UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-1199
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DAVID EUGENE BAGWELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
2:92 CR 45 01

September 10, 1993

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Bagwell appeals his drug trafficking and related firearms convictions. We affirm.

I.

A jury found David Eugene Bagwell guilty of possession with intent to distribute methamphetamine, aiding and abetting (count one), and use of a firearm during a drug trafficking crime, aiding and abetting (count two). The district court imposed consecutive sentences of 121 months on count one and 60 months on count two, a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

five-year term of supervised release, and a special assessment of $100. On appeal, Bagwell challenges the district court's denial of his motion to suppress and the sufficiency of the evidence to support his conviction. We consider these two issues below.

II.

A.

Bagwell asserts first that he was detained, seized, and searched in violation of the Fourth Amendment. He contends that the stop was illegal because the officer lacked reasonable suspicion that Bagwell was in violation of the Texas seatbelt law. Implicitly, he argues that the district court erred in denying his motion to suppress the evidence resulting from the stop of his vehicle. This evidence includes over ten pounds of methamphetamine, drug paraphernalia, a loaded handgun, and statements made prior to his request for an attorney.

In an appeal from the denial of a motion to suppress, this Court reviews the district court's factual findings for clear error and its legal conclusions **de novo**. **United States v. Wallace**, 889 F.2d 580, 582 (5th Cir. 1989), **cert. denied**, 497 U.S. 1006 (1990). The question whether an officer had reasonable suspicion to stop a person involves both standards. **See United States v. Casteneda**, 951 F.2d 44, 47 (5th Cir. 1992). The district court's findings of historical facts are reviewed for clear error, and "the ultimate conclusion to be drawn from the found historical facts regarding the reasonableness of an investigatory stop is a conclusion of law. . . ." **Id**. The Supreme Court carved out the "reasonable

suspicion" exception to the requirement of probable cause for searches and seizure in **Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." **Id**. at 22.

At the suppression hearing, Trooper Wayne Clark Williams of the Texas Department of Public Safety testified that he stopped a brown 1983 Oldsmobile driven by David Bagwell because Bagwell was driving below the speed limit and was not wearing a shoulder harness. As Williams signaled Bagwell to pull over, he noticed that a passenger, George Nealy Wilson,[2] appeared to wake from his sleep, reach under the seat, and sit upright. Williams asked Bagwell for his driver's license and registration and requested that he step out of the car.

After checking the passenger's identification, Williams asked Bagwell to sit in his patrol car. Williams noticed that the car was registered to a third person, and Bagwell stated that it belonged to a friend. Bagwell told Williams that he owned a small trucking company, and Williams found it strange that Bagwell did not have a commercial driver's license. Williams asked Bagwell and Wilson for permission to search the vehicle, and both gave verbal consent. As a result of a search of the passenger compartment and the trunk, Williams found a nylon bag containing approximately ten

[2] Wilson was released on bond and failed to appear for any of the hearings.

pounds of methamphetamine wrapped in 20 bundles, drug paraphernalia, and a gun and ammunition that belonged to Wilson. A "sniff" dog later indicated a Marlboro cigarette package in the front seat console area which contained a small amount of methamphetamine.

On cross-examination, Williams stated that he noticed that the driver, Bagwell, did not have a shoulder harness. However, he could not see the passenger nor could he see if the driver was using the lap belt portion of the safety restraint. Williams acknowledged that under Texas law there was no requirement to wear both. The magistrate judge determined that the initial stop was based on reasonable suspicion that the driver was not wearing a seatbelt. He concluded that the possibility that the driver had engaged a lap belt did not vitiate the reasonableness. **Id**. The district court adapted the magistrate judge's report and recommendation. The district court did not err in reaching this conclusion.

