UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1543
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

HOWARD COLIN SMITH,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-510-G)

(February 17, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

In this appeal from his conviction for violating 18 U.S.C. § 922 (possession of a firearm by a convicted felon), Howard Colin Smith challenges the constitutionality of the search and seizure, pursuant to an INS administrative warrant, that led to his indictment. We **AFFIRM**.

I.

Smith, a citizen of Jamaica, entered the United States in July 1984, and was accorded permanent resident status in December 1985.

---

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 Pursuant to that rule, the court has determined that this opinion should not be published.

On November 23, 1988, he was convicted in Virginia of the felony offense of possession of cocaine, and sentenced to a one-year term of imprisonment. Because he was convicted of a drug offense, Smith became subject to deportation. 8 U.S.C. § 1251(a)(2)(B)(i).[2]

That same day, pursuant to an Order to Show Cause, the Immigration and Naturalization Service (INS) issued an administrative warrant for Smith's arrest. The warrant was issued under § 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(1), and regulations pursuant to that section. 8 C.F.R. §§ 242.1, 242.2(c)(1)(xi).[3]

---

[2] That section provides: "Any alien who at any time after entry has been convicted of a violation of... any law... relating to a controlled substance..., other than a single offense involving [possession of a small amount of marijuana for personal use,] is deportable."

[3] 8 U.S.C. § 1252(a)(1) provides that an alien may be taken into custody pending a determination of deportability. Deportation proceedings against an alien are commenced with the issuance of an Order to Show Cause under 8 C.F.R. § 242.1. *See* ***Johns v. Department of Justice***, 653 F.2d 884, 889-90 (5th Cir. 1981) (discussing application of statute and regulations); ***Villegas v. O'Neill***, 626 F. Supp. 1241, 1242-43 (S.D. Tex. 1986) (same). Once the Order to Show Cause is issued, or at any time thereafter until a warrant of deportation is issued, the alien may be arrested or taken into custody under the authority of an administrative warrant issued under 8 C.F.R. § 242.2(c), which provides:

> Warrant of arrest. (1) At the time of issuance of the Order to Show Cause, or at any time thereafter and up to the time the respondent becomes the subject of a duly issued warrant of deportation, the respondent may be arrested and taken into custody under the authority of a warrant of arrest.... However, such warrant may be issued by no other than [certain specified officers of the INS].

Smith does not dispute that this procedure was followed.

The warrant was outstanding when, in July 1989, Smith was convicted in Texas of, *inter alia*, the felony offense of murder with a deadly weapon, and sentenced to a 10-year term of imprisonment, concurrent with five years imprisonment on another charge. He was released on parole in November 1992.

When INS agents received information that Smith had been released on parole, a new administrative warrant for his arrest was issued under the same regulations.[4] It was executed November 19, 1992. Smith was arrested by INS Special Agent George Putnam, acting in cooperation with agents of the FBI, Drug Enforcement Administration, and United States Treasury Bureau of Alcohol, Tobacco and Firearms. In a search incident to the arrest, Putnam found a loaded, 9mm semi-automatic pistol in Smith's left front trouser pocket.

Based on the discovery of the firearm, Smith was charged with one count of violating 18 U.S.C. § 922(g)(1), which proscribes possession of a firearm by a convicted felon. Smith filed a motion to suppress the firearm, contending that it was seized from him pursuant to an unlawful arrest in violation of the Fourth Amendment. The government responded to the motion; Smith filed a reply to the response. Without a hearing, the district court

---

[4] Needless to say, murder is an "aggravated felony," the commission of which is also a deportable offense. 8 U.S.C. §§ 1101(a)(43), 1251(a)(2)(A)(ii). In its brief before this court, the government asserts (and Smith does not dispute), however, that the new warrant was issued pursuant to the Order to Show Cause that had been issued with the first warrant, in November 1988.

denied the motion.[5] Smith entered a conditional guilty plea under Fed. R. Crim. P. 11(a)(2), reserving his right to appeal the district court's denial of the motion to suppress. He was sentenced to a 77-month term of imprisonment, to be followed by a three years supervised release.

II.

