IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3077
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CLYDE E. HARNAGE,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CR92 072 "N" (1))

(October 20, 1993)

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

PER CURIAM:*

I

On the morning of January 27, 1992, appellant Clyde Harnage robbed Joseph Guzman, a teller for the Schwegmann Bank and Trust Company. Harnage walked into the Veterans Memorial Boulevard Branch of the bank in Metairie, Louisiana, threw a brown shaving bag through Guzman's teller window, and pointed a pistol at him.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Harnage told Guzman, "Put the money in the bag, quick, quick." Guzman placed U.S. currency in the bag and also a "dye pack," which looks like a packet of ten-dollar bills but contains red dye and tear gas. Guzman then activated the bank's security cameras, which photographed Harnage as he left the bank. At trial, Guzman and Michael Guidry, a bank customer, positively identified Harnage as the robber.

As Harnage proceeded toward his red Trans Am automobile in the bank's rear parking lot, the dye pack exploded, causing a big puff of smoke and spilling red dye on the money and the inside of the shaving bag. Donald Sampey, a Metairie businessman, heard the explosion, saw the smoke, and saw Harnage then get into his car and drive away. Sampey deduced that the man, whom he later identified as Harnage, had just robbed the bank, so he followed the Trans Am in his own vehicle. Sampey followed the Trans Am until he was close enough to read the license number, KEL11K. He thought it was either an Oklahoma or a Florida plate, because of its coloration. Sampey then returned to the bank, where he gave this information to Jefferson Parish Sheriff's Office deputies; they sent out an alert for the red sports car.

Deputy Sheriff Sidney Aiavolasiti located the red car before noon that day, in the parking lot of a Metairie apartment complex. He saw dye-stained currency on the floorboard of the car when he looked through its windows. At the apartment complex, Sampey identified the car as the one he had followed from the Schwegmann

Bank. The manager of the apartment complex, Barbara Bush, told her security officer that the car belonged to the man who rented apartment 316, and that he matched the description of the bank robber given to her by the officer. Ms. Bush also told the officer that the man did not live alone. This information was given to a lieutenant in the sheriff's office who was at the apartment complex.

Supervising Detective Glen Toca, who was the officer in charge at the apartment complex, believed at that time that the deputies had sufficient evidence to support a warrant to search apartment 316. Toca communicated the information they had gathered to Detective Ferd Hebert, who was still at Schwegmann Bank processing the scene of the crime.

Other deputies, believing that there was an armed bank robber and possibly others in the apartment, positioned themselves on both sides of the walkway to the apartment. They were there to make sure that no one left or entered the apartment while other deputies sought to obtain a search warrant. Before the deputies could request a search warrant, Harnage opened the front door of apartment 316 from the inside. After the nearby deputies told Harnage to freeze, he slammed the door and retreated into his apartment. The deputies pursued Harnage, handcuffed him, and arrested him in his apartment foyer.

Harnage had changed his clothing and the deputies found that he was not carrying the pistol on his person. The deputies then

conducted a limited sweep, which took about 30 seconds, to make sure that no one else was in the apartment who might have access to Harnage's pistol. While conducting the sweep, the deputies saw "several denominations of currency with ... red dye or powder on them," in the bathtub and the kitchen sink. Detective Toca used Harnage's telephone to transmit this information to Detective Hebert, who included it in his affidavit in support of the warrant to search Harnage's apartment. Deputies waited in the apartment until the warrant was signed before they began to search. Upon searching the apartment, the deputies found a large amount of red-stained currency, the red-stained brown leather bag, and the pistol Harnage used to commit the robbery. The district court, determining that the deputies "were entitled ... to conduct a protective sweep to ensure their safety after and while making the arrest," denied Harnage's motion to suppress the evidence seized from his apartment.

