

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3261
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RAYMOND READO,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
(CR-92-27-B-M1)

(February 10, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Raymond Reado appeals his conviction of, and sentence for, possession of a firearm by a convicted felon and sale of stolen firearms, in violation of 18 U.S.C. § 922(g)(1) and (j). Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Reado sold stolen guns to ATF confidential informant Timothy Sonnier. Relying upon four prior state burglary convictions, the district court applied the Armed Career Criminal Act, 18 U.S.C. § 924(e), and sentenced Reado pursuant to U.S.S.G. § 4B1.4.

Reado was sentenced to 293 months' imprisonment for two counts of possession of firearms by a convicted felon and 120 months for two sales of the stolen firearms, with sentences to run concurrently, and five years' supervised release.

II.

A.

Reado asserts that the trial court erred in allowing a lineup photograph into evidence "with one single photo used for identification." Reado argues that "a single photo of a suspect to a potential witness cannot be shown absent extingent [sic] requiring photographic display." The picture shown to the witness was a photocopy of Reado's Louisiana identification card.

Reado argues that the photo shown to Sonnier was overly suggestive because the number on the identification card matched that recorded on Sonnier's cancelled check used to purchase the firearms. He argues that "[t]his identification by the witness caused irreparable harm to the defendant" and that the government should have shown the photo with the identification removed.

Reado filed a pretrial "Motion to Suppress Suggestive Pre-Trial Identification." After an evidentiary hearing, the district

court denied the motion.

We review factual findings on a motion to suppress under the "clearly erroneous" standard in the light most favorable to the prevailing party. United States v. Capote-Capote, 946 F.2d 1100, 1102 (5th Cir. 1991). We review conclusions of law de novo. United States v. Richardson, 943 F.2d 547, 549 (5th Cir. 1991).

In determining the admissibility of identification evidence, we conduct a two-step analysis: (1) whether the identification procedure was impermissibly suggestive and (2) whether under the totality of the circumstances the suggestiveness leads to the substantial likelihood of irreparable misidentification. Herrera v. Collins, 904 F.2d 944, 946 (5th Cir.), cert. denied, 498 U.S. 925 (1990). "Even an impermissibly suggestive identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability." Id. at 947. "An identification is reliable if it is based upon observations of the individual independent from suspect pretrial identification procedures." Lavernia v. Lynaugh, 845 F.2d 493, 500 (5th Cir. 1988).

We consider the following factors to determine whether a single-photo identification is reliable: "[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of his prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the confrontation." Manson v. Brathwaite, 432 U.S. 98, 114

(1977).

There is no evidence to support Reado's assertion that Sonnier was shown a copy of Reado's identification card with the written information showing. Sonnier testified at trial that he could not remember whether the written information including the identification number was showing. Agent Russell, who showed Sonnier the identification card photo, testified at the suppression hearing that he folded back the written information and showed Sonnier only the photograph.

Even assuming the photo identification was impermissibly suggestive, there was no substantial likelihood of irreparable misidentification. See Herrera, 904 F.2d at 946. Sonnier was a confidential informant working with the ATF concerning sales of stolen firearms. He had his attention focused on Reado during the sales. He had ample time to view Reado during the two sales of the stolen firearms and was within two to six feet of Reado on these occasions. The sales occurred on June 19 and June 26, 1991; the photo identification took place on July 11, 1991.

Sonnier looked at the photo for about five seconds and expressed certainty in regard to his identification. He testified at the suppression hearing that his in-court identification would be based solely upon his contacts with Reado. At trial, Sonnier identified Reado in the courtroom, even though Reado had changed his hairstyle since the crimes. Under the circumstances, there was no substantial likelihood of misidentification; thus, the district court's ruling was not clearly erroneous.

B.

Reado argues that the district court erred by not allowing "the evidence of the character and truthfulness of [government informant] Timothy Sonnier in regards to the confidential agreement entered into evidence." Reado avers that "[d]isallowing the specific instances of conduct by Timothy Sonnier, a government paid informant, seriously prejudices the defendant from having a fair trial before a jury of his peers."

