IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1720

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ERIC ANTHONY THOMAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(5:93-CR-13-C)

(November 15, 1994)

Before POLITZ, Chief Judge, SMITH, Circuit Judge, and HAIK,[*] District Judge.

JERRY E. SMITH, Circuit Judge:[**]

I.

Based upon intelligence information indicating cocaine trafficking, narcotics officers in Lubbock, Texas, began surveillance of Eric Thomas. In February 1993, Dewayne Proctor, an

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[*] District Judge of the Western District of Louisiana, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

investigator for the South Plains Regional Narcotics Task Force, encountered Thomas traveling in a rental car on East Broadway approaching Quirt Ave. Proctor radioed for assistance and was joined by Investigator Billy Koontz and Officer Theron French.

As the officers followed Thomas, who approached the Fourth Street and Parkway Drive intersection and entered an area within 1,000 feet of both Alderson Junior High School and Butler Park. When Thomas failed to stop at a stop sign, French turned on his overhead lights, signaling Thomas to pull over. Instead of stopping, Thomas proceeded westbound until he arrived at the Parkway Village Apartments, well within 1,000 feet of the school but no longer within 1,000 feet of the park. Thomas parked his car and approached the apartment. When French honked his horn and told Thomas to stop, Thomas turned around and threw the car keys on the ground.

French requested Thomas's driver's license and proof of insurance. Thomas told French that his name was "Stephan McKinney" and that his driver's license was inside, in his mother's apartment. The officers knocked on the apartment door, and Thomas's mother answered, stating that Thomas was her son but that the driver's license and insurance were not inside.

Thomas was placed under arrest for failure to identify to a police officer, lack of proof of financial responsibility, failure to stop at a stop sign, and failure to carry a driver's license. The police inventoried Thomas's car and discovered a plastic bag containing 62.36 grams of 90% pure cocaine base.

II.

Thomas was indicted for possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(iii), and two counts of possession of cocaine, with intent to distribute, within 1,000 feet of a public secondary school (count 2) and within 1,000 feet of a playground (count 3), both in violation of 21 U.S.C. § 860(a). He was convicted on all three counts and sentenced to 220 months' imprisonment, to be followed by a five-year term of supervised release.

III.

Thomas contends that the Double Jeopardy Clause bars his conviction on counts two and three. Whether Thomas was subjected to multiple convictions and sentenced for the same offense is a legal question that we review de novo. United States v. Brechtel, 997 F.2d 1108, 1112 (5th Cir.), cert. denied, 114 S. Ct. 605 (1993).

The Double Jeopardy Clause of the Fifth Amendment prohibits multiple convictions for the same offense. See Ball v. United States, 470 U.S. 856, 865 (1985). The government concedes that under United States v. Scott, 987 F.2d 261, 266 (5th Cir. 1993), § 841(a)(1) is a lesser included offense of § 860(a). And, "where one offense is included in another, it cannot support a separate conviction and sentence." Id. (citation omitted).

Nevertheless, the government claims that Thomas waived his right to challenge the convictions on counts two and three because

he did not seek to dismiss the indictment in a FED. R. CRIM. P. 12(b) motion. In United States v. Marroquin, 885 F.2d 1240, 1245-46 (5th Cir. 1989), cert. denied, 494 U.S. 1079 (1990), this court held that a defendant who fails to move to dismiss the indictment under rule 12(b)(2) waives his right to challenge multiple convictions. Nevertheless, under Marroquin the defendant still may object to multiple sentences unless they are to be served concurrently. Id. (citing United States v. Cauble, 706 F.2d 1322, 1334-35 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984)). The Supreme Court has held the concurrent sentence exception inapplicable to all crimes for which special assessments are mandatory under 18 U.S.C. § 3013. Ray v. United States, 481 U.S. 736, 737 (1987).

The district court imposed a $50 mandatory assessment on Thomas for each conviction. Thus, under Marroquin, we must affirm the convictions on the basis of Thomas's waiver but remand for resentencing. The government will elect under which of the three convictions Thomas should be sentenced.

