

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8391

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BOBBY JAMES CAMMOCK,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas
(A-92-CR-50)

(June 30, 1994)

Before GARWOOD, SMITH, and STEWART, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Bobby James Cammock appeals his conviction of, and sentence for, possession of a firearm by an illegal alien. Finding no reversible error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Cammock is a Jamaican citizen and has been admitted to the United States eleven times since 1985. According to testimony at his trial, he had been scheduled by the Immigration and Naturalization Service ("INS") for deportation hearings several times but avoided them by leaving the country and returning legally.

On May 9, 1991, Cammock arrived in the United States on a tourist visa that allowed him to stay legally in the United States for no more than six months, until November 8, 1991. The next day, Cammock was a passenger in a vehicle stopped for a traffic violation. The inside moldings were loose, and there was an odor of marihuana. A consent search revealed a nine-millimeter Stallard Arms semi-automatic handgun under the front passenger seat; a loaded clip in the glove box; and crack cocaine, a digital scale, and other paraphernalia in the trunk. Cammock had a black bag containing \$5,152 in U.S. currency, \$6,781 in Jamaican currency, gold jewelry, and twenty to thirty keys.

Cammock and the other two occupants were charged with possession of marihuana with intent to distribute. Sometime after this, deportation proceedings were initiated against Cammock, and he posted bond and was released. The bond remained in effect at least through his next arrest in 1992.

On March 4, 1992, Cammock was stopped for a traffic violation while driving the same vehicle. He did not stop immediately, but pulled onto a residential street, "hurriedly" exited the vehicle,

and locked the doors. While Cammock and the officer proceeded to a carport area, the officer noticed a partially covered black bag on the seat of the car. At the carport, Cammock removed a small baggie from his pocket that appeared to contain marihuana.¹ When the officer patted Cammock down, he felt bulges like bundles of currency.

Cammock attempted to escape and struggled with the officer. During the struggle, a female approached and asked Cammock whether he wanted her to take control of the bag in the car. Cammock mumbled "yes" and gave the woman the keys, and she got the bag from the car and left. After Cammock was subdued, the officer found \$3,142 and a telephone beeper on him.

A citizen riding with the officer looked in the driver's side of the car with a flashlight and noticed a nine-millimeter Ruger handgun on the passenger's side floorboard. The officer took the gun and discovered that it was fully loaded. The officer testified that the butt of the gun was sticking out from under the seat and that he believed it could have been seen from the driver's side.

The gun was determined to have been purchased in 1990 from an Austin gun shop and then stolen in October 1991. A friend of Cammock's, Linda Ford, stated that the Ruger was hers and that she had bought it from a pawn shop. The pawn shop records, however, showed that she had bought the Stallard, not the Ruger. A firearms

¹ It was later determined that the bag did contain .02 ounces of marihuana.

expert testified that the Ruger was never made in Texas and would have traveled in interstate commerce to get there.

Cammock was indicted for (1) possession of a firearm while being an alien illegally and unlawfully in the United States, in violation of 18 U.S.C. § 922(g)(5); (2) possession of marihuana, in violation of 21 U.S.C. § 844(a); (3) reception and concealment of a stolen firearm, in violation of 18 U.S.C. § 922(j); and (4) possession of a firearm while under indictment for a felony offense, in violation of 18 U.S.C. §§ 922(n) and 924(a)(1). After a jury trial, Cammock was convicted on all counts. At sentencing, the district court granted an upward departure, and Cammock was sentenced to 120, 12, 120, and 60 months' imprisonment on the respective counts.

II.

Cammock contends that the evidence was insufficient to establish that he was an illegal alien, that the firearm had traveled in interstate commerce, or that he had possessed the firearm. Since Cammock did not move for judgment of acquittal after the close of all evidence, his conviction is reviewed for "manifest miscarriage of justice." United States v. Thomas, 12 F.3d 1350, 1358 (5th Cir.) (citations omitted), cert. denied, 62 U.S.L.W. 3755 (U.S. May 16, 1994), and cert. denied, 62 U.S.L.W. 3773 (U.S. May 23, 1994). Such a miscarriage of justice would exist only if the record is "devoid of evidence

pointing to guilt" or if the evidence on a key element of the offense was "so tenuous that a conviction would be shocking." Id. (citation omitted). The evidence is reviewed in the light most favorable to the government, drawing all reasonable inferences in support of the verdict. United States v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988) (citation omitted).

A.

Cammock argues that he was not an illegal alien at the time of his arrest because he was under bond to the INS awaiting deportation proceedings. The government contends that Cammock was in the United States past the expiration date of his visa and that his bond to the INS does not change this illegal status.

The controlling case in this circuit is United States v. Iqbatayo, 764 F.2d 1039, 1040 (5th Cir.) (per curiam), cert. denied, 474 U.S. 862 (1985), where we said that "an alien who is in the United States without authorization is in the country illegally." In Iqbatayo, the defendant entered the country as a non-immigrant student, effective through December 20, 1984, conditioned on his remaining a full-time student. He did not remain a student, and in February 1984 he answered "no" to a Bureau of Alcohol, Tobacco, and Firearms form inquiring whether he was illegally in the United States. He was deported in May 1984 for failure to maintain his student status. We rejected his defense that, at the

time he purchased the gun, he was merely "deportable" and not illegal.

