IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-4438

Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SYLVESTER TOLLIVER and
TROY A. LAWRENCE,

Defendants-Appellants.

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Appeal from the United States District Court
for the Western District of Louisiana
(92-CR-20008(01))

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(March 18, 1994)

Before KING, DUHÉ and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Sylvester Tolliver and Troy A. Lawrence were both convicted of conspiring to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A); possession, aided and abetted by each other, with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 18

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

U.S.C. § 2; and using and carrying a firearm during a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1). Tolliver and Lawrence appeal. We affirm.

I.

On December 31, 1991, Corporal Bruce Cole of the Lake Charles Police Department was monitoring traffic with a radar gun on I-10 in Lake Charles, Louisiana. At approximately 9:00 a.m., Cole clocked two vehicles traveling one behind the other at seventy-one miles per hour in a fifty mile per hour zone. Cole pulled out onto the interstate and pulled both vehicles over. The lead vehicle was a maroon Maxima driven by Lawrence and Tolliver was in the other vehicle, a white Cougar.

When Cole exited his vehicle, he activated a video camera located inside his car and a recorder located on his person. Cole then approached Lawrence's vehicle. In response to questioning by Cole, Lawrence stated that he was returning to New Orleans from visiting his sister in San Antonio. Cole asked Lawrence whether he was traveling with the other vehicle that had been stopped. Lawrence did not answer the question; instead, he asked Cole why he had been stopped. During his initial questioning of Lawrence, Cole noticed that there was a white cardboard box, which he believed to be a food container, sitting on the front seat of Lawrence's vehicle. Cole asked Lawrence once again whether he was traveling with the other vehicle and Lawrence stated that he knew the other driver but that they weren't really following each other. Because Tolliver was

stepping out of his vehicle, Cole ended his conversation with Lawrence and proceeded to Tolliver's vehicle.

Cole asked Tolliver for his drivers license and told him why he had been stopped. He asked Tolliver if he knew the driver of the other vehicle; Tolliver responded that he did know him and that they had just met up down the road. Cole also noticed that there was a white box similar to the one he had seen in Lawrence's vehicle lying on the front seat of the vehicle. Tolliver told Cole that he was returning to New Orleans from visiting his girlfriend in Houston.

Cole returned to Lawrence's vehicle, retrieved the registration for Lawrence's vehicle, and proceeded to run a vehicle check. Because the Alabama registration of the vehicle that Lawrence was driving was in a female's name, Cole returned to Lawrence's vehicle and asked him who the owner of the vehicle was. Lawrence responded that his mother-in-law was the owner of the vehicle. Cole testified that as he was questioning Lawrence concerning the ownership of the vehicle Lawrence became more nervous. Cole then returned to his vehicle and awaited the results of the vehicle check.

After completing the vehicle checks, Cole once again approached Lawrence's vehicle. Cole testified that at this time Lawrence was demonstrating signs of extreme nervousness. Cole also testified that in response to further questioning concerning the ownership of the vehicle he was driving, Lawrence told him that the vehicle belonged to his girlfriend's mother. Cole then

asked Lawrence for permission to search his vehicle. Lawrence responded affirmatively to Cole's request and signed a consent to search form. Cole asked Lawrence whether there were any weapons in the vehicle, and Lawrence told him that there was a pistol on the front seat. Cole found a .45 Glock automatic pistol fully loaded in the vehicle. Cole then began his search; he found no other contraband in the vehicle.

After completing his search of Lawrence's vehicle, Cole obtained Tolliver's consent to search his vehicle. Tolliver also signed a consent to search form. Before beginning the search of the vehicle, Cole asked Tolliver whether there were any weapons in the vehicle, and Tolliver stated that there was a pistol under the front seat. Cole found a 10mm Glock automatic pistol in the vehicle. Cole began searching the vehicle, and he ultimately found a hidden compartment which contained thirty-one kilo-sized bricks of cocaine. Tolliver and Lawrence were then placed under arrest. A subsequent search of Tolliver's vehicle revealed an additional nineteen kilos of cocaine in another secret compartment.

Lawrence and Tolliver were charged with conspiracy to possess cocaine with intent to distribute; possession, aided and abetted by each other, with intent to distribute cocaine; and using and carrying a firearm during a drug trafficking offense. Lawrence and Tolliver each filed a motion to suppress arguing that the cocaine and certain statements made by them should be excluded from evidence. The district court denied both motions.

