

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4302

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAMUEL GREGORY COPE,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(4:92 CR 37 (1))

October 6, 1993

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Samuel Gregory Cope was convicted by jury of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (count one); conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846 (count two); and the use or carrying of a firearm during and in

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

relation to a drug-trafficking crime in violation of 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2 (count three). He was sentenced to 151 months imprisonment on counts one and two, to run concurrently, and 60 months on count three, to run consecutively. Cope now appeals his conviction and sentence. We affirm the district court's judgment of conviction and sentence.

I. BACKGROUND

On August 3, 1992, Officer Thomas Mrozinski of the Howe Police Department was on routine traffic patrol. Upon entering U.S. Highway 75 near Howe, Texas, he observed that the driver and the front-seat passenger in a red Pontiac Sunbird were not wearing seat belts as required by Texas law. Mrozinski then motioned for the driver to pull off the highway. After the driver had pulled over, Mrozinski observed that the driver had exited his vehicle quickly and had hurriedly walked to meet Mrozinski, who at that point informed the driver of the reason for the stop. When Mrozinski asked the driver for his driver's license, however, the driver was unable to produce it or any other form of identification.

When Mrozinski then asked the driver who owned the Pontiac, Samuel Cope, who was sitting in the front passenger's seat, responded by saying that the car was his in that he had leased it. Cope also volunteered his Oklahoma driver's license to Mrozinski. Two other men were passengers in the back seat.

Mrozinski then escorted the driver to the patrol car to issue a citation. Pursuant to Mrozinski's questioning, the driver identified himself as "Robert Moore," gave Mrozinski several different birth dates, and was unsure of his address. During this questioning, Mrozinski noticed that the three remaining occupants of the car "kept turning around and looking back at [him], appearing very nervous." After learning through a teletype computer check that no driver's license existed for a "Robert Moore," Mrozinski walked back to the Pontiac and asked Cope--as the car's lessee--why he was allowing the driver to drive without a license. Partially opening the car door, Cope showed Mrozinski his lease agreement and identified the driver as Tyrone McDaniel, the brother of Purvis McDaniel, one of the rear passengers.¹

Cope then opened the door completely and turned sideways, placing his feet on the ground outside the car. At this time Mrozinski observed the handle of a Luger pistol² protruding from a plastic box on the right front floorboard, where Cope's feet had just been. Mrozinski then ordered the three men out of the car, told them that he had seen a gun in the car, informed them that they were all under arrest, and radioed for backup support. The three men admitted that there was a gun in the car but that

¹ The other rear passenger was later identified as Ronald Keith Irving.

² Mrozinski testified at trial that he had initially thought this weapon to be a machine gun.

"nothing else" was there. Mrozinski also testified that Cope told him to look in the car all he wanted.

When two backup officers arrived, Mrozinski removed the pistol from the floorboard and told the backup officers that Cope and the two rear passengers should be frisked and handcuffed. Mrozinski also told the other officers that they had Cope's permission to search the vehicle and arrested Tyrone McDaniel, who had remained in the patrol car.

In viewing the Pontiac from the outside, one of the backup officers observed in plain view a baggie containing a white substance, which protruded from behind the right front passenger seat. As the officer was preparing to retrieve the baggie and another officer was preparing to frisk Cope, Cope stated that he "had some more," removed two other baggies from the front of his pants, and handed them to the officer.³ Cope also told the officers that a set of digital scales was in the trunk, which the officers then seized. A search of the car also revealed a loaded magazine for the Luger pistol, which contained twelve live shells, found underneath the front passenger seat.

On August 13, 1992, Cope and the three other men in the car were indicted for possession with intent to distribute a controlled substance, conspiracy to commit the same, and use or carrying a firearm during and in relation to a drug-trafficking crime. All defendants entered pleas of not guilty. Before

³ Cope stipulated at trial that the substance in all of the baggies was "crack" cocaine.

trial, Cope and his co-defendants filed a joint motion to suppress the evidence obtained during the search of the Pontiac, alleging that such evidence was inadmissible because it had been seized during a search which had been conducted without warrant or probable cause and pursuant to an illegal arrest. After an evidentiary hearing, the district court granted the motion with respect to the scales, concluding that the officers had no reasonable basis to search the trunk and that that search had taken place before the defendants had been advised of their Miranda rights. However, the court denied the remainder of the motion, finding that (1) Mrozinski had probable cause to stop the car initially; (2) Mrozinski's later actions were reasonable under the circumstances; (3) the officers acted properly in looking into the car for additional weapons; and (4) the baggie of cocaine seen protruding from the front passenger seat was in plain view and thus not the result of an illegal search.

