

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1476
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN L. SULLIVAN,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
(3:92-CR-402-H)

(December 17, 1993)

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

PER CURIAM:*

Following a bench trial, John L. Sullivan, a felon on parole, was found guilty of being a felon in possession of a firearm and possession of cocaine. The trial court sentenced Sullivan to 51 months of imprisonment on the firearms charge and 6 months of imprisonment on the cocaine charge, both sentences to run

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

concurrently. The terms of imprisonment are followed by a two-year period of supervised release. Sullivan appeals.

Sullivan argues that 18 U.S.C. §§ 922(g)(1) and 924(a)(2), read in conjunction with Tex. Penal Code Ann. § 46.05 (West 1989) are unconstitutionally vague. He contends that §§ 922(g)(1) and 924(a)(2)--which make it a crime for a felon to possess a firearm affecting interstate commerce--impermissibly contradict Texas state law, which allows a violent felon to possess a firearm in his home. Also, because of this ambiguity, Sullivan argues that he should be able to rely on the defenses of the rule of lenity, entrapment by estoppel, and another alleged ambiguity resulting from a Texas state law that, according to Sullivan, conflicts with § 46.05. We reject the argument for the following reasons:

I

The premise of Sullivan's argument is foreclosed by U.S. v. Thomas, 991 F.2d 206, 213-15 (5th Cir. 1993), petition for cert. filed, Sept 7, 1993. In Thomas, the appellant challenged his conviction for being a felon in possession of a firearm under 18 U.S.C. § 922(g) on the grounds that Texas state law permitted a person convicted of a non-violent felon to possess firearms. Thomas, 991 F.2d at 208 & n.4 (citing § 46.05). Section 922(g) specifies that any person who has been convicted in any court of a crime punishable by imprisonment for more than one year is proscribed from possessing a firearm. Under 18 U.S.C. § 921(a)(20), however, the definition of "a crime punishable by

imprisonment" for more than a year is determined by state law. "Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter," unless the state provides otherwise. 18 U.S.C. § 921(a)(20).

Thomas argued that because Texas did not prohibit him from possessing a firearm, his civil rights had been restored for purposes of § 921(a)(20), and he should not have been convicted under § 922(g). Thomas, 991 F.2d at 208. The court ruled that since Texas does not actively or passively restore a non-violent felon's right to possess firearms, § 46.05 did not satisfy the requirements of the exception described in § 921(a)(20). Id. at 215.

Thus, Sullivan erroneously concludes that § 46.05 restored to him his limited civil right to possess firearms in his home. Although it is true that § 46.05 allows individuals convicted of a violent felony to possess a firearm in his house, that fact clearly does not translate into a reading that Texas has restored Sullivan's civil rights. Thus, the requirements of the exception in § 921(a)(20) plainly have not been satisfied. Thomas, 991 F.2d at 208 & n.4.

Sullivan also argues that because federal statutes, when read with § 46.05, are ambiguous, Sullivan should be granted the most lenient interpretation, and therefore his possession of firearms should be deemed lawful. However, as discussed above, Thomas shows

that §§ 921(g)(1) and 921(a)(20) are not ambiguous when read with § 46.05. We thus need say no more on this point.

Finally, Sullivan argues, for the first time on appeal, that because of the alleged ambiguity of the federal statutes and Texas law, he is entitled to rely upon the defenses of authorized reliance and entrapment by estoppel. He also argues that certain ambiguities present within Texas state law itself present him with a defense to the proscribed conduct of possessing firearms. This court does not generally review issues raised for the first time on appeal unless they involve purely legal questions and failure to consider them would result in manifest injustice. U.S. v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). Even if the application of Sullivan's asserted issues are purely legal issues, failure to consider them would not result in manifest injustice in light of the clarification by Thomas of the relevant federal and Texas state law and the overwhelming evidence of Sullivan's guilt, as discussed below.

II

Sullivan next argues that insufficient evidence supports his convictions for being a felon in possession of a firearm and for possession of cocaine. He contends that he believed he had the right to possess firearms in his home and that he never physically possessed the firearms in his home outside of the shooting incident, for which incident he was allowed to possess a firearm in self-defense. He also contends that the record is insufficient to

prove that either he knew cocaine was in his house or that he exercised dominion and control over it.

