UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8416
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

KENNETH STRAIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-91-CR-117 (01))

(March 4, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Kenneth Strain appeals his conviction and sentence for conspiracy to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. We **AFFIRM.**

I.

In July 1991, Stan Farriss, an undercover police officer, let it be known that he had a large quantity of marijuana to sell. Shortly thereafter, he was put in contact with David Hoot, who told

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 Pursuant to that rule, the court has determined that this opinion should not be published.

Farriss that he had some people lined up to do business. Hoot then arranged a meeting, and introduced Farriss to appellant Strain. During the meeting, which was recorded, Farriss showed Strain a sample of the marijuana; and Strain agreed to purchase 100 pounds at $700 per pound. Strain then left, promising to have the money ready in one hour.

An hour later, Farriss and Hoot met Strain at the location Strain had designated. Hoot got into Strain's truck, and they drove away. When they returned approximately five minutes later, Hoot informed Farriss that Strain did not want to show Farriss the money for fear of being arrested. Hoot said, however, that Strain had the $70,000 in a shoebox on the floorboard of the truck, and that he, Hoot, had seen and counted it. Shortly thereafter, Farriss gave the arrest signal to nearby officers. When they approached Strain, he exited his truck and started walking away from it. The officers ordered him back to the truck, however, and arrested him. They then searched the truck, and found $70,000 in a shoebox on the floorboard and a cellular telephone.

Following his indictment in August 1991, Strain moved to suppress the evidence obtained as a result of the warrantless arrest and search of his truck. The district court held a hearing, and determined that the arrest and search were supported by probable cause. In March 1992, Strain pleaded guilty to the conspiracy charge, reserving his right to appeal the warrantless arrest and search. Strain was sentenced to 60 months imprisonment, followed by five years of supervised release and a $10,000 fine.

II.

Strain contends that the district court erred in (1) finding that his arrest was supported by probable cause and that the search of his vehicle was constitutional, and (2) calculating his sentencing guidelines base offense level.

A.

In reviewing challenges made to a ruling on a motion to suppress based on live testimony at a suppression hearing, factual findings must be accepted unless clearly erroneous or influenced by an incorrect view of the law. ***United States v. Maldonado***, 735 F.2d 809, 814 (5th Cir. 1984).

1.

Probable cause to arrest is present when the facts and circumstances within the knowledge of the arresting officer and of which he has reasonable trustworthy information are sufficient to warrant in a person of reasonable caution the belief that an offense has been, or is being, committed. ***Maldonado***, 735 F.2d at 815. Probable cause to arrest is determined by looking at the totality of the circumstances surrounding the arrest. ***United States v. Antone***, 753 F.2d 1301, 1304 (5th Cir.), *cert. denied*, 474 U.S. 818 (1985).

Strain's contention that his arrest was not based on probable cause rests entirely upon Farriss's testimony at the suppression hearing that he did not believe Hoot, when Hoot stated that he had counted the money. Strain contends that, therefore, Farriss did not believe a crime was being committed. Farriss did testify,

however, that he believed Hoot's statement that he had seen the money. This fact, in addition to the fact that Strain had negotiated to purchase the marijuana, had left to get the money, had designated the meeting place at which to consummate the sale, had arrived there an hour later as promised, and had used Hoot to communicate with Farriss (their meeting was under audio surveillance) provide far more than enough support for the district court's finding that, under the totality of the circumstances, there was probable cause to arrest Strain.

2.

Strain next contends that his truck should not have been searched incident to his arrest because he was not occupying it at the time of the search, citing ***New York v. Belton***, 453 U.S. 454, 460 (1981). The district court did not, however, uphold the search as one incident to arrest. Instead, it found that the search fell within the automobile exception to the warrant requirement. That exception is an independent one, based upon the risks posed by a vehicle's mobility and the lesser expectation of privacy one has in a vehicle. *See* ***United States v. Espinoza-Seanez***, 862 F.2d 526, 532 (5th Cir. 1988). Therefore, Strain's argument regarding search incident to arrest is irrelevant.

In any event, the district court did not err in finding that the search fell within the automobile exception and was supported by probable cause; based upon the events leading up to the agreed sale and Hoot's statement that Strain had the money in the truck, Farriss correctly adduced "a fair probability that contraband or

evidence of a crime [would] be found" in it. ***United States v. Delario***, 912 F.2d 766, 768 (5th Cir. 1990) (citations omitted).

B.

Finally, Strain contends that the district court erred in using the 300 pounds of marijuana discussed during the conspiracy in calculating his base offense level, rather than the 100 pounds named in the count of conviction. The quantity of drugs used to calculate the base offense level is a factual finding reviewable only for clear error. ***United States v. Devine***, 934 F.2d 1325, 1337 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 954 (1992). Strain was sentenced under, and we apply, the guidelines in existence before the November 1992 amendments took effect.

In the case of jointly undertaken criminal activity, the base offense level shall be determined based on all reasonably foreseeable conduct of others in furtherance of the jointly undertaken criminal activity. U.S.S.G. § 1B1.3, comment. (n.1). This includes quantities of drugs which the defendant could have reasonably foreseen would be involved in the conspiracy. ***United States v. Puma***, 937 F.2d 151, 159-60 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1165 (1992). Furthermore, "[i]f the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount". U.S.S.G. § 2D1.4, comment. (n.1); *see* ***United States v. Sarasti***, 869 F.2d 805, 806 (5th Cir. 1989); ***United States v. Moore***, 927 F.2d 825, 827 (5th Cir.), *cert. denied*, 112 S. Ct. 205 (1991).

As in ***Sarasti***, 869 F.2d at 807, the sentencing judge properly considered evidence that the amount mentioned in the indictment was part of a scheme that envisioned additional amounts. *See also* ***Moore***, 927 F.2d at 827 (stating that court correctly considered drug amounts still under negotiation in an uncompleted distribution). The PSR, whose findings the district court adopted, stated that Strain had spoken to both Hoot and Farris about buying an additional 200 pounds of marijuana following the initial 100 pound purchase. A PSR generally bears sufficient indicia of reliability to be considered as evidence by the trial court in making the factual determinations required by the guidelines. ***United States v. Robins***, 978 F.2d 881, 889 (5th Cir. 1992). Furthermore, these findings were supported by other evidence introduced at the sentencing hearing, including a statement Hoot made during a recorded conversation on the day of the arranged sale. When Farriss asked him: "When's he [Strain] gonna let me know about the other two [hundred pounds]? Or does he don't [sic] wanna mess with the other two?", Hoot replied: "When this go smooth [sic], then we'll get the other two". The district court specifically determined that Strain "reasonably foresaw at least three hundred pounds of marijuana being dealt". Its findings were not clearly erroneous.

III.

For the foregoing reasons, the conviction and sentence are **AFFIRMED.**