At the conclusion of the jury trial, the jury found Cope guilty, but the other defendants not guilty, on all counts. The court sentenced Cope to 151 months imprisonment on counts one and two, to run concurrently, and 60 months on count three, to run consecutively. Cope now appeals his conviction and sentence.

II. COPE'S MOTION TO SUPPRESS

Cope first argues that Mrozinski and the backup officers conducted an illegal search of the Pontiac and that evidence obtained from that search was inadmissible as "fruit of the

poisonous tree." Specifically, Cope alleges that (1) there was no warrant for the search; (2) there was no probable cause for the search; (3) the search was not incident to a valid and lawful arrest; (4) the search was conducted pursuant to involuntary consent because of threats by a peace officer; and (5) there were no exigent circumstances to justify the search. Cope thus asserts that the district court erred in not granting his motion to suppress in its entirety.

In reviewing a district court's denial of a motion to suppress evidence obtained as the result of an alleged illegal search or seizure, we review the district court's findings of underlying fact for clear error. United States v. Kelley, 981 F.2d 1464, 1467 (5th Cir.), cert. denied, 113 S. Ct. 2427 (1993); United States v. Smith, 978 F.2d 171, 176 (5th Cir. 1992), cert. denied, 113 S. Ct. 1620 (1993). The ultimate determination of whether the search and seizure was reasonable under the Fourth Amendment is reviewed de novo. United States v. Seals, 987 F.2d 1102, 1106 (5th Cir. 1993), petition for cert. filed (U.S. June 18, 1993) (No. 92-9137). In making such a determination, we review the evidence concerning the reasonableness of a warrantless search and seizure most favorably to the party prevailing in the district court, unless such a view is inconsistent with the trial court's findings or is clearly erroneous considering the evidence as a whole. United States v. Shabazz, 993 F.2d 431, 434 (5th Cir. 1993). Evidence at both the suppression hearing and at trial may be considered. See United

States v. Comstock, 805 F.2d 1194, 1197 n.2 (5th Cir. 1986),
cert. denied, 481 U.S. 1022 (1987); United States v. Quiroz-
Carrasco, 565 F.2d 1328, 1330 (5th Cir. 1978).

Cope first maintains that the search was illegal because it was conducted without a warrant and probable cause did not exist to make such a warrantless search constitutionally valid. We disagree that the search was illegal.

The Fourth Amendment prohibits unreasonable searches and seizures. A routine traffic stop and the detention of passengers is a limited "seizure" within the meaning of the Fourth Amendment. Shabazz, 993 F.2d at 434; see Berkemer v. McCarty, 468 U.S. 420, 436-37 (1984). The reasonableness of such a seizure and ensuing search are to be analyzed according to the criteria set forth in Terry v. Ohio, 392 U.S. 1 (1968). See Michigan v. Long, 463 U.S. 1032, 1049-50 (1983); Shabazz, 993 F.2d at 435; Kelley, 981 F.2d at 1467. Thus, the inquiry in which we must engage when evaluating the legality of a search and seizure made pursuant to a traffic stop is a dual one: (1) whether a police officer's action was justified at its inception and (2) whether the search was "reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 19-20; Shabazz, 993 F.2d at 435.

Cope concedes that the vehicle in which he was riding was lawfully stopped because he and the driver were not in compliance with the Texas seat-belt law. Thus, he cannot argue that the first prong of Terry has not been satisfied.