"[S]o long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry." **United States v. Causey**, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc). Even if the officer had an ulterior motive, the fact that it appeared that the driver was not wearing a seatbelt was an objectively reasonable basis for a valid stop. **United States v. Harris**, 932 F.2d 1529, 1536 (5th Cir.), **cert. denied**, 112 S.Ct. 270 (1991).

Bagwell contends that the statements he made to Trooper

Williams should have been suppressed because they were a result of custodial interrogation without the benefit of **Miranda**[3] warnings or the presence of counsel. In his brief, he asserts that Williams "asked defendant a number of questions intended to elicit incriminating responses . . . after [Williams] had already become suspicious that defendant was a drug courier." He does not specifically identify the "incriminating" statements.

The Government conceded that statements made to the agents from the Drug Enforcement Agency subsequent to Bagwell's request for counsel should be excluded. The magistrate judge recommended that the district court grant the motion to suppress as to those statements made during custodial interrogation at Department of Public Safety headquarters and deny the motion as to statements made to Williams. Implicit in the recommendation to deny the motion is a finding that Bagwell was not in custody when he made statements to Williams. We agree.

"The meaning of custody has been refined so the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." **United States v. Bengivenga**, 845 F.2d 593, 596 (5th Cir.) (en banc), **cert. denied**, 488 U.S. 924 (1988) (internal quotations and citations omitted). Custody differs from Fourth Amendment seizure in that there is custody only when freedom is restrained to "the degree associated with formal arrest." **Id**. at 598. A traffic stop

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[3] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

or a noncustodial investigation of a person suspected of criminal activity does not render a person in custody for purposes of **Miranda**. **Id.** at 599.

Trooper Williams testified that Bagwell was not in "custody arrest," but that he was going to be issued a traffic citation. Technically, Bagwell was not free to leave because Williams "had not completed the citation." Williams asked Bagwell several questions. Bagwell answered that he had been in Albuquerque, New Mexico, and was returning to Louisiana; the car was registered to a friend; and he had been in Albuquerque working on a truck that belonged to the owner's husband. Williams then commented to Bagwell that contraband was being shipped with frequency in vehicles from Albuquerque.

Bagwell's freedom was not restrained to such a degree as to constitute a formal arrest. Bagwell was first stopped for a traffic violation, and Williams conducted a noncustodial investigation because certain "indicators" of suspected criminal activity were present. Williams was not required to issue **Miranda** warnings because Bagwell was not in custody. **See Bengivenga**, 845 F.2d at 599. The findings of the district court are not clearly erroneous, and it did not err in declining to suppress the statements.

Bagwell next contends that the district court erred in declining to suppress the evidence found in the car as a result of his consent to search. He argues that his consent was not voluntary.

"To be valid, consent to search must be free and voluntary." **United States. v. Kelley**, 981 F.2d 1464, 1470 (5th Cir.), **cert. denied**, 113 S.Ct. 2427 (1993) (internal quotation and citation omitted). "The voluntariness of consent is a question of fact to be determined from the totality of all the circumstances." **Id.** (internal quotation and citation omitted). In determining the voluntariness of consent the Court considers 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. "All six factors are relevant, but no single one is dispositive or controlling." **Id.**

Bagwell argues that he was not voluntarily in a custodial status (factor one), and he was ordered to sit in the patrol car and answer Williams' questions (factor two). He asserts that factors five and six should be resolved in his favor because they were not addressed by the Government. Moreover, he contends that they are a legal fiction because no one would consent to a search, knowing that the car contained contraband, if he was free to go. His argument fails.

Bagwell was not in custody when he consented to the search. There is no evidence that Williams used coercive measures to obtain consent or that Bagwell and Wilson did not cooperate fully. Also, Williams testified that he informed Bagwell that he did not have to allow the search. The district court's finding that Bagwell gave

voluntary oral consent is not clearly erroneous.

Accordingly, the district court did not err in denying Bagwell's motion to suppress.

B.

Bagwell contends that the evidence was insufficient to support a conviction for knowing possession of a controlled substance. He argues that the evidence shows only that he was in "close proximity to the gun and the drugs."

