

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3205
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRY JOHNSON,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 92-506-N-1
- - - - -
October 27, 1993

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:*

The district court's finding under U.S.S.G. § 2D1.1(b)(1) is a factual finding reviewed under the clearly erroneous standard. United States v. Eastland, 989 F.2d 760, 769 (5th Cir.), cert. denied, 62 U.S.L.W. 3251 (U.S. Oct. 4, 1993). Under this standard, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the evidence differently." Anderson v. City of Bessemer City, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d (1985).

The two-level enhancement under § 2D1.1(b)(1) should be applied "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." § 2D1.1, comment. (n.3). To establish weapon possession the Government must prove by a preponderance of the evidence "that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant." Eastland, 989 F.2d at 770 (internal quotations and citation omitted). The Government must show that the weapon was found with the drugs or drug paraphernalia or where part of the transaction occurred. Id.

The firearm was found under a couch in the apartment of Terry Johnson's co-defendant, Corey Berry. Johnson admitted taking the crack cocaine to Berry's apartment to prepare it for sale, and there was evidence that after the undercover agent showed Johnson the cash for the crack cocaine he retrieved the drugs from Berry's apartment. This evidence is sufficient to establish that Berry possessed the firearm in relation to the drug offense. See United States v. Mergerson, ___ F.2d ___, No. 92-1179, slip op. at 5535-36 (5th Cir. Jul. 12, 1993) (The fact that one co-defendant was seen leaving another co-defendant's apartment shortly before delivering the heroin, taken together with the fact that the handgun was found in the apartment on the same day, created a spatial and temporal connection between the weapon and the offense.).

A conspirator may be assessed the two-level increase under § 2D1.1(b)(1) if a co-conspirator's possession of a firearm during the conspiracy was reasonably foreseeable. United States v. Aguilera-Zapata, 901 F.2d 1209, 1215 (5th Cir. 1990). Because firearms are "tools of the trade" of the drug-trafficking business, the district court may ordinarily infer that a conspirator should have reasonably foreseen that his co-conspirator would possess a firearm. Id.

The district court specifically found that Berry possessed the firearm and that Johnson should have foreseen that Berry would possess the firearm. The court also noted that Johnson offered no evidence to rebut the inference of foreseeability. The district court's finding was not clearly erroneous. See Mergerson, slip op. at 5536.

AFFIRMED.