[I]n reviewing the findings of guilt by a trial court in a non-jury trial, the standard of review of the appellate court "is to determine whether such findings are supported by any substantial evidence. . . . The test is whether the evidence is sufficient to justify the trial judge, as trier of the facts, in concluding beyond a reasonable doubt that the defendant was guilty"

U.S. v. Jennings, 726 F.2d 189, 190 (5th Cir. 1984) (citation omitted).

To prove possession of cocaine, the government must prove that Sullivan knowingly or intentionally possessed cocaine. See 21 U.S.C. § 844(a).

Under 18 U.S.C. § 922(g)(1), it is a crime for a convicted felon to possess a firearm that has been transported in interstate commerce. The requisite proof by the government for a conviction under 18 U.S.C. § 922(g)(1) requires: knowing possession of a firearm; the firearm or weapon must have an interstate nexus; and the defendant must have been previously convicted of a felony. See U.S. v. Dancy, 861 F.2d 77, 80-82 (5th Cir. 1988). The parties stipulated that Sullivan was a convicted felon and that the firearms had moved in interstate commerce.

Illegal possession of firearms or controlled substances may be either actual or constructive. U.S. v. Knezek, 964 F.2d 394, 400 (5th Cir. 1992); U.S. v. Onick, 889 F.2d 1425, 1429 (5th Cir. 1989).

In general, 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. Constructive possession need not be exclusive, it may be joint with others, and it may be proven with circumstantial evidence.

U.S. v. McKnight, 953 F.2d 898, 901 (5th Cir.), cert. denied, 112 S.Ct. 2975 (1992) (citation omitted). "[T]his Court . . . prefers a 'commonsense, fact-specific approach' to the constructive possession problem. . . . [Therefore, this Court] examine[s] the merits of each constructive possession case independently; previous cases serve as illustration only.'" We therefore turn to examine the facts of this case.

Olmedo Rincon testified that on September 2, 1992, at approximately 7:30 a.m., he heard shots and saw two men running from a house, one of whom was carrying a shotgun. Rincon immediately sought the police and brought an officer to the house. Officer Donald A. Craft responded as backup. When he checked the house, there was no response to his knock. He saw a bullet hole in the front window and observed bullet holes in the living room when he looked in the windows in back of the house.

Police Sergeant Matthew M. Hunt knew Sullivan through his investigations as a narcotics officer. When he arrived at the house and heard that shots had been fired and that officers were unsuccessful in gaining entrance to the house, he was concerned that Sullivan and his family were dead. Hunt went to the front

door, saw Sullivan looking at him, and told him to open the door, which he did. Sullivan was initially evasive when questioned about what had happened. Hunt could see numerous bullet holes in the house. Because he was concerned for the safety of the household members, he asked to come inside. Sullivan allowed him to come in. Sullivan admitted that someone had come into the house, had fired shots, and had attempted to kidnap his wife, whereupon Sullivan had fired back at the men. Hunt believed Sullivan to be the complainant in the shooting incident and did not place Sullivan under arrest at the time.

Sullivan gave Hunt the .357 Magnum he had used in the shooting incident and another gun. Sullivan admitted to the presence of other guns in the house and retrieved a .38 caliber Derringer from the master bathroom. Hunt left the house at that point and called an agent of the Bureau of Alcohol, Tobacco, and Firearms because Hunt knew Sullivan was a convicted felon in possession of firearms.

The officers were further concerned about securing all of the weapons for safety reasons and made a quick visual search of the residence. Hunt saw a set of weighing scales with a white powdery substance consistent with cocaine sitting on a cabinet in the master bathroom. The substance later tested positive for cocaine.

Later that day, Hunt helped execute a federal search warrant on Sullivan's house. Sullivan indicated that the master bedroom was his alone and that his wife lived in the other bedroom. Police found a rifle in the master bedroom closet containing Sullivan's

personal effects. Officers also found a baggy of cocaine and a small set of scales in the same bedroom closet. A .32 caliber revolver was found in a chest of drawers in the master bedroom. In Carol Sullivan's bedroom there was a .22 caliber Derringer in the closet.

Bobby Reagor, Sullivan's brother, testified that he had lived with his brother until a month before the shooting incident. When he moved, he left behind a rifle, a .41 Colt handgun, and a .32 handgun. He believed the .357 Magnum was his nephew's gun. He knew nothing about the Derringers. He further testified that in late August 1992, he found a friend in the master bathroom getting ready to snort cocaine. He got her out of the bathroom and put the cocaine in the baggy, which he threw aside when he heard Sullivan coming. Reagor knew Sullivan was troubled by the presence of the guns because Sullivan was not supposed to have guns.