II

Harnage contends that the district court reversibly erred by denying his motion to suppress the evidence seized during the search of his apartment. He argues, first, that there were no exigent circumstances which made it necessary to conduct a protective sweep, so that it constituted an illegal search. He asserts that the search warrant was illegal because the supporting affidavit included tainted and false information relative to the

first search, without which the affidavit did not state sufficient facts upon which to base a finding of probable cause.

When law enforcement officers request the issuance of a search warrant, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). "A reviewing court is charged with insuring that the magistrate had a `substantial basis' for determining that probable cause existed." U.S. v. McKeever, 906 F.2d 129, 132 (5th Cir. 1990), cert. denied, 498 U.S. 1070 (1991). Upon review, "an affidavit for search warrant is to be interpreted in a common sense and realistic manner, and the magistrate's finding of probable cause should be sustained in doubtful or marginal cases." U.S. v. Maestas, 546 F.2d 1177, 1180 (5th Cir. 1977).

In Harnage's case, Detective Ferd Hebert prepared the search-warrant affidavit based on information he received from Detective Toca over a police radio and by telephone. Except for the last paragraph, the affidavit contains the following information, which the sheriff's office gathered prior to Harnage's arrest. An armed bank robbery had occurred that day; the teller included an explosive dye pack with the money he turned over to the robber. A witness saw the dye pack explode and got the license-plate number

of the perpetrator's automobile. An officer found a car fitting the witness's description and with the same license-plate number in the parking lot of Harnage's apartment complex. The officer saw dye-stained currency in the car and another officer obtained information that its owner lived in apartment 316. This information provided the issuing magistrate judge with "a `substantial basis for ... conclud[ing]' that a search would uncover evidence of wrongdoing[;] the Fourth Amendment requires no more." Illinois v. Gates, 462 U.S. at 236. If the last paragraph of the affidavit concerning evidence obtained during the sweep had not been included in the affidavit, it still would have been sufficient to support the warrant. See U.S. v. Restrepo, 966 F.2d 964, 970 (5th Cir. 1992), cert. denied, 113 S.Ct. 968 (1993).

Harnage alleged in his supplemental motion to suppress that the district court needed to determine "whether the information gained through the illegal search [or sweep] motivated the officers' decision to procure a warrant," citing Restrepo. In Restrepo, this court remanded for the district court to make such a finding. In Harnage's case, the district court did not make any finding on this issue. However, the defense did not object or request that the court do so. For that reason, Harnage is barred from contending on appeal that the information gained during the sweep motivated the decision to seek a search warrant. See U.S. v. Caballero, 936 F.2d 1292, 1296 (D.C. Cir. 1991), cert. denied, 112 S.Ct. 943 (1992). Furthermore, Detective Toca testified without

contradiction that prior to the sweep, he had determined that he had enough information to support a search warrant. In the light of this testimony and the affidavit itself, an implied finding that Toca did so would not be clearly erroneous. See U.S. v. Williams, 951 F.2d 1287, 1289-91 (D.C. Cir. 1991).

Harnage also contends that he is entitled to reversal on grounds that the last paragraph of the affidavit contains statements made with reckless regard for the truth. In Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the Court held that if such statements are "necessary to the finding of probable cause," then "the fruits of the search [must be] excluded." Harnage is not entitled to relief on this point because, as discussed ante, the affidavit's last paragraph was not necessary in order to establish probable cause for the search.

III

Harnage contends that the government failed to prove beyond a reasonable doubt that the funds deposited with the Metairie branch of Schwegmann Bank were insured by the Federal Deposit Insurance Corporation (FDIC) at the time of the robbery for which he was convicted. He argues that the certificate of insurance admitted into evidence was dated July 1, 1986, more than five years before the robbery occurred, and that it stated that it was issued for the Schwegmann Bank in Harvey, Louisiana. Harnage asserts that the bank manager's testimony that the Metairie bank branch was FDIC-

insured lacked credence because it was contradicted by the certificate.