Tolliver and Lawrence were convicted on all counts. The district court sentenced Tolliver to 216 months imprisonment on counts one and two, to run concurrently, and to sixty months on count three, to run consecutively. The district court sentenced Lawrence to 216 months on counts one and two, to run concurrently, and to sixty months on count four, to run consecutively, and five years supervised release for counts one and two and three years supervised release on count four, all to run concurrently, and ordered him to pay a $150 special assessment.

II.

A. Motion to suppress

Initially, Tolliver asserts that the district court improperly denied his motion to suppress.[1] We review a district court's findings of fact on a motion to suppress under the clearly erroneous standard, and we review the district court's ultimate determination of Fourth Amendment reasonableness de novo. United States v. Seals, 987 F.2d 1102, 1106 (5th Cir.), cert. denied, 114 S. Ct. 155 (1993). We must also view the evidence in the light most favorable to the party that prevailed

[1] In his brief, Lawrence adopted the issues and arguments raised by Tolliver to the extent that they were applicable and beneficial to him. FED. R. APP. P. 28(i). The only issue that Tolliver asserts in his brief is the denial of his motion to suppress the evidence seized during the search of his vehicle. Lawrence does not have standing to challenge the search of Tolliver's vehicle, see United States v. Mendoza-Burciaga, 981 F.2d 192, 196 (5th Cir. 1992) (Fourth Amendment rights are personal and may not be vicariously asserted), cert. denied, 114 S. Ct. 356 (1993), and therefore Lawrence cannot join in this argument.

below. United States v. Simmons, 918 F.2d 476, 479 (5th Cir. 1990).

Tolliver asserts that the evidence which Cole seized in the search of his vehicle should have been suppressed because the valid stop for speeding became an illegal detention when Cole conducted an investigation not reasonably related to the initial justification for the stop and that Tolliver's consent to the search of his vehicle was the product of the illegal detention. The district court overruled Tolliver's motion to suppress because it determined that the stop by Cole was reasonable. The district court initially noted that Tolliver was validly stopped because Cole had personally observed Tolliver commit a traffic offense, speeding. The district court further determined that Tolliver validly consented to the search of his vehicle.

A routine traffic stop is a limited seizure that closely resembles an investigative detention. United States v. Shabazz, 993 F.2d 431, 435 (5th Cir. 1993). This court has utilized the standards enunciated in Terry v. Ohio, 392 U.S. 1 (1968), to analyze cases in which motorists are stopped for violating traffic laws. Id. Under Terry, the judicial inquiry into the reasonableness of a search or seizure "'is a dual oneSQwhether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" Id. Tolliver's motion to suppress brings into question the second prong of the Terry inquiry.

In United States v. Shabazz, we determined that the second prong of Terry is concerned with detentions. Id. at 436. We further stated that a police officer's questioning, even on a subject unrelated to the stop, is not in and of itself a Fourth Amendment violation. Furthermore, in United States v. Sharpe, the Supreme Court stated that in determining whether an officer's actions were reasonably related in scope to the circumstances which justified the initial interference, this court should "determine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly . . . . The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." 470 U.S. 675, 686-87 (1985).

We believe that given the circumstances facing Cole, he pursued his investigation in a diligent and reasonable manner. We have recognized that as part of a valid traffic stop an officer can "request a driver's license, insurance papers, vehicle registration, run a computer check thereon, and issue a citation." Shabazz, 993 F.2d at 437. Even though the detention of Tolliver in the facts of this case amounted to an approximate twenty minute delay, his detention must be viewed in relation to the circumstances facing the officer at the time, i.e., he was dealing with two separate vehicles at the same time. We do not believe that Cole, as a single officer, acted unreasonably.

The facts of the instant case demonstrate that Cole completed his routine checks on Lawrence's and Tolliver's vehicles at approximately 9:02 a.m. Immediately after receiving the last transmission, he approached Lawrence's vehicle, which was the vehicle immediately in front of Cole's vehicle, and asked Lawrence for permission to search his vehicle.

