UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-5367
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOEY ALLEN DAVIS,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Texas
(1:93-CR-9-1)

(December 1, 1994)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Joey Allen Davis (Davis), appeals from his conviction for possession with intent to distribute cocaine. He claims error in the district court's denial of his motion to suppress. Specifically, he claims that (1) he was arrested without probable

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

cause; and (2) his postarrest statements were made in conversations initiated by peace officers after he had requested an attorney. Finding no error in the trial court's determination of Davis' suppression motion, we AFFIRM Davis' conviction.

The following facts were developed at the suppression hearing. Texas State Trooper Rodney Mahan stopped a car for speeding near Corrigan, Texas. The driver, co-defendant Craig Sorrell, got out and walked towards Mahan's patrol car. When Mahan asked for Sorrell's driver's license and proof of insurance, Sorrell gave Mahan a valid Texas driver's license and told him that the insurance card was in the car. Mahan noticed that Sorrell smelled of burning marijuana. Sorrell told Mahan that he and his passenger (Davis) were going to Baton Rouge, Louisiana. Mahan thought that this was curious because they were headed in the wrong direction. Sorrell admitted that he had been smoking marijuana. Mahan asked Sorrell if Mahan could look in the car, and Sorrell made a gesture indicating that Mahan was free to do so.

Mahan approached the passenger side of the car and asked Davis for identification. Davis appeared to be "under the influence half asleep" and "just kind of out of it." Mahan again smelled burning marijuana, so he asked Davis if there was marijuana in the car, and Davis replied that he had "eaten his stash." Davis told Mahan that he and Sorrell were on their way to Baton Rouge, and he gave Mahan expired insurance papers and a check-cashing card bearing the name "James E. Hill." Mahan suspected that Davis' identification was

forged, so he returned to Sorrell and asked him Davis' name. Sorrell told Mahan that he could not answer because he did not want to lie. While Mahan and Sorrell were talking, Mahan noticed a bag containing 5.9 grams of marijuana on the ground next to Sorrell. He arrested Sorrell and Davis for possession of marijuana.

During an inventory search of the car at the Corrigan police station, officers discovered hidden compartments containing 13.2 pounds of cocaine. Trooper Mahan showed Davis and Sorrell the cocaine, gave them Miranda[1] warnings, placed them in a holding cell, and called Drug Enforcement Administration (DEA) officers working in the area.

DEA agent Tim Binkley interviewed Davis and Sