

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-5033
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHI THIEN DUONG, TAI TAN DUONG,
f/k/a TAN TAI DUONG,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Texas
(1:93-CR-16-2)

(October 14, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:¹

Appellants challenge their convictions on drug trafficking and related weapons offenses. We affirm.

I.

In August 1991, Officer Todd Richards was surveilling the parking lot of a Circle K convenience store based on an informant's tip that someone was selling drugs there. He saw a man make and receive calls from a pay phone, and then several minutes later get

¹ 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

into a white Mazda low-rider truck that had pulled into the parking lot. Believing that the man's conduct was consistent with drug trafficking activity, Richards approached the driver's side of the truck, identified himself as a police officer and asked the two occupants to get out of the truck.

When the driver, Chi Thien Duong, got out of the truck, Richards immediately saw a small pistol on the floorboard between the seat and the door. He asked Chi if he had a gun in the car, and Chi admitted that the gun was his. In the car, Richards found a cellular phone and a pager which still held the phone number of the Circle K pay phone. He also discovered five rocks of crack cocaine in the front pocket of Chi's pants.

In January 1993, Richards was monitoring traffic by radar on Highway 73 between Houston and Port Arthur, Texas, when he stopped another white Mazda low-rider pickup truck for speeding. After he activated the emergency lights, the truck rolled on the shoulder for approximately 100 to 200 yards, during which time Richards saw the occupants of the truck moving about considerably. When the truck stopped, Richards approached the driver and asked for his driver's license. The driver, Tai Tan Duong, readily admitted that his license was suspended. After Richards asked Tai to get out of the car, he immediately saw a small pistol on the floorboard between the driver's seat and the door. He placed Tai under arrest and asked the passenger to place his hands on the dashboard. Upon recognizing the passenger as Chi Duong, Richards arrested him as well.

Richards then conducted an inventory search of the truck with Max, his narcotics dog. Max alerted on the passenger seat, but Richards found no drugs in the truck. As an alert usually indicates the recent presence of drugs, Richards searched both men and found two clear plastic baggies with three cookies of crack cocaine in the crotch area of Tai's pants. A small set of scales was later found in the glove box.

Chi was charged with one count of possession of cocaine with intent to distribute for the January 1993 stop (count I), and two counts of carrying a firearm during the commission of a drug trafficking offense for both the 1991 stop (count II) and the 1993 stop (count III). He filed a motion to suppress his statements made during the 1991 and 1993 stops as well as the evidence seized during the 1993 stop. The district court granted the motion to suppress the statements made during the 1993 stop, but denied the motion to suppress the statements made during the 1991 stop and the evidence seized during the 1993 stop. The jury convicted Chi on all three counts, and he filed a timely notice of appeal.

Tai was charged in counts I and II of the indictment. He filed a motion to suppress the evidence seized during the 1993 search, arguing that the stop was pretextual. The jury convicted him on both counts. Although Tai did not file a timely notice of appeal, the district court found excusable neglect and granted an out-of-time appeal.

II.

A. CHI DUONG

1. Sufficiency of the Evidence

Chi argues first that the evidence was insufficient to support his convictions in counts I and II. Because he failed to move for judgment of acquittal at the close of all the evidence, our review is limited to determining whether the conviction constituted "a manifest miscarriage of justice." **United States v. Pierre**, 958 F.2d 1304, 1310 (5th Cir.) (en banc), **cert. denied**, 113 S. Ct. 280 (1992). This would be the case only "if the record is devoid of evidence pointing to guilt, or . . . because the evidence on a key element of the offense was so tenuous that a conviction would be shocking." **Id.** (internal quotations and citations omitted). Whether we apply this standard or the usual standard of review--whether a reasonable jury could have found each element of the offense beyond a reasonable doubt--the evidence was sufficient to prove Chi's guilt.

To establish possession with intent to distribute under 21 U.S.C. § 841(a)(1), the government must show knowledge, possession, and intent to distribute. **United States v. Munoz**, 957 F.2d 171, 174 (5th Cir.), **cert. denied**, 113 S. Ct. 332 (1992). Possession may be actual or constructive. **U.S. v. Casilla**, 20 F.3d 600, 603 (5th Cir. 1994), **petition for cert. filed**, (U.S. July 19, 22, 25, 1994) (No. 94-5245, 94-5313, 94-5388). "Constructive possession is the knowing exercise of, or the knowing power or right to exercise, dominion and control over the proscribed substance." **Id.** (quoting

United States v. Molina-Apodaca, 889 F.2d 1417, 1423 (5th Cir. 1989)).

Chi argues that the evidence fails to support constructive possession of the cocaine retrieved from Tai's pants. While mere ownership of or mere presence in a car can be insufficient to establish constructive possession, **see United States v. Barrera**, 547 F.2d 1250 (5th Cir. 1977), a jury may infer possession from additional circumstantial evidence, such as a close relationship between the defendants, the defendant's presence in the place the drugs were found and circumstances of the arrest. **See, e.g., Casilla**, 20 F. 3d at 607. Substantial circumstantial evidence supported Chi's conviction. Specifically, evidence showed that Chi owned the truck; that Tai is Chi's brother; that Officer Richards saw the two occupants moving around in the truck, suggesting that one individual was passing something to the other; that the narcotics dog alerted on the passenger seat, where Chi had been sitting; that two of the three "cookies" of cocaine retrieved from Tai's pants were not broken although the cookies are very fragile; and that a set of scales was found in the glove compartment of the truck. From this evidence, a reasonable jury could conclude that Chi knew the cocaine was in the truck and passed it to Tai when the police car began pursuit. Thus, the evidence was sufficient to support Chi's conviction on Count I.

To establish an offense under 18 U.S.C. § 924(c)(1), the government must prove that Chi "used or carried a firearm during a drug trafficking crime." **United States v. Ivy**, 973 F.2d 1184, 1189

(5th Cir. 1992), **cert. denied**, 113 S. Ct. 1826 (1993). Conviction under this section "does not depend on proof that the defendant had actual possession of the weapon or used it in any affirmative manner," rather the evidence must show only that "the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking.'" **Id.** (quoting **United States v. Raborn**, 872 F.2d 589, 595 (5th Cir. 1989)).

The evidence established that a loaded pistol was on the floorboard of Chi's truck, within Tai's reach. Moreover, the evidence that Chi possessed a similar pistol under similar circumstances during the 1991 transaction could be used to infer knowledge of the pistol to Chi. Fed. R. Evid. 404(b). Thus, a reasonable jury could also conclude that Chi had constructive possession of the pistol and that the pistol was carried during the commission of a drug trafficking crime.

2. Motion to Suppress

Chi argues next that the district court improperly denied his motion to suppress statements made during the 1991 detention. He contends that the statements were made after he was in custody, without the benefit of **Miranda**² warnings. When reviewing the denial of a motion to suppress based on live testimony, this Court accepts the district court's factual findings unless they are clearly erroneous or influenced by an incorrect view of the law. **United States v. Coleman**, 969 F.2d 126, 129 (5th Cir. 1992).

² **Miranda v. Arizona**, 384 U.S. 436 (1966).

An individual is "in custody" within the meaning of **Miranda** "when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." **United States v. Bengivenga**, 845 F.2d 593, 596 (5th Cir.) (en banc), **cert. denied**, 488 U.S. 924 (1988).³ The reasonable person "must be neutral to the environment and to the purposes of the investigation--that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances." **Id.**

Richards testified that he approached the truck in 1991 to investigate potential drug trafficking activity. Richards immediately spotted the pistol as Chi got out of the truck, and, without placing any physical restraint on Chi's movements, asked him if he had a weapon in the truck. Chi readily admitted that the pistol was his, and Richards arrested him. Under these facts, the court could conclude that a reasonable person would not believe he was under arrest at the time Richards asked about the weapon. Thus, the district court did not err in admitting Chi's 1991 statement.