It is within the district court's broad discretion to limit the scope of cross-examination. United States v. Rocha, 916 F.2d 219, 242 (5th Cir. 1990). The district court's ruling will not be disturbed on review unless there was an abuse of discretion. Id.

Sonnier was an unpaid government confidential informant and the key prosecution witness. During cross-examination, Reado asked Sonnier whether he had violated any terms of his agreement with the ATF or the prohibitions against unlawful, violent, or criminal acts. Sonnier answered, "No." Reado then attempted to elicit testimony concerning whether Sonnier had used an Uzi machinegun to damage his employer's premises during the period of the investigation of Reado. Sonnier was not arrested, charged, or convicted in connection with this alleged incident.

Reado's trial counsel argued that he wanted to show that Sonnier had violated his agreement with the ATF. He contended that this would demonstrate that Sonnier had been untruthful on direct examination. Reado says that "questions were disallowed to Timothy Sonnier, the government paid informant, concerning whether he lied

based on an incentive agreement under the confidential questionnaire."¹ There was no suggestion that the cross-examination was offered to show bias. See Rocha, 916 F.2d at 242. The line of questioning was offered solely to show that Sonnier had lied on direct examination.

The district court asked what legal and factual basis Reado had for questioning Sonnier about the alleged Uzi incident. Reado's counsel stated that only "strong circumstantial" evidence linked Sonnier to this alleged incident. Counsel admitted that he had no evidence linking Sonnier to the shooting of the store where he worked, stating only that the shooting incident took place while Sonnier was "on duty as manager."

FED. R. EVID. 608(b) states in pertinent part,

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

During a FED. R. EVID. 104(c) hearing outside the jury's presence, the court found that extrinsic evidence offered concerning the Uzi incident was speculative and overwhelmingly prejudicial to both parties. The court ruled that the defense could not question

¹ Reado does not give any citation to the record in this section of his brief. Such neglect can preclude the issue from being considered. See Moore v. F.D.I.C., 993 F.2d 106, 107 (5th Cir. 1993). Sonnier testified that he was not paid.

Sonnier concerning the alleged Uzi incident.

Because the defendant was unable to substantiate a "specific incident of conduct" of the witness, the Uzi-shooting incident was outside the scope of rule 608(b). The district court did not abuse its discretion, as the evidence, not linked to the witness, the defendant, or the issues at trial, was irrelevant.

C.

Reado argues that the trial court erred in using his prior state convictions as a basis for enhancement of his sentence. He contends that "[t]he trial judge erred in considering a Pre-Sentence Report of alleged offenses by defendant of which he had never been tried for nor convicted of." Reado fails to set forth what alleged offenses the court erroneously relied upon. The district court considered only crimes for which Reado had been convicted and for which appeals had been exhausted.

Reado argues that no upward departure under U.S.S.G. § 4A1.3 (under-representation of defendant's past criminal conduct) is warranted because the presentence report ("PSR") indicates a sentence of between 235 and 293 months. The district court held that the Armed Career Criminal Act applied and sentenced Reado pursuant to § 4B1.4, not § 4A1.3. Because the court did not depart from the guidelines, this argument has no factual basis.

The court's finding that Reado had four prior convictions for violent felonies occurring on different occasions subjected Reado to a 15-year mandatory minimum sentence under 18 U.S.C. § 924(e)(1)

and placed him at offense level 33 under § 4B1.4(b)(3)(B). His prior convictions resulted in a criminal history score of 19 and put him in criminal history level VI. The indicated sentencing range was 235 to 293 months' imprisonment. The court sentenced Reado to the maximum sentence under the guidelines, 293 months.

The court found that Reado's four prior convictions for burglaries of residential structures committed on four separate occasions were sufficient to qualify him as an armed career criminal. Section 924(e) provides a mandatory minimum sentence for a defendant who is convicted of unlawful possession of a firearm in violation of § 922(g) and who has three prior convictions for violent felonies or serious drug offenses "committed on occasions different from one another" § 924(e)(1); see also U.S.S.G. § 4B1.4, comment. (n.1). A "Violent felony" is defined as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . (ii) is burglary" § 924(e)(2)(B).