IV.

Thomas also argues that the evidence was insufficient to support his conviction under the "schoolyard" and "playground" statutes because he only drove through the protected zones. The standard for reviewing a conviction allegedly based upon insufficient evidence is whether a reasonable jury could find that the evidence establishes the guilt of the defendant beyond a reasonable doubt. United States v. Sanchez, 961 F.2d 1169, 1173 (5th Cir.)

(citation omitted), cert. denied, 113 S. Ct. 330 (1992). The evidence is reviewed in the light most favorable to the government, drawing all reasonable inferences in support of the verdict. Jackson v. Virginia, 443 U.S. 307, 319 (1979). But if the evidence, viewed in the light most favorable to the prosecution, gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, the conviction should be reversed. United States v. Menesses, 962 F.2d 420, 426 (5th Cir. 1992) (citations omitted). It is not necessary that the evidence exclude every reasonable hypothesis of innocence, United States v. Stone, 960 F.2d 426, 430 (5th Cir. 1992); the jury is free to choose among reasonable constructions of the evidence, United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd, 462 U.S. 356 (1983).

Thomas contends that merely traveling through a federal drug-free zone does not support a conviction under § 860(a). In United States v. Wake, 948 F.2d 1422 (5th Cir. 1991), cert. denied, 112 S. Ct. 2944 (1992), however, we determined that the defendant need not intend to distribute the contraband within the protected zone to be convicted under § 845(a), the precursor to the current schoolyard/playground statute.

In Wake, various drug paraphernalia, records, marihuana, and cocaine were found in the defendant's office, located 400 feet from a high school. We held that the schoolyard statute applied even if the intended distribution was elsewhere. In reaching this conclusion, we examined the legislative history of the statute.

See id. at 1429-33.

The 1988 amendment to the statute was an effort to "rid the area around schools of persons possessing large quantities of drugs." Id. at 1431. Congress chose to focus on the quantity of drugs, not the location of the intended purchasers. Id. at 1432. We emphasized that this "strict liability approach" comports with the plain meaning of the statute and the goal of deterring not only the sale of drugs to schoolchildren, but also the risk that drugs would be available in the area. Id. at 1432-33. The Third and D.C. Circuits have followed this court's analysis. See United States v. Rodriguez, 961 F.2d 1089 (3d Cir. 1992); United States v. McDonald, 991 F.2d 866, 871 (D.C. Cir. 1993).

Notwithstanding Wake, Thomas argues that an exception to the statute is implied for those whose presence in the zone is purely incidental. He cites footnote 9 from Wake, in which we stated that we were not resolving whether an implied exception existed for the hypothetical defendant who merely speeds under the protected zone in a subway train. 948 F.2d at 1433 & n.9 (discussing United States v. Coates, 739 F. Supp. 146, 153 (S.D.N.Y. 1990), in which the court refused to apply the schoolyard statute "every time defendants on trains, or any other means of transportation, speed by a school on their way to a narcotics sale").

With regard to the school zone, we need not resolve this question, as Thomas's circumstances mirror Wake's. Thomas was not merely traveling through the protected zone on his way to a destination outside the zone. The jury reasonably could have

concluded that Thomas's intended destination was his mother's house, the place where he eventually stopped. That location was within 1000 feet of a school. Furthermore, Thomas stated that his driver's license and proof of insurance were inside that apartment. And French testified that he believed Thomas identified his mother's apartment as his residence. Thus, even if one could not be convicted for merely driving through the protected zone, the evidence supported the jury's conclusion that Thomas had intended to stop in the zone.

Thomas also falls within § 860(a) with regard to the playground, although he did not stop within a 1000 foot radius of the park. As a threshold matter, there seems no reason to allow Thomas to escape the schoolyard penalty enhancement simply by causing the police to chase him to a point beyond the zone before stopping his car, as he did here. The facts of this case are a far cry indeed from the extreme scenario dealt with by the court in Coates, which refused to apply the schoolyard/playground statute to a defendant who, in a subway car, sped under a vocational school located in a skyscraper. Coates, 739 F. Supp. at 153. By contrast, Thomas drove through a residential area in a car containing a large amount of cocaine in an unlocked, interior compartment.