B. TAI DUONG

1. **Lesser-Included Offense Instruction**

Tai argues for the first time on appeal that the district court should have charged the jury on the lesser-included offense of simple possession of cocaine. When a defendant in a criminal

³ Chi relies on the four factor test of **United States v. Morin**, 665 F.2d 765 (5th Cir. 1982). However, this court abandoned that test in **Bengivenga**, 845 F.2d at 596.

case has forfeited an error by failing to object, this Court may remedy the error only in the most exceptional cases. **United States v. Rodriguez**, 15 F.3d 408, 414-15 (5th Cir. 1994). An appellant who raises an issue for the first time on appeal must show that there is an error, that it is plain ("clear" or "obvious"), and that it affects substantial rights. **United States v. Olano**, 113 S. Ct. 1770, 1777-78 (1993). This Court lacks the authority to relieve an appellant of this burden. **Id.** at 1781.

Under Fed. R. Crim. P. 31(c), a defendant is entitled to a jury instruction on a lesser-included offense if the elements of the lesser offense are a subset of the elements of the charged offense, and the evidence at trial would permit a rational jury to find the defendant guilty of the lesser offense, yet acquit him of the greater. **United States v. White**, 972 F.2d 590, 596 (5th Cir. 1992), **cert. denied**, 113 S. Ct. 1651 (1993). Neither party disputes that simple possession is a subset of possession with intent to distribute, but Tai argues that a rational jury could have convicted him of simple possession and acquitted him of possession with intent to distribute.

Richards testified at trial that the 65.94 grams of cocaine retrieved from Tai's pants was consistent with distribution and had a street value of \$5000 to \$6000. No evidence was presented that Tai used cocaine or that the quantity of cocaine discovered was consistent with personal use. Although Tai concedes that a jury permissibly could infer intent to distribute from the amount of cocaine involved, **see, e.g., United States v. Elwood**, 993 F.2d

1146, 1150 n.11 (5th Cir. 1993) (noting that intent to distribute may be inferred from the possession of a large quantity of drugs), he argues that the inference was not compelled, and therefore he was entitled to the lesser-included offense jury instruction. **See United States v. Brischetto**, 538 F.2d 208, 210 (8th Cir. 1976) (noting that while possession of 75 pounds of marijuana created a permissible inference of intent to distribute, it did not compel that conclusion). He also argues that the jury could have concluded that he had hidden the drugs to protect his brother, who had a prior drug arrest, without ever forming an intent to distribute. **Cf. United States v. Deisch**, 20 F.3d 139, 153 & n.30 (5th Cir. 1994) (noting lesser-included offense instruction was justified despite the large amount of drugs involved because there was evidence that defendant hid them to protect her boyfriend).

Even if Tai would have been entitled to the lesser jury instruction had he requested it, the district court did not commit plain error in failing to **sua sponte** give the instruction because there was substantial evidence of intent to distribute. **See U.S. v. Young**, 655 F.2d 624, 627 (5th Cir. 1981) (holding that it was not plain error for judge to fail to give simple possession jury instruction when there was substantial evidence of intent to distribute).

2. Motion to Suppress

Tai also argues that the district court improperly prevented him from developing his argument at the suppression hearing that the 1993 stop was an impermissible pretextual stop to search for

contraband. Under **United States v. Causey**, 834 F.2d 1179 (5th Cir. 1987) (en banc), because Tai was properly stopped for speeding, the subjective intent of Richards is irrelevant. Tai concedes that under **Causey** and its progeny the district court properly prevented him from pursuing the issue, but he has raised the issue on appeal to preserve it for reconsideration **en banc**. The district court therefore correctly denied Tai's motion to suppress.

III.

For the above reasons, we affirm the judgments below.

AFFIRMED.