Cammock's situation is no different. Once his visa expired, he became illegal. Neither his pending deportation proceeding nor his bond to the INS changed this status. See, e.g., United States v. Bazargan, 992 F.2d 844, 848 (8th Cir. 1993).

Cammock also argues that the INS considered him free to remain in the United States on bond and that this court should defer to the agency's interpretation of its regulations. The Ninth Circuit, however, has rejected the argument that permission from the INS to remain in the United States is the same as being legally in the country. United States v. Garcia, 875 F.2d 257, 257-58 (9th Cir. 1989). This rule comports with Iqbatayo; the agency interpretation is irrelevant, and Cammock was an illegal alien at the time of his arrest.

B.

Cammock argues that there was insufficient proof to establish that the firearm was in or had been shipped or transported in interstate commerce, an element of the offense set out in § 922(j). We conclude that the testimony of the government's expert who stated that the gun was not manufactured in Texas was sufficient evidence on this point.

C.

Cammock also contends that the government failed to establish his control over the firearm. He argues that the only evidence linking him to the gun was that he had driven the car before, the car belonged to a friend of his, and he had been arrested previously in the car. He argues that the government's theory that the gun was visible from his position in the driver's seat is insufficient because there was a console between the two seats and the interior was dark blue. Cammock also argues that the fact that he had previously loaded the gun for his girlfriend is insufficient proof that he possessed or knew that the gun was in the car. According to Cammock, this does not constitute sufficient evidence of actual or constructive possession.

The government argues that the evidence was sufficient, particularly under a "manifest miscarriage of justice" standard, because the citizen-rider testified that he saw the gun through the window; the officer said that the butt was sticking out from under the seat; Cammock admitted he had handled the gun; Ford said that he had loaded the gun; and Cammock previously had driven the car and was the sole occupant on this occasion. "A person has constructive possession if he has `ownership, dominion or control over the contraband itself, or dominion over the premises in which the contraband is concealed.'" United States v. Cardenas, 748 F.2d 1015, 1019 (5th Cir. 1984) (quoting United States v. Salinas-Salinas, 555 F.2d 470, 473 (5th Cir. 1977)). Mere physical

proximity is not enough; there must be a nexus between the accused and the contraband. Id. at 1019-20. Constructive possession may be inferred, however, from dominion over the vehicle in which the contraband is located. United States v. Perez, 897 F.2d 751, 754 (5th Cir.), cert. denied, 498 U.S. 865 (1990). Cammock's argument is without merit.

III.

Cammock argues that the district court erred in failing to inform the jury that to find him guilty, it had to find beyond a reasonable doubt that at the time of his arrest he knew that he was an illegal alien and that the gun was stolen. Cammock argues that this instruction was required because § 924(a)(2) applies only to a "knowing" violation of § 922(g) or § 922(j).

Cammock did not object to the charge given. When an instruction is challenged for the first time on appeal, even an inaccurate instruction will be upheld in the absence of plain error. United States v. Sellers, 926 F.2d 410, 417 (5th Cir. 1991). Plain error exists "only when, considering the entire charge and evidence presented against the defendant, there is a likelihood of a grave miscarriage of justice." Id. (citation omitted).

Section 922(g)(5) does not require knowledge by the defendant of his illegal status. And with respect to Cammock's knowledge that the firearm was stolen, the district court did instruct the jury that they must find that Cammock knew or had reasonable cause

to believe that the gun was stolen. Therefore, there was no plain error.

IV.

Cammock further contends that the prosecutor misstated the burden of proof in closing argument and made other comments not supported by the evidence. Since Cammock failed to object to any comments, we review this claim for manifest miscarriage of justice. Thomas, 12 F.3d at 1367. After reviewing the record, we conclude that the comments did not amount to plain error.

V.

Cammock argues that the government obtained his conviction through perjured testimony. The basis of this argument is his belief that it was physically impossible for the citizen-rider and the officer to have seen the pistol under the passenger's seat if it was situated as they testified. A conviction resting on the knowing use of false testimony will be overturned only if there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. United States v. Miranne, 688 F.2d 980, 989 (5th Cir. 1982), cert. denied, 459 U.S. 1109 (1983).

In Miranne, the court rejected the defendant's argument because there was just a conflict in testimony and no hard evidence that the witness committed perjury, and because there was no

evidence of actual or constructive knowledge of perjury on the part of the prosecutor. Cammock's arguments alleging perjured testimony are simply a disagreement with that testimony. This disagreement does not amount to perjury and does not provide a ground to set aside the conviction.

VI.

Finally, Cammock contests the district court's upward departure based upon his extensive criminal history not accurately reflected in the criminal history category.² We agree with the district court that Cammock's extensive criminal history, with convictions at least every few years since 1960, was not adequately reflected by a criminal history category of VI. Over a dozen convictions in England were not counted in his category determination, and the district court adequately explained its basis for departure. See United States v. Lambert, 984 F.2d 658 (5th Cir. 1993) (en banc).

AFFIRMED.

² Cammock attempts to raise additional sentencing issues on appeal, disputing the base offense level and other matters. These issues were not raised before the district court and do not constitute plain error. See United States v. Hatchett, 923 F.2d 369, 376 (5th Cir. 1991).