

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.93-4368
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES ALEX MINNIFIELD,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1:92CR87-2)

(March 10, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.*

PER CURIAM:

A jury found appellant Minnifield guilty of possession with intent to distribute cocaine base (Count 1), receiving and possessing an unregistered .410 gauge weapon made from a shotgun (Count 2), and using or carrying the weapon during and in relation to the charged drug-trafficking offense (Count 3). He was sentenced to concurrent terms of imprisonment of 236 months on the first count and 120 months on the second count; as to the third

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

count, a consecutive term of 120 months was imposed. From this punishment and other sanctions, Minnifield has appealed. We find no error and affirm.

Minnifield first contends that his conviction for the offense of using or carrying a firearm in relation to a drug trafficking offense (Count 3) violates the double jeopardy clause because it duplicates the allegations set forth in the first two counts against him. This argument is subject to two fatal flaws. First, Minnifield did not preserve his argument below, either by objecting to multiplicity of the indictment or the presentence report. Consequently, we may only review this contention for plain error. United States v. Podell, 869 F.2d 328, 330-31 (7th Cir. 1989).

Second, not only is there no plain error, but there seems to be no error at all in the framing of this indictment. Minnifield was charged under three discrete statutes. His conviction under 18 U.S.C. § 924(c)(1), for use of a firearm during and in relation to the predicate drug-trafficking offense, required proof that the firearm was used or carried in relation to the drug offense. Neither of the other two counts of the indictment required this proof. Consequently, the three offenses did not fail the "same elements" test. "The same-elements test, sometimes referred to as the 'Blockburger' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional

punishment and successive prosecution." U.S. v. Dickson, ____ U.S. ____, 113 S. Ct. 2849, 2856 (1993).

Minnifield next asserts that the district court erred in admitting "opinion" evidence by the arresting officer concerning his intent to distribute the cocaine base. Federal Rule of Evid. 704(b) precludes an expert witness from offering his opinion on a person's "intent". The officer was not asked to speculate directly on Minnifield's intent, however. The prosecutor asked the arresting officer if, in his opinion based on his training and experience, the amount of cocaine found was "an amount for mere possession." After an objection by the defense, the district court found that the officer possessed the expert qualifications to testify as to drug quantities "designed for personal use or distribution." Although the jury could infer Minnifield's intent from this testimony, the officer did not testify as to Minnifield's mental state or condition. His testimony was properly admissible.

Minnifield's last contention is that the government's proof was insufficient to show that he possessed an unregistered firearm. The statute requires proof that the shotgun was "not registered to him in the National Firearms Registration and Transfer Record . . ." 26 U.S.C. § 5861(d). The government offered documentary evidence bearing the seal of the Department of the Treasury that neither the sawed-off shotgun nor any other firearms were registered to appellant James Alex Minnifield. Viewing the evidence in the light most favorable to the verdict, a rational jury could have found that Minnifield possessed a firearm not

registered to him. Minnifield's argument that the evidence showed only that the person searching the records did not find evidence of registration goes to the weight and credibility of the evidence, matters within the province of the jury. His alternative argument that the government should have offered proof that the weapon was not registered to any of his codefendants is frivolous. After they pleaded guilty, the government dismissed the indictment against them, rendering the language in Count 3 considering them surplusage.

For these reasons, the conviction is **AFFIRMED**.