Reado argues that the Armed Career Criminal Act should not be applied because he did not have sufficient number of prior convictions to qualify as an armed career criminal; he asserts that his drug offense was not final and was currently "in the appeal process." This argument is without factual basis, as the district court considered only crimes for which appeals had already been exhausted.

Reado argues that his convictions for simple burglary under LA. REV. STAT. ANN. 14:62 (West 1986) are no violent crimes under § 4B1.1 because his burglaries were of "residential structures,"

not "dwellings." Reado was not sentenced pursuant to § 4B1.1, Career Offender. He was sentenced as an Armed Career Criminal pursuant to § 4B1.4. Thus, this argument is without factual basis.

The Supreme Court has held "that a person has been convicted of burglary for the purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Taylor v. United States, 495 U.S. 575, 599 (1990). Reado argues that the evidence used to prove the existence of the prior convictions was unreliable. He asserts that the government failed to carry its burden of proof that "these were actually bonafide and true convictions" and argues that no minutes of court or any official copies of any documents were introduced into evidence validating the prior convictions. The PSR and the testimony of the employee who prepared the report, however, are sufficiently reliable evidence of the nature of the defendant's prior burglaries. United States v. Flores, 875 F.2d 1110, 1112 (5th Cir. 1989).

The following evidence was entered by the prosecutor on the record at the sentencing hearing: "exemplified copies" of the defendant's penitentiary packet that "show[ed] the fact of conviction on the four occasions I have noticed in the enhancement of this defendant's sentence under the Armed Career Criminal Act"; "exemplified minute entry indicating a guilty plea while [Reado was] represented by counsel and being properly Boykinized."

Reado's counsel did not object to the authentication of the documents. These exemplified copies are sufficiently reliable to prove Reado's prior convictions.

Reado argues that his convictions for burglary of a vehicle and four counts of burglary of residential structures were incorrectly included in the PSR as multiple convictions. He does nothing more than assert, in conclusional terms, that these should have been included in the PSR as a single conviction. Because Reado failed to provide any factual or legal analysis regarding this issue, it is waived. See United States v. Green, 964 F.2d 365, 371 (5th Cir. 1992), cert. denied, 113 S. Ct. 984 (1993).

Reado "further challenges the validity of any prior convictions in the Pre-Sentence Report and prior to sentencing." He does not identify which prior convictions he refers to, nor does he allege any basis for the convictions' invalidity. Because Reado fails to provide any legal or factual analysis regarding this issue, it is waived. See Green, 964 F.2d at 371.

Reado argues that sentencing of greater than twenty years is not in proportion to the crime of possession of firearm by convicted felon and is unduly harsh and not in compliance with § 4A1.3. This argument is without foundation, as Reado was sentenced pursuant to § 4B1.4, not § 4A1.3.

Reado avers that his sentence is so disproportionate to the crime of felon in possession of a firearm that it violates the Eighth Amendment ban on cruel and unusual punishment. An Eighth Amendment challenge to a sentence mandated by the guidelines is

subject to a narrow review. United States v. Sullivan, 895 F.2d 1030, 1031-32 (5th Cir.), cert. denied, 498 U.S. 877 (1990). "[A] reviewing court rarely will be required to engage in extending analysis to determine that a sentence is not constitutionally disproportionate." Solem v. Helm, 463 U.S. 277, 290 n.16 (1983). We are reluctant "to limit legislative responses to criminal activity, and consistently have refused to disturb a trial court's sentence absent impermissible motives, incorrect information, or, where applicable, noncompliance with the recently promulgated Sentencing Guidelines." Sullivan, 895 F.2d at 1032 (citations omitted). Moreover, "the Guidelines are a convincing objective indicator of proportionality." Id. (citation omitted).

The severity of Reado's sentence was directly related to the gravity of his criminal history. The district court did not err in applying the sentencing guidelines, and Reado has not raised a convincing argument that the application of the armed-career-criminal provision to his offense conduct constitutes an Eighth Amendment violation.

AFFIRMED.