Smith challenges the district court's denial of his motion to suppress. In an appeal from the denial of such a motion, we review the district court's conclusions of law *de novo*, and accept its findings of fact unless they are clearly erroneous or "influenced by an incorrect view of the law". ***United States v. Muniz-Melchor***, 894 F.2d 1430, 1433 (5th Cir.), *cert. denied*, 495 U.S. 923 (1990), *quoted in* ***United States v. Ervin***, 907 F.2d 1534, 1537 (5th Cir. 1990). And, the evidence is viewed in the light most favorable to the prevailing party. ***United States v. Lanford***, 838 F.2d 1351, 1354 (5th Cir. 1988), *cited in* ***United States v. Lopez***, 911 F.2d 1006, 1008 (5th Cir. 1991).

Smith's challenge to the admissibility of the firearm is founded on a constitutional claim: that the INS statute and regulations, quoted *supra*, authorizing his arrest pursuant to an administrative warrant, do not satisfy the requirements the Fourth

---

[5] Smith did not request a hearing on the motion; and, as the district court noted, evidentiary hearings on motions to suppress are not granted automatically. ***United States v. Harrelson***, 705 F.2d 733, 737 (5th Cir. 1983). This is especially true where, as here, the underlying facts relating to the seizure of the contested evidence are not disputed. ***Id.*** (citing ***United States v. Smith***, 546 F.2d 1275, 1279-80 (5th Cir. 1977); ***United States v. Poe***, 462 F.2d 195, 197 (5th Cir. 1972), *cert. denied*, 414 U.S. 845 (1973)).

Amendment imposes for a warrant to be valid. Specifically, he claims that the INS administrative warrant authorizing his arrest is invalid, because it was not issued by a neutral and detached magistrate who made a finding of probable cause.[6] Because we hold that the good-faith exception to the exclusionary rule applies, we do not reach this issue. *See* ***Jean v. Nelson***, 472 U.S. 846, 854-55 (1985) (reaffirming principle that "federal courts must consider nonconstitutional grounds for decision" before reaching constitutional questions (citing cases)); ***Jackson v. Louisiana***, 980 F.2d 1009, 1011 (5th Cir. 1993) (same).

In reviewing the denial of a motion to suppress evidence seized pursuant to an allegedly defective warrant, we first determine whether the good-faith exception to the exclusionary rule developed in ***United States v. Leon***, 468 U.S. 897 (1984), applies. ***United States v. Satterwhite***, 980 F.2d 317, 320 (5th Cir. 1992) (citing ***United States v. Webster***, 960 F.2d 1301, 1307 (5th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 355 (1992)). If we hold that it does, we need not address whether the warrant was supported by probable cause, unless the case concerns a "`novel question of law whose resolution is necessary to guide future action by law enforcement officers and magistrates.'" ***Id.*** (quoting ***Illinois v. Gates***, 462 U.S. 213, 264 (1983) (White, J., concurring)).

---

[6] We emphasize that Smith does not contest the validity of the administrative warrant as it was used to arrest him pending deportation proceedings. He contends only that the warrant is unconstitutional "as applied to criminal procedures" -- i.e., that Special Agent Putnam's search of Smith incident to his arrest, and the use of evidence seized during that search in subsequent criminal proceedings, were unconstitutional.

Under this analysis, we turn first to the applicability *vel non* of the good-faith exception. ***Leon*** established a narrow exception to the exclusionary rule for "evidence obtained by officers in objectively reasonable good-faith reliance upon a search warrant ... even though the affidavit on which the warrant was based is insufficient to establish probable cause." ***Satterwhite***, 980 F.2d at 322 (citing ***Leon***, 468 U.S. at 922-23). Our review of the reasonableness of an officer's reliance on a warrant is *de novo*. ***Id.*** (citations omitted).

Smith contends that the good-faith exception is not applicable, because INS officers should have known that the statute authorizing administrative warrants was unconstitutional. He concedes that such warrants are commonly used in deportation proceedings. This notwithstanding, he contends that because the warrant was used as part of "a criminal matter", it was required to satisfy the Fourth Amendment. Because INS agents should have realized that the warrant was deficient, Smith contends, they could not have acted objectively reasonably in relying on it to arrest and search him.