Thomas's conviction is squarely within Congress's purpose to "rid the area around schools [and playgrounds] of persons possessing large quantities of drugs." Wake, 948 F.2d at 1431. His presence in the zone plainly falls under the rule established in Wake, and the evidence therefore supports his conviction on counts

two and three. The result))especially in regard to the park))may seem harsh, but it is not unconstitutional, so we merely divine the will of Congress and apply it to the facts. Wake's hypothetical is still reserved for a later case.

V.

Thomas also asserts that the district court erred in enhancing his offense level by two points for conduct "directly involving a protected location." We review the findings of fact under the "clearly erroneous" standard, but legal application of the Guidelines is reviewed de novo. United States v. Barbontin, 907 F.2d 1494, 1497 (5th Cir. 1990).

The applicable sentencing guideline, U.S.S.G. § 2D1.2(a)(1) and (2), provides:

> § 2D1.2: Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy
>
> (a) Base Offense Level (Apply the greatest):
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> (1) 2 plus the offense level from §2D1.1 applicable to the quantity of controlled substances directly involving a protected location . . .; or
>
> (2) 1 plus the offense level from §2D1.1 applicable to the total quantity of controlled substances involved in the offense.

Thomas contends that his conduct did not directly involve the protected location because he merely drove through it. As discussed above, however, Thomas did more than drive through the protected zone. The conclusion that he either resided at his

mother's apartment or at least intended to stop there was not clearly erroneous.

This interpretation of § 2D1.2(a)(1) is consistent with Fifth Circuit precedent. In United States v. Echevaria, the court found that a crack cocaine transaction between two adults in an apartment complex parking lot "directly involve[d]" the protected kindergarten 634 feet away, reasoning that "[i]t suffices that the drugs are present within 1,000 feet of the school." United States v. Echevaria, 995 F.2d 562, 565 (5th Cir. 1993) (quoting United States v. Walker, 993 F.2d 196, 198 (9th Cir.), cert. denied, 114 S. Ct. 276 (1993)).

Application note 1 to § 2D1.2 (which Thomas cites) is inapplicable to this case, as it deals with multiple transactions (some occurring in the zone, others outside of it). The district court did not err in applying § 2D1.2 to enhance Thomas's offense level.

VI.

Thomas argues that the warrantless detention and search of his vehicle violated the Fourth Amendment, and therefore that the district court erred in denying his motion to suppress evidence of the cocaine found. When a motion to suppress is based upon live testimony at a suppression hearing, "the trial court's purely factual findings must be accepted unless clearly erroneous, or influenced by an incorrect view of the law." United States v. Randall, 887 F.2d 1262, 1265 (5th Cir. 1989) (quoting United States

v. Maldonado, 735 F.2d 809, 814 (5th Cir. 1984)). Moreover, the trial court's implicit credibility findings are entitled to the same deference as are its express factual findings. Montelongo v. Meese, 803 F.2d 1341, 1347 n.6 (5th Cir. 1986), cert. denied, 481 U.S. 1048 (1987).

Under Terry v. Ohio, 392 U.S. 1 (1968), a temporary investigatory stop is proper if it is based upon reasonable suspicion that criminal activity may be afoot. After an automobile has been properly stopped pursuant to Terry, the police may search the vehicle without a warrant if probable cause exists to believe that contraband or evidence of criminal activity is located inside. California v. Carney, 471 U.S. 386, 391 (1985). Moreover, "inventory searches are now a well-defined exception to the warrant requirement of the Fourth Amendment." Colorado v. Bertine, 479 U.S. 367, 371 (1987). The two principal purposes of the exception are to protect the owner's personal property and to protect the police against claims to property. United States v. Walker, 931 F.2d 1066, 1068 (5th Cir. 1991). Inventories must be "conducted according to standardized criteria." Id. (citation omitted).