The second prong of Terry is satisfied if the search is reasonably related in scope to the circumstances which engendered it--that is, if "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger" and hence a search was necessary. Long, 463 U.S. at 1050 (quoting Terry, 392 U.S. at 27)). The district court found that Mrozinski began to become suspicious of the situation in which he found himself after Tyrone McDaniel could not provide a driver's license or identification, remember his address, or give Mrozinski his real name or his date of birth. The district court also found that Mrozinski's suspicion was magnified by his observations that (1) the three passengers appeared extremely nervous when he was questioning Tyrone and (2) the handle of a gun was in plain view on the front floorboard of the Pontiac. Moreover, the court found that Mrozinski's removal of the passengers from the car after he saw the gun, a "preventative measure to ensure that there were no other weapons within [their] immediate grasp," Long, 463 U.S. at 1051, indicated that Mrozinski believed the passengers to be a danger to himself and others. The district court's findings are supported by testimony evinced at trial and are not clearly erroneous. These findings of underlying fact and our review of the evidence in the light most favorable to the government support our conclusion that the search of the Pontiac's passenger compartment for weapons satisfies the requirements of Terry's

second prong. Therefore, the search was a reasonable one and not violative of the Fourth Amendment.

We need not consider Cope's allegations concerning the illegality of the search because of the lack of Cope's voluntary consent or exigent circumstances or because the search was the product of an invalid arrest, for we have determined that the search of the passenger compartment for weapons was lawful under Terry and Long. Furthermore, when the backup officer observed the cocaine baggie from outside the car, his search of the passenger compartment was then supported by probable cause that the passenger compartment contained illegal drugs. See United States v. Ross, 456 U.S. 798, 824-25 (1982); Seals, 987 F.2d at 1107. Moreover, contraband properly seized may be admitted into evidence against the person from whom it was taken. See United States v. Merritt, 882 F.2d 916, 921 (5th Cir. 1989), cert. denied, 496 U.S. 907 (1990); United States v. Moore, 786 F.2d 1308, 1316 (5th Cir. 1986). The district court, therefore, did not err by denying Cope's motion to suppress in its entirety.

III. JURY INSTRUCTION AND SUFFICIENCY OF THE EVIDENCE

Cope also argues that it was plain error for the jury not to have been properly instructed concerning "the Texas Handgun Law and the Statutory Traveler's Exemption to such handgun law." He further argues that because of this "traveling" exemption, the evidence was insufficient to support his conviction for using or carrying a firearm during and in relation to a drug trafficking

crime under 18 U.S.C. § 924(c)(1). We address each of these issues in turn.

A. Jury Instruction

We adhere to the general rule that "the failure of the district court to afford an instruction to the jury cannot be complained of on appeal in the absence of request or objection by counsel in the trial court." United States v. Jones, 673 F.2d 115, 118 (5th Cir.), cert. denied, 459 U.S. 863 (1982); see United States v. Barnett, 945 F.2d 1296, 1300 (5th Cir. 1991) (quoting Jones), cert. denied, 112 S. Ct. 1487 (1992). However, Federal Rule of Criminal Procedure 52(b) allows this court to review and correct "plain errors or defects affecting substantial rights" even though the error or defect was not "brought to the attention of the [trial] court." See FED. R. CRIM. P. 52(b). "'Plain error' is error which, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness and integrity or public reputation of judicial proceedings." United States v. Lopez, 923 F.2d 47, 50 (5th Cir.), cert. denied, 111 S. Ct. 2032 (1991). The failure of the district court to give a jury instruction in the absence of trial counsel's request for it "may amount to plain error only in egregious instances." Jones, 673 F.2d at 119.

Cope failed to oppose the jury instruction provided by the district court. We thus examine the court's jury instruction in the context of the entire case for plain error.

The district court's instruction charged the jury as follows:

Before you find the Defendants guilty of a violation of . . . Section 924(c)(1), you must be convinced that the Government has proved each of the following beyond a reasonable doubt: First, that the Defendants committed . . . a drug trafficking crime; Second, that the Defendants knowingly used or carried the firearm . . . in relation to the commission of said drug trafficking crime. The Government is not required to prove that the Defendants actually fired the weapon or brandished it at someone in order to prove "use" as that term is used in this instruction. However, you must be convinced beyond a reasonable doubt that the firearm played a role in or facilitated the commission of a drug offense. In other words, you must find that the firearm was an integral part of the drug offense charged.