Tolliver asserts that after Cole had completed his routine checks on both vehicles all legitimate traffic procedures were effectively completed. However, this is not necessarily true because Cole could have still issued Tolliver and Lawrence a citation for speeding. In other words, the detention of Lawrence and Cole could have legitimately extended beyond 9:02 a.m. Essentially, Tolliver asserts that he was illegally detained because Cole searched Lawrence's vehicle before going over to his vehicle. However, as we have already stated we do not believe that the Fourth Amendment required Cole to go to Tolliver's vehicle before proceeding with the search of Lawrence's vehicle. The evidence demonstrated that Cole took only about ten minutes to search Lawrence's vehicle. We do not believe that Cole's detention of Tolliver exceeded the legitimate purposes of the initial stop. Furthermore, Cole received consent from Tolliver to search the vehicle, and there is no basis for concluding that this consent was involuntarily given. Therefore, we uphold the district court's denial of Tolliver's motion to suppress.

B. Rule 404(b) evidence

Next, both defendants assert that the district court committed reversible error by admitting evidence of prior bad acts. Specifically, they complain of the testimony of three government witnessesSQRicky Davis, Angela Bernard, and Detective Wehmeirer of the New Orleans police department. Lawrence and Tolliver contend that the evidence from the witnesses had little or no probative value and was highly prejudicial.

Ricky Davis testified that during the latter part of 1989 through early 1991 he had worked for an individual by the name of Glenn Metz in the drug trafficking business and that Tolliver and Lawrence had been similarly employed. He also stated that he had seen Tolliver and Lawrence together at the Metz organization. Davis further testified that he has been incarcerated since April 1991. Although he admitted that he had never actually seen Lawrence and Tolliver sell drugs, he did testify that he had seen both of them with drugs.

Angela Bernard testified that she had distributed cocaine and collected money for Glen Metz. She also testified that she had made several trips to Houston to pick up cocaine. She testified that she would drive a station wagon with a hidden compartment full of money from New Orleans to the Galleria Mall in Houston and park the car in the garage; someone would pick up the car, replace the money with cocaine, and return the car to the parking garage. She further testified that Lawrence and Tolliver had worked for Glen Metz. She also stated that she had

received large amounts of money from both Lawrence and Tolliver which she then turned over to the organization. She also testified that both Lawrence and Tolliver acquired cocaine from her and that Tolliver had taken a car to Houston that was kept at her house in New Orleans. Metz's wife would come over to Bernard's house and place money in a secret compartment in the car. When Tolliver returned from Houston, the car would have cocaine in the secret compartment. She quit working for the Glen Metz organization in June 1991.

Detective Wehmeirer testified that on September 27, 1990, he spotted five individuals in two parked cars which he believed were acting suspiciously; Lawrence was one of these individuals. In a subsequent search of the vehicles, six weaponsSQthe weapons included an AK-47 assault weapon, Uzi machine pistol, two 9mm handguns, and .38 special revolversSQthree beepers, and a cellular phone were seized. No charges were ever filed in relation to this incident.

Admission of evidence of prior bad acts is governed by Federal Rules of Evidence 404(b), which does not permit the admission of evidence of "other crimes, wrongs, or acts" in order to prove the character of a person in order to show that the person acted in conformity with such character; evidence of "other crimes, wrongs, or acts" is, however, admissible for such purposes as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b). This court reviews a district court's

evidentiary rulings under the abuse of discretion standard. United States v. Anderson, 933 F.2d 1261, 1267-68 (5th Cir. 1991). The basic test in this circuit for determining whether evidence is admissible under Rule 404(b) is that (1) the evidence must be relevant to some issue other than the defendant's character and (2) the evidence's probative value must not be substantially outweighed by its undue prejudice and meet the other requirements of Rule 403. United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). In addition, the "predicate to relevance of an extrinsic offense is proof that the defendant committed the offense." United States v. Jimenez, 613 F.2d 1373, 1376 (5th Cir. 1980). However, the government need not show that the defendant was convicted as the result of the bad act or that the defendant was even indicted. All that the government must provide is evidence sufficient to allow a reasonable jury to find that the defendant committed the act. United States v. Gonzalez-Lira, 936 F.2d 184, 189-90 (5th Cir. 1991).

We have recognized that a not guilty plea in a conspiracy case always renders a defendant's intent a material issue and imposes a difficult burden on the government. United States v. Roberts, 619 F.2d 379, 383 (5th Cir. 1980); see also United States v. Parziale, 947 F.2d 123, 129 (5th Cir. 1991), cert. denied, 112 S. Ct. 1499 (1992). Evidence that a defendant associated with conspirators, standing alone, does not show that he had the requisite intent to join the conspiracySQeven if he

knew they intended to commit a crime. Roberts, 619 F.2d at 383. Thus, evidence of such extrinsic offenses as may be probative of a defendant's state of mind is admissible unless he affirmatively acts to take the intent issue out of the case. Id.