There was no Fed. R. Crim. P. 29 motion for judgment of acquittal at the close of all the evidence or after the jury was discharged. "Consequently, this Court's review is limited to determining whether the district court committed plain error or whether there was a manifest miscarriage of justice." U.S. v. Pierre, 958 F.2d 1304, 1310 (5th Cir.) (internal quotation marks and citations omitted), cert. denied, 113 S.Ct. 280 (1992). A miscarriage of justice would exist only if there was no evidence supporting this element of the offense or if the evidence in support of the element "was so tenuous that a conviction would be shocking." Id.

This court has held that the evidence was sufficient under the standard of "beyond a reasonable doubt," although "the government's sole evidence as to this element was the testimony by a vice-president of the bank that it had been insured by the FDIC on the day of the robbery and that he had been a vice-president of the bank on that day." The Court noted that "[a]ppellant's attorney did not cross-examine the witness on this point." U.S. v. Slovacek, 867 F.2d 842, 845 (5th Cir.), cert. denied, 490 U.S. 1094 (1990). The Court noted further that in U.S. v. Rangel, 728 F.2d 675, 676 (5th Cir.), cert. denied, 467 U.S. 1230 (1984), "the sole evidence of a credit union's federally insured status was the testimony of the credit union's assistant vice-president that the

credit union was federally insured at the time of trial," but that Rangel held that "this evidence, when not challenged on cross-examination, was sufficient." Id. at 846.

At Harnage's trial, Mr. Ernest J. Cadro, Jr., testified that he was the manager of the Metairie branch of Schwegmann's Bank. He testified further that on the date of the robbery, the funds deposited in his bank were insured by the FDIC. He also sponsored a copy of the FDIC certificate of insurance which, he said, was hanging on the wall of his bank on the date of the robbery. The defense did not cross-examine Mr. Cadro.

This evidence adequately supported the jury's finding that the Metairie branch bank was FDIC-insured at the time Harnage robbed it. The fact that the certificate of insurance was dated more than five years earlier than the date of the robbery did not render it incompetent evidence. See U.S. v. Maner, 611 F.2d 107, 110 (5th Cir. 1980). The Maner Court noted that, although there was no direct testimony that the bank was insured on the date of the robbery, the bank manager also testified that at the time of trial, copies of the insurance certificate "were posted on teller windows for public display." Finding that "the jury's conclusion that the bank was insured is a reasonable one," this Court affirmed Maner's conviction. The fact that the certificate in Harnage's case stated the address of the Schwegmann Bank as Harvey rather than the Metairie branch does not compel a different result, in the light of Mr. Cadro's unchallenged testimony that he was the branch manager

of the bank and that the funds in his branch of the bank were FDIC-insured on the day of the robbery. See Slovacek, 867 F.2d at 845-46; Maner at 110-11.

IV

Harnage contends that the district court reversibly erred by not subpoenaing three witnesses whom he wanted to testify in his defense. After the defense rested without presenting any evidence, Harnage told the court that he had asked his counsel to call as witnesses the two officers who arrested him and the "bug man" whom the officers ordered not to enter his apartment after Harnage's arrest and not to spray that area of the apartment complex. Harnage stated that the two officers would testify that he did not resist being apprehended. Apparently Harnage wanted the bug man to testify that deputies remained in his apartment after his arrest and prior to obtaining the warrant. The district court, mentioning that an unsuccessful attempt had been made to locate the bug man, did not issue any subpoenas. Harnage contends that the district court's failure to do so as authorized by Fed. R. Crim. P. 17 violated his Sixth Amendment guarantee of compulsory process and violated his right to due process of law. He argues that these witnesses' "testimony could have caused the court to reconsider its ruling on the suppression motion."

Rule 17(b) requires the district court to issue a subpoena for a witness whom an indigent defendant requests "upon a satisfactory showing ... that the presence of the witness is necessary to an

adequate defense." "That requirement leaves broad discretion in the district court by allowing the trial judge to weigh numerous factors, including materiality, relevancy, and competency, in deciding whether to grant the request for a subpoena." U.S. v. Moudy, 462 F.2d 694, 697-98 (5th Cir. 1972). Failure to issue a subpoena for a witness whose testimony would have been "of limited value" does not constitute an abuse of discretion. Thor v. U.S., 574 F.2d 215, 220 (5th Cir. 1978).