Not only did the court's instruction track the elements of the federal offense with which Cope was charged, but it also adequately informed the jury of an available defensive theory: that the use of the weapon in question was *not* connected to the commission of a drug-trafficking offense, e.g., that Cope was merely "traveling" with the Luger pistol. Hence, even assuming *arguendo* that the jury could have benefitted from a specific instruction regarding the Texas "traveling" exception, the failure to give such an instruction was not plain error. Cope's conviction under § 924(c)(1), therefore, cannot be reversed based on Cope's allegation concerning the district court's failure to instruct the jury properly.

B. Sufficiency of the Evidence

To determine whether the evidence supports a conviction, this Court will generally review whether the "evidence adduced at trial could support any rational determination of guilt beyond a

reasonable doubt." United States v. Powell, 469 U.S. 57, 67 (1984); see United States v. Salazar, 958 F.2d 1285, 1290-91 (5th Cir.), cert. denied, 113 S. Ct. 185 (1992). In determining whether the government has met its burden, this Court will weigh all reasonable inferences derived from the evidence in a light most favorable to the verdict. United States v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989).

To support a conviction under § 924(c)(1), the evidence must "show that the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking; a showing that the weapon was used, handled or brandished in an affirmative manner is not required." United States v. Molinar-Apodaca, 889 F.2d 1417, 1424 (5th Cir. 1989); see United States v. Raborn, 872 F.2d 589, 595 (5th Cir. 1989); United States v. Robinson, 857 F.2d 1006, 1009 (5th Cir. 1988). Although the weapon must be an "integral part" of the drug-trafficking offense, it is sufficient to show that the weapon "facilitated, or could have facilitated," the offense. United States v. Capote-Capote, 946 F.2d 1100, 1104 (5th Cir. 1991), cert. denied, 112 S. Ct. 2278 (1992). Moreover, a loaded clip or magazine located near the weapon is sufficient to show that the weapon could have facilitated the drug-trafficking offense. See id.

Cope relies on our decision in United States v. Prieto-Tejas, 779 F.2d 1098 (5th Cir. 1986), to sustain his contention that the evidence was insufficient to support his conviction under § 924(c)(1). In Prieto-Tejas, the defendant claimed that

because he was "traveling" while in possession of a firearm, the statutory exemption under Texas law was applicable and therefore the evidence at trial was insufficient to sustain his conviction under § 924(c)(1). 779 F.2d at 1103-05. We agreed, determining that the jury could not have found the defendant guilty of carrying a firearm unlawfully under § 924(c)(1) because the government had failed to offer any evidence that the defendant was not a "traveler" within the meaning of the statutory exemption. Id. at 1105.

Copes's reliance on Prieto-Tejas, however, is misplaced. That case was decided under § 924(c)(1) when the statute required proof that the firearm was being carried "unlawfully." See id. The statute has since been amended, as Cope concedes, to omit the requirement that the firearm be carried "unlawfully" in connection with a drug-trafficking offense. See 18 U.S.C. § 924(c)(1). Thus, the government need prove only that (1) the firearm was knowingly used or carried and (2) the firearm "facilitated, or could have facilitated," the commission of the underlying offense--in this case, drug trafficking. Furthermore, the fact "[t]hat carrying the [firearm] itself was legal under state law is of no moment to the federal offense." Raborn, 872 F.2d at 595. With the foregoing discussion in mind, we now detail some of the evidence which Cope's jury considered before we determine whether such evidence was sufficient to support Cope's conviction.

Evidence of Drug-trafficking

The parties stipulated at trial that the substance found in the Pontiac and on Cope's person was "crack" cocaine. Testimony by Mrozinski and the backup officers provided details of the traffic stop and the events that led up to the seizure of the cocaine from the Pontiac, including indications that the passengers were nervous when they repeatedly turned around to look at Mrozinski in his patrol car and were "fidgeting." Additionally, testimony detailed Cope's voluntary surrender of two bags of "crack" cocaine--one blue "Crown Royal" bag and one large, clear, plastic bag--that were concealed in his shorts and totalled about five ounces. Two pager-beepers--one found in Tyrone McDaniel's possession, the other in Cope's--were also admitted into evidence.

