 4A1.2(f) is not unconstitutionally vague. *See United States v. Cavalier*, ___ F.3d ___, ___, slip op. at 3315 n.5 (5th Cir. March 14, 1994) (noting that a criminal statute is not unconstitutionally vague if, as applied to the situation at hand, it is sufficiently definite). As we stated earlier, § 41-29-150 is applicable only when the defendant is "found to be guilty . . . after trial or upon a plea of guilty." Thus, the statute specifically required the state court to find that Magee was guilty

of the crime to which he pleaded guilty. Consequently, Magee's prior criminal disposition is explicitly controlled by both sentences of § 4A1.2(f). Accordingly, we conclude that U.S.S.G. § 4A1.2(f) is not unconstitutionally vague as applied to Magee.

B

Magee next asserts that 18 U.S.C. § 924(c)(1) does not provide clear guidance as to what activities constitute possession of a firearm in relation to a drug trafficking crime. Accordingly, he asserts that a person of ordinary intelligence cannot determine what conduct § 924(c)(1) proscribes.

Section 924(c)(1) provides that "[w]hoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . ." We have explained the language of § 924(c)(1) in numerous decisions. *Eg., United States v. Thomas*, 12 F.3d 1350, 1361-62 (5th Cir. 1994); *Pace*, 10 F.3d at 1117-20; *United States v. Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.), *cert. denied*, 498 U.S. 824, 111 S. Ct. 76, 112 L. Ed. 2d 49 (1990). These decisions establish that "`[u]se' does not require the government to prove actual use such as the discharging of or brandishing of the weapon. The government may meet its burden by simply showing that the weapons facilitated, or could have facilitated, the drug trafficking offense." *Pace*, 10 F.3d at 1117. Further, we have construed "during and in relation to" to mean "`that the government is only obliged to show that the

firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking . . . .'" *Id*. (citation omitted).

"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *United States v. National Dairy Prod. Corp*., 372 U.S. 26, 32, 83 S. Ct. 594, 597-98, 9 L. Ed. 2d 561 (1963). The language of § 924(c)(1) and our clarifying decisions allow a person of ordinary intelligence to reasonably understand that the statute prohibits the presence of a firearm in a residence containing a relatively large quantity of crack cocaine, a pipe bomb, and a radio scanner set to monitor law enforcement frequencies. *See United States v. Ivy*, 973 F.2d 1184, 1189 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1826, 123 L. Ed. 2d 455 (1993) (finding that a gun discovered in a briefcase, which contained cash and a cocaine test kit, "was clearly being `used' in the sense of being available to provide protection during [the defendant's] drug trafficking activities"); *United States v. Hoch*, 837 F. Supp. 542, 545 (W.D.N.Y. 1993) (holding that the language of 924(c) permits an individual to reasonably understand the conduct it prohibits); *cf*. *Gentile v. State Bar of Nevada*, ___ U.S. ___, ___, 111 S. Ct. 2720, 2731, 115 L. Ed. 2d 888 (1991) (declaring a disciplinary rule promulgated by the Nevada Supreme Court to be void for vagueness because of its grammatical structure and its "lack of clarifying interpretation by the state court"). "Where a defendant embarks on a patently

unlawful course of conduct, due process does not require that a statute demark the limits of his offense with algebraic exactitude." *United States v. Abod*, 770 F.2d 1293, 1297 (5th Cir. 1985).

IV

For the foregoing reasons, we AFFIRM the judgment of the district court.