The district court's failure to issue the subpoenas was not an abuse of discretion because the testimony of the two officers and the bug man would have been of no value to Harnage. Detective Hebert testified that he stated in his affidavit that "a struggle ensued" because Harnage failed to stop when ordered "to do so, ran away from the police back further into the apartment, and then had to be physically restrained on the ground." Harnage testified at his suppression hearing that he went to his door to surrender, but he admitted that he did not stop when the officer ordered him to do so. He testified that then he "shut his door and [he] laid down on the floor," because he was "scared for [his] life." Harnage testified that after he was handcuffed, Toca made a phone call from his apartment. At the trial, Toca testified without contradiction that the officers "secured the apartment" after Harnage was arrested, but that it was not searched until after the search warrant was obtained.

The testimony of the bug man and the two arresting officers would have been of no value to Harnage because it would have been relevant only to the last paragraph of the search-warrant affidavit. As shown in our previous discussion, the affidavit adequately stated probable cause without consideration of its last paragraph. The district court did not abuse its discretion because Harnage was not prejudiced by the failure of these three persons to testify on his behalf. See Thor, 574 F.2d at 221.

V

Harnage contends that he was improperly charged and sentenced as an armed career offender under 18 U.S.C. § 924(e)(1). He argues that his three prior bank-robbery convictions should be treated as one offense because "they should be seen as part of a single and continuous criminal episode." The information alleges that Harnage was convicted of robberies of three different bank tellers, which occurred on July 13, 17, and 23, 1981. He was convicted on all three counts on his pleas of guilty on November 19, 1981.

A person who has been convicted of possessing a firearm after having previously been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1), who has three prior violent-felony or serious drug convictions, for offenses committed on different occasions, is subject to a mandatory prison sentence of at least 15 years. 18 U.S.C. § 924(e). In U.S. v. Washington, 898 F.2d 439 (5th Cir.), cert. denied, 498 U.S. 842 (1990), this Court held that the appellant's sentence was properly enhanced under § 924(e), because

his two prior convictions of robbing the same store clerk were separate offenses. The court reasoned that "Washington's two robberies were separate criminal episodes because he committed the first, completed it, and escaped; then, after a few hours of no criminal activity, Washington returned to commit the second crime." Id. at 442. Harnage's three bank-robbery convictions also were separate episodes because they not only occurred on different dates, they also involved different victims.

VI

Harnage contends that he was improperly sentenced as an armed career criminal because the predicate offense used to obtain his § 922(g)(1) conviction was one of the convictions used to enhance his sentence under § 924(e). Harnage relies on an excerpt from a brief in a case wherein this Court affirmed a conviction on this point with an unpublished opinion on authority of U.S. v. Wallace, 889 F.2d 580 (5th Cir. 1989), cert. denied, 497 U.S. 1006 (1990). U.S. v. Martin, 974 F.2d 171 (5th Cir.), cert. denied, 113 S.Ct. 503 (1992). Count III of the indictment, alleging the § 922(g)(1) violation, alleged all three of Harnage's prior federal bank-robbery convictions, a California state robbery conviction, and a Florida conviction of trafficking in methaqualone.

In Wallace, 889 F.2d at 584, this Court held that the prior conviction used to convict a defendant of a § 922(g)(1) violation can also be counted as one of the three prior felonies justifying enhancement of his sentence under § 924(e). The Court reasoned

that "[r]elying on a prior felony for sentence enhancement of a later conviction is not punishment for the prior offense," but that the heavier penalty is justified by the defendant's repetitious criminal conduct. Id.

VII

For the reasons stated herein, the convictions and sentence of the defendant are

A F F I R M E D.