Bagwell did not present any evidence and moved for judgment of acquittal at the close of the Government's case. The standard for evaluating the sufficiency of the evidence is that found in **United States v. Bell**, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), **aff'd on other grounds**, 462 U.S. 356 (1983):

> It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.[] A jury is free to choose among reasonable constructions of the evidence.

In order to establish the substantive count of possession with intent to distribute, the Government has the burden of proving that Bagwell 1) knowingly, 2) possessed methamphetamine, 3) with the intent to distribute it. **See United States v. Diaz-Carreon**, 915 F.2d 951, 953 (5th Cir. 1990). "Possession of contraband may be either actual or constructive." **United States v. McKnight**, 953 F.2d 898, 901 (5th Cir.), **cert. denied**, 112 S.Ct. 2975 (1992). "[A] person has constructive possession if he knowingly has ownership, dominion, or control over the contraband itself or over

the premises in which the contraband is located." **Id.**

The evidence established that Bagwell gave Williams verbal consent to search the car he was driving, and Wilson agreed. In the trunk, Williams found a leather gun case and a box of bullets. Wilson told Williams that the case was his and that the gun was in the front seat of the car. A blue bag belonging to Bagwell held an electronic scale. In the front seat of the car, Williams discovered two crack pipes and a razor cutter underneath the front passenger seat. Between the driver's seat and the passenger seat, Williams found a loaded gun. In the back seat, there were some bottles of B-12 powder, a cutting agent for narcotics; a bag containing clear tape and black electrical tape; and a black bag on the floor. The black bag contained 20 packages of methamphetamine secured with either clear or black tape. Later, a trained dog alerted to a Marlboro package, which contained rock forms of methamphetamine.

"The proof that the defendant knowingly possesses contraband will usually depend on inference and circumstantial evidence." **United States v. Gallo**, 927 F.2d 815, 822 (5th Cir. 1991). Although the methamphetamine was found in Wilson's bag, numerous other items associated with the drugs were in various locations in the vehicle. These included an electronic scale (in Bagwell's bag), crack pipes (in front seat), cutting agents (back seat). The presence of these items of drug paraphernalia, which the jury was entitled to find Bagwell knew about, tended to show that Bagwell was not just an innocent occupant of the vehicle with no knowledge

of the presence of the methamphetamine. It was reasonable for the jury to infer that Bagwell knew that there was a bag in the back seat containing 20 packets of methamphetamine. It is undisputed that the quantity was sufficient to infer intent to distribute. **See United States v. Williams-Hendricks**, 805 F.2d 496, 501-02 (5th Cir. 1986).

Further, Bagwell argues that, because there is insufficient evidence of knowing possession of methamphetamine, "his conviction for using a gun during a drug transaction must be reversed." Because the evidence was sufficient to support the conviction for possession, his argument is unavailing. The evidence is sufficient to support the conviction.

III.

Bagwell argues next that the district court's ruling declining to admit evidence of Wilson's positive urine tests for methamphetamine was error. He contends that the evidence was relevant under Fed. R. Evid. 402 because proof that Wilson was "a confirmed methamphetamine user would have made it less probable that the methamphetamine was defendant's." Other than a Rule 401 definition of relevant evidence, Bagwell cites no authority in support of his proposition.

"The trial judge has broad discretion in ruling on questions of relevancy." **United States v. Waldrip**, 981 F.2d 799, 806 (5th Cir. 1993). There are two requirements for relevancy: "(1) the evidence must tend to prove the matter sought to be proved; and (2) the matter sought to be proved must be one that is of consequence

to the determination of the action." **Id**.

Evidence that Wilson was a drug user does not tend to exculpate Bagwell or negate the government's contention that he possessed a large quantity of methamphetamine with intent to distribute it. The district court did not abuse its discretion in refusing to admit the evidence.

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