Furthermore, Mark Wilson, a federal narcotics agent, testified that he interviewed the four defendants, including Cope, after advising them of their rights. During that interview, according to Wilson's testimony, Cope (1) indicated that he had just been to Dallas but that he did not know exactly where in Dallas he had been; (2) stated that he had taken \$1000 with him to Dallas and had spent \$800 for a one-ounce baggie of "crack" cocaine; (3) admitted that he owned the "crack" cocaine contained in the Crown Royal bag (one ounce); (4) maintained that he did not know who owned the other bag which he had voluntarily surrendered, but that it had been given to him by one of his companions--although he could not recall which one; (5) contended

that he did not know to whom the Luger pistol belonged; and (6) stated that he was unemployed and living with his mother.

Wilson also testified that the quantity of "crack" cocaine seized pursuant to the traffic stop--about 230 grams--was the second largest he had seen during his course of work, exceeded amounts normally retained for personal use, and had a street value of between \$18,000 and \$20,000. Additionally, Wilson testified that, in his experience as a federal narcotics agent, "unemployed individuals with pagers are typically selling drugs." Wilson testified further that because mere users needed to purchase cocaine very often, they tended not to have enough money to buy the quantities involved in the instant case.

Evidence that a Firearm was an Integral Part of Drug-trafficking

Cope concedes that the Luger pistol was located in the passenger compartment of the Pontiac where some of the "crack" cocaine was found. Thus, the means of "carrying" this weapon for § 924(c)(1) purposes was the vehicle itself. See United States v. Pineda-Ortuno, 952 F.2d 98, 104 (5th Cir.), cert. denied, 112 S. Ct. 1990 (1992). Although Mrozinski testified that the pistol was unloaded, he also testified that a loaded magazine was found under the front passenger's seat, about six inches from the unloaded pistol. This evidence was sufficient for a reasonable juror to have found that the pistol "facilitated, or could have facilitated" the drug-trafficking. See Capote-Capote, 946 F.2d at 1104.

Conclusions

Our review of the evidence in this case, weighing all reasonable inferences derived from that evidence in a light most favorable to the verdict, belies Cope's contention that the evidence would not support any rational determination of guilt by the jury. We thus conclude that Cope's conviction under § 924(c)(1) cannot be overturned on sufficiency-of-the-evidence grounds.

IV. CONSPIRACY CONVICTION

Finally, Cope contends that his conspiracy conviction cannot stand because his co-defendants were all acquitted of that charge and the indictment alleged no other co-conspirators, known or unknown.

The acquittal of co-defendants will not bar Cope's conviction under existing law. This court, in United States v. Zuniga-Salinas, 952 F.2d 876, 878 (5th Cir. 1992) (en banc), determined that "an inconsistent verdict should no longer be a bar to conviction where all other coconspirators are acquitted." We reasoned that the inconsistency of a verdict might have been the result of other variables not related to the co-defendants' guilt, such as lenity towards them. Id. at 877-78. We also recognized that, because of the independent availability of a sufficiency-of-the-evidence review, a verdict in a conspiracy case should not be subject to review for inconsistency. Id. at 878.

Cope argues, however, that the facts in Zuniga-Salinas are distinguishable from the instant case because the indictment in Zuniga-Salinas charged that the defendant not only conspired with a named individual, who was acquitted, but also with "persons unknown." His argument seems to suggest that once other named defendants are acquitted, the evidence must point to other possible co-conspirators, or at least other "persons unknown," to support a conviction.

Although Cope characterizes the distinction between Zuniga-Salinas and the instant case as "very significant," he fails to indicate how Zuniga-Salinas would require a different result in his case. Furthermore, he has misconstrued Zuniga-Salinas, in which, as in the instant case, there was no evidence that the defendant conspired with "persons unknown." See id. at 878-79 & n.3. This Court held that as long as there was sufficient evidence that a defendant conspired with the named acquitted co-defendants, the defendant should not be acquitted on account of the inconsistent verdicts. See id. at 878. Thus, that the indictment in Cope's case failed to indicate "persons unknown" does not change the result under Zuniga-Salinas. Cope's argument that his conviction should be vacated because his co-defendants were acquitted is thus without merit.

V.

For the foregoing reasons, we AFFIRM the district court's judgment of conviction and sentence.