We conclude that the testimony that the government elicited from Ricky Davis and Angela Bernard clearly satisfied both prongs of the Beechum test. See United States v. Hitsman, 604 F.2d 443, 448 (5th Cir. 1979) ("Evidence of prior drug dealings is highly probative of intent to distribute a controlled substance, as well as involvement in a conspiracy."). Thus, the district court did not abuse its discretion in admitting this testimony.

However, we believe that the probative value of officer Wehmeirer's testimony was minimal at best. The government apparently offered the evidence to establish that Lawrence had intentionally possessed the firearm found in his vehicle during the search. However, the fact that Lawrence possessed the firearm was never really at issue because Cole had testified that before he began searching Lawrence's vehicle he had asked Lawrence whether there were any weapons in the vehicle and Lawrence responded affirmatively and even told Cole where the weapon was. The real issue in the trial was whether the weapon found in Lawrence's vehicle was used in relation to a drug trafficking offense. We do not believe that officer Wehmeirer's testimony was especially relevant to that issue or to whether Lawrence was a member of a conspiracy to distribute cocaine.

Even if the admission of the extrinsic offense evidence was erroneous as to Lawrence, however, it would not be reversible error under the harmless error rule. FED. R. CRIM. P. 52(a); United States v. Mortazavi, 702 F.2d 526, 528 (5th Cir. 1983). We believe, as will be seen infra, that there was ample evidence to convict Lawrence of both the conspiracy and the weapons charge. Therefore, the district court's admission of Wehmeirer's testimony, if erroneous, was harmless error as to Lawrence.

C. Sufficiency of the evidence

1. Conspiracy, possession, and aiding and abetting

Both defendants contend that there was insufficient evidence to support their convictions for conspiracy to possess with the intent to distribute cocaine, possession of cocaine with the intent to distribute, and aiding and abetting the possession of cocaine. We review the district court's denial of a motion for judgment for acquittal de novo. United States v. Restrepo, 994 F.2d 173, 182 (5th Cir. 1993). The well-established standard in this circuit for reviewing a conviction allegedly based on insufficient evidence is whether a reasonable jury could find that the evidence establishes the guilt of the defendant beyond a reasonable doubt. Id. We view the evidence in the light most favorable to the government to determine whether the government proved all elements of the crimes alleged beyond a reasonable doubt. United States v. Skillern, 947 F.2d 1268, 1273 (5th Cir. 1991), cert. denied, 112 S. Ct. 1509 (1992). Furthermore, the evidence does not have to exclude every reasonable hypothesis of

innocence. United States v. Leed, 981 F.2d 202, 205 (5th Cir.), cert. denied, 113 S. Ct. 2971 (1993).

In order to find Lawrence and Tolliver guilty of a conspiracy under 21 U.S.C. § 846, the government must prove (1) the existence of an agreement to import or possess controlled substances with intent to distribute them; (2) Tolliver and Lawrence's knowledge of the agreement; and (3) Tolliver and Lawrence's voluntary participation in the agreement. Id. The government is not required to prove the existence of the agreement between the co-conspirators by direct evidence; the agreement may be inferred from circumstantial evidence. United States v. Natel, 812 F.2d 937, 940 (5th Cir. 1987). The government does not have to show an overt act in furtherance of the conspiracy. Id. While presence at the scene of the crime or close association with another involved in a conspiracy will not by itself support an inference of participation in a conspiracy, presence or association is a factor that a jury may rely upon, along with other evidence, in finding conspiratorial activity by the defendant. Id.

To convict Lawrence and Tolliver of aiding and abetting, the government must prove that they (1) associated with the criminal venture, (2) participated in the venture, and (3) sought by action to make the venture succeed. United States v. Gallo, 927 F.2d 815, 822 (5th Cir. 1991). Furthermore, the evidence that supports a conviction for conspiracy can also be used to support

a conviction for aiding and abetting the possession of illegal narcotics with the intent to distribute. Id.

To convict Lawrence and Tolliver of possession of cocaine with the intent to distribute, the government must prove that they knowingly possessed cocaine with intent to distribute. United States v. Munoz, 957 F.2d 171, 174 (5th Cir.), cert. denied, 113 S. Ct. 332 (1992). "Proof of intent to distribute may be inferred from the presence of distribution paraphernalia, large quantities of cash, or the value and quality of the substance." Id.