While it is true that Smith's case is a criminal proceeding, we cannot agree that INS Special Agent Putnam did not act objectively reasonably in relying on the administrative warrant for authority to arrest Smith, and search him incident to that arrest. *See* ***United States v. Landry***, 903 F.2d 334, 339 (5th Cir. 1990) (declining to address constitutionality of city curfew ordinance not yet declared invalid, and holding that, assuming officer relied

on it to make arrest, officer's good-faith reliance on it was objectively reasonable) (citations omitted). He cites no cases supporting his argument that no reasonable INS agent could have so relied on an administrative warrant issued pursuant to deportation proceedings.[7] To the contrary, on very similar facts, the Supreme Court held in ***Abel v. United States***, 362 U.S. 217, 235-37 (1960) that INS officers acting pursuant to an administrative arrest warrant do have authority to make a limited search incident to that arrest.[8] *See also* ***Chimel v. California***, 395 U.S. 752 (1969)

---

[7] ***Flores v. Meese***, 942 F.2d 1352 (9th Cir. 1991), *reversed*, __ U.S. __, 113 S. Ct. 1439 (1993), cited by Smith, is inapposite. In ***Flores***, the Ninth Circuit held regulations that strictly limited the release of arrested juvenile aliens were unconstitutional, particularly where the detainees posed "no apparent risk to the community" and because their "presence at their [deportation] hearings could be ensured by responsible individuals". ***Id.*** at 1355. Not only are these facts not present in the instant case, but also, the Supreme Court reversed the Ninth Circuit in ***Flores***. __ U.S. __, 113 S. Ct. 1443, 1449 (noting Attorney General's "broad discretion" to regulate the custody of arrested aliens, and delegation of that authority to INS). The Court stated:

> If we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles... who are aliens. For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.... Respondents do not dispute that Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings....

Id. at 1449 (internal quotations and citations omitted).

[8] In ***Abel***, INS officers, assisted by other law enforcement officers, arrested Abel, who was suspected of being a deportable alien. 362 U.S. at 222-25. Using a warrant of the same type used here, INS agents arrested Abel, and conducted a search for weapons and for documents to substantiate their suspicion that Abel was an

(discussing permissible scope of search incident to arrest); ***United States v. Chadwick***, 433 U.S. 1 (1977) (same).

The Court in ***Abel*** did not address the constitutionality of the statute or INS regulations leading to the issuance of the warrant. ***Abel***, 362 U.S. at 230-234. It noted, however, that "[s]tatutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time." ***Id.*** at 230. While, as stated, we also do not address the constitutionality of the administrative warrant used here, the fact that it has "the sanction of time" supports our conclusion that Putnam acted objectively reasonably in relying on it. *See also* ***Johns v. Department of Justice***, 653 F.2d 884, 889-90 (discussing, without questioning constitutionality of, 8 U.S.C. § 1252 and INS administrative warrant procedures); ***Villegas v. O'Neill***, 626 F. Supp. 1241, 1242-43 (S.D. Tex. 1986) (upholding INS post-arrest detention and hearing procedures against alien's due process challenge). We hold that, regardless of the constitutionality *vel non* of the INS administrative warrant, the good-faith exception to the warrant requirement applies to shield the firearm seized from Smith from the operation of the exclusionary rule.[9]

---

alien. ***Id.*** at 223-24. In the course of that search, the agents discovered various paraphernalia later used as evidence in Abel's prosecution for espionage. ***Id.*** at 219-20. The Court held that this evidence was admissible in the espionage prosecution, notwithstanding that the seized articles were unrelated to the administrative warrant. ***Id.*** at 228-30.

[9] The ***Abel*** Court emphasized that its holding was grounded on the fact that the INS administrative warrant was not used as "an instrument of criminal law enforcement to circumvent" the legal restrictions imposed on criminal prosecutions. 362 U.S. at 230.

Having held that the good-faith exception to the exclusionary rule applies, we need not address whether the administrative warrant that the INS issued for Smith's arrest was supported by probable cause. Ordinarily, we would do so if the case concerned a "novel question of law whose resolution is necessary to guide future action by law enforcement officers and magistrates." ***Satterwhite***, 980 F.2d at 320 (citations and internal quotations omitted). It does not.

III.

For the foregoing reasons, the district court's denial of Smith's motion to suppress the firearm is

AFFIRMED.

Similarly, in the present case-- despite Smith's bald assertion to the contrary -- we find no evidence that the INS warrant was used to "circumvent the legal restrictions" of criminal law enforcement. As in ***Abel***, the record is bare of any indication that "the decision to proceed administratively toward deportation was influenced by, [or] was carried out for, a purpose of amassing evidence in the prosecution for crime." ***Id.*** Indeed, the district court specifically noted that "the record strongly suggests that at the time the [administrative] warrant was issued, the INS had no intention of arresting and prosecuting Smith on ancillary criminal matters."