The police stopped Thomas because he failed observe a stop sign. Therefore, the initial stop was permissible. When the police realized that Thomas did not have proof of insurance and that he had failed to identify himself, he was lawfully arrested. At that point the police conducted a permissible inventory search of his car. The district court did not err in denying the motion

to suppress.

VII.

Finally, Thomas contends that the district court erred in sentencing him based upon sixty-three grams of cocaine. He claims that since he was driving a rental car, someone renting the car before him could have left the cocaine in the armrest. The district court resolved this issue against Thomas at sentencing. The sentencing court's findings of fact are reviewed under the "clearly erroneous" standard. See United States v. Shell, 972 F.2d 548, 550 (5th Cir. 1992).

Possession can be imputed to a passenger or driver of a vehicle containing contraband. United States v. Garcia, 917 F.2d 1370, 1377 (5th Cir. 1990). As the cocaine was found in the unlocked armrest of Thomas's rental car, the district court's conclusion that the sixty-three grams was relevant conduct was not clearly erroneous.

VIII.

For the foregoing reasons, Thomas's convictions are AFFIRMED. As required by this court's precedent in Marroquin, the sentence is VACATED, and this matter is REMANDED to the district court for resentencing on the count elected by the government.

POLITZ, Chief Judge, concurring in part and dissenting in part:

I concur in all of the opinion by Judge Smith except for the affirmance of the conviction on Count 3, the felony possession of cocaine within 1000 feet of a playground. Persuaded that Congress did not intend 21 U.S.C. § 860(a) to criminalize the conduct charged in that count under the factual setting as proven in this case, I respectfully dissent from that portion of the opinion.

Thomas did no more than momentarily drive down a street within 1000 feet of a playground en route to his mother's house. Unlike the defendant in **United States v. Wake**,[***] he did not maintain a drug cache within a premises inside the proscribed zone. The record is devoid of any evidence reflecting any intent by Thomas to conduct narcotics-related activity in the protected zone. He merely passed through that zone on the way to his mother's residence.[****]

The majority concludes that today's disposition is mandated by the holding in **Wake**. I do not agree. In footnote 9 in **Wake** our prior panel reserved judgment on the factual and legal situation as presented herein. **Wake** holds that one need not intend to distribute drugs inside the protected zone to violate section 860(a). But

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[***]948 F.2d 1422 (5th Cir. 1991), cert. denied, 112 S.Ct. 2944 (1992).

[****]Noting that Thomas would have stopped his car within 1000 feet of the playground had he heeded the police signal, the majority maintains that he should not benefit from his disobedience. I do not agree that an involuntary stop would trigger section 860(a); an act typically is not deemed criminal unless it is voluntary.

Wake left open the question whether mere travel with drugs within 1000 feet of a playground or school is a violation.

One can readily envision situations in which a person traveling through an urban area on a major traffic artery, stopping only for traffic signals, passes within 1000 feet of multiple schools and playgrounds. Is each such passage to be deemed a separate count of felonious conduct? Suppose someone with contraband in the trunk of the auto drives across town without making any stops, bound for a hospital or a restaurant or a shopping center, with no intent to peddle drugs, but in doing so passes within 1000 feet of 15 different schools and playgrounds. Did that person commit 15 separate felonies? Suppose that same person is in a helicopter or light aircraft and flies at an altitude of 1000 feet or less over those same 15 protected entities. Or one crosses a major metropolitan area in a speeding subway and, in doing so, passes within 1000 feet of 100 schools or playgrounds. Does each such passage constitute a violation of section 860(a)?

I am not persuaded that Congress intended section 860(a) to cover such fleeting and momentary passage. Congress may have the power to make such mere passage a crime, but the exercise of that power would require very explicit language. Convinced that Congress has not made such passage a crime, I must dissent from the affirmance of the conviction on Count 3.