Lawrence contends that the government's evidence did nothing more than place him with some very bad company. We believe, however, that there was sufficient evidence for a rational jury to determine beyond a reasonable doubt that both Lawrence and Tolliver were guilty of conspiracy to possess with the intent to distribute cocaine. Both defendants maintained that they did not know each other very well and were not traveling together. However, we conclude that there was sufficient evidence that the defendants were traveling together and that they both knew about the cocaine in Tolliver's vehicle.

In Houston, Lawrence stayed at a La Quinta hotel. He prepaid for a two room suite and an adjacent single room for three nights, but he checked out early on December 31. During Lawrence's stay at the La Quinta, Tolliver's car was seen in the parking lot adjacent to one of the rooms that Lawrence had rented. Ricky Davis' testimony revealed that Lawrence and

Tolliver knew each other and had both worked for Glen Metz's drug organization. Tolliver and Lawrence were following each other when they were stopped, both of the defendants were carrying a weapon in their vehicle, and both of the defendants had similar food containers in their vehicles which tended to show that they had stopped at the same restaurant to eat. Therefore, we believe that it was reasonable for a jury to conclude that Tolliver and Lawrence were traveling together, and that their stories that they barely knew each other were false.

The government also introduced testimony from Marlon Harmon. Harmon testified that he had overheard Lawrence and Tolliver talking to each other in their jail cell. Harmon stated that he overheard Tolliver state that he was glad that Cole had not found all of the cocaine in his vehicle, that they were going to beat the charges, and "that they couldn't stick this on us." He also testified that he heard Lawrence say "don't worry they wasn't going to find it." Harmon also stated that Tolliver and Lawrence acted as if they were friends and talked about partying in New Orleans. This evidence also tended to establish that both defendants knew about the cocaine and were traveling together. Further, Davis' and Bernard's testimony was some evidence of the defendants' intent to join in the conspiracy.

The government also introduced testimony from Michael Cimino. Cimino stated that fifty kilograms of cocaine has a street value of $1-1.5 million. He also stated that major drug trafficking organizations often transport large quantities of

drugs by drug courier in secret compartments. He further testified that they often use multiple vehicles when they transport large loads of narcotics.

We also believe that there was ample evidence to convict both defendants of possession with the intent to distribute cocaine. The large amount of drugs found in Tolliver's vehicle coupled with the testimony of Harmon is sufficient for a reasonable jury to find that Tolliver possessed the drugs with the intent to distribute. Furthermore, a party to a conspiracy can be convicted of a substantive offense committed by a co-conspirator if the offense was committed in furtherance of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 647-48 (1946). Thus, there was also sufficient evidence to convict Lawrence of the possession charge.

2. Use of a firearm during or in relation to a drug crime

To prove that Tolliver and Lawrence "used" a weapon to further a drug trafficking offense, the government need not prove that they discharged or brandished the weapon. United States v. Blakenship, 923 F.2d 1110, 1114 (5th Cir.), cert. denied, 111 S. Ct. 2262 (1991). All that the government has to prove is that the weapon "could have been used to protect or have the potential of facilitating the operation, and that the presence of the weapon was connected with the drug trafficking." United States v. Featherson, 949 F.2d 770, 776 (5th Cir. 1991), cert. denied, 112 S. Ct. 1698 (1992); see also United States v. Beverly, 921 F.2d 559, 563 (5th Cir.) (noting that the government need only

present sufficient evidence so that a jury could infer that a weapon was "used as protection `in relation to' both the ill-gained cash and drugs found in the room" to convict the defendant of carrying or using a firearm during the commission of a drug trafficking offense), cert. denied, 111 S. Ct. 2869 (1991).

The evidence at trial established that Tolliver and Lawrence were traveling together with a large quantity of drugs. Further, the evidence clearly established that the defendants actually possessed the weapons because each of them told Cole about his weapon in response to Cole's questions concerning whether he had a weapon. Lawrence's weapon was loaded. Testimony established that this weapon was of a type typically used by drug couriers and the weapons were easily accessible. Therefore, we conclude that there was sufficient evidence to convict Lawrence and Tolliver of using a firearm in furtherance of a drug trafficking offense.

III.

For the foregoing reasons, we AFFIRM the district court's judgments of conviction and sentences.