Sullivan's wife, Carol, testified that the guns in the house belonged to her and Reagor. She further testified, however, that Reagor had been gone from the house about a year when the shooting took place. She admitted that Sullivan knew he was not supposed to have guns in the house because he was on parole. She did remember telling the police that she did not own a gun, that she had never purchased a gun, and that she did not believe in guns.

This evidence, presented to the district court judge as trier of fact and judge of credibility, was sufficient to justify the conclusion beyond a reasonable doubt that Sullivan had dominion and

control over the guns and cocaine. He therefore knowingly possessed the weapons and drugs. See U.S. v. Smith, 930 F.2d 1081, 1086 (5th Cir. 1991).

Sullivan asserts for the first time on appeal that, as a convicted felon, he was able to possess the weapons for the limited purpose of self-defense. As we have stated earlier, issues presented for the first time on appeal are not generally reviewed by this court. Garcia-Pillado, 898 F.2d at 39. However, even if this issue were reviewable, Sullivan could not rely upon this defense. A convicted felon may take temporary possession of a firearm for the purpose of defending himself, if he is reacting out of a reasonable fear for his life or safety, in the course of a conflict that he did not provoke. U.S. v. Panter, 688 F.2d 268, 272 (5th Cir. 1982). The evidence presented at trial demonstrated that Sullivan possessed the weapons located in his home long before the attack on himself and his wife occurred.

III

Finally, Sullivan urges that the evidence seized from his home should have been excluded because the affidavit supporting the search warrant contained stale information that did not supply probable cause. The trial court heard Sullivan's motion to suppress at the close of the evidence presented at trial. The government asserts that the search warrant was supported by probable cause and executed in good faith.

This court reviews the denial of a motion to suppress, which is premised on a lack of probable cause, to determine (1) whether the good-faith exception to the exclusionary rule applies, and (2) whether the warrant was supported by probable cause. U.S. v. Pofahl, 990 F.2d 1456, 1473 (5th Cir.), cert. denied, 114 S.Ct. 266 (1993). Unless the defendant's motion involves a novel question of law, it is unnecessary to address the probable cause issue if the good-faith exception applies. Id.

"[E]vidence obtained by officers in objectively reasonable good-faith reliance upon a search warrant is admissible, even though the affidavit on which the warrant was based was insufficient to establish probable cause." U.S. v. Satterwhite, 980 F.2d 317, 320 (5th Cir. 1992) (citing U.S. v. Leon, 468 U.S. 897, 922-23, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)). This court reviews de novo the reasonableness of an officer's reliance upon a warrant issued by a magistrate. Id. at 321.

The staleness or timeliness of the information supporting a warrant cannot be evaluated mechanically. Whether the information is current will depend upon the facts of the case and the nature of the unlawful activity. U.S. v. Webster, 734 F.2d 1048, 1056 (5th Cir.), cert. denied, 469 U.S. 1073 (1984). "Courts are more tolerant of dated allegations if the evidence sought is of the sort that can reasonably be expected to be kept for long periods of time in the place to be searched." U.S. v. Craig, 861 F.2d 818, 823 (5th Cir. 1988).

The search warrant was supported by the affidavit of Officer Hunt. Hunt swore in the affidavit that he knew Sullivan had an extensive criminal record that included convictions for violent crimes and for unauthorized possession of weapons. Hunt swore that a confidential informant had told him a year earlier that Sullivan was dealing with large quantities of drugs and kept automatic weapons at his house. Two to three months before the execution of the search warrant, Hunt received an anonymous telephone call repeating this information. In February 1992, Hunt saw known narcotics traffickers visiting Sullivan's residence, carrying packages. Hunt also swore that during the protective sweep at Sullivan's house, following the reported shooting incident, he saw several weapons and a scale of the type used for weighing drugs in Sullivan's residence.

The district court properly denied Sullivan's motion to suppress. The information contained in the affidavit was not so stale that the officers could not infer that Sullivan was continuing to deal drugs and possess weapons in his home. The officers' objective reliance on the warrant was therefore reasonable.

IV

For the reasons stated herein, the conviction of John L. Sullivan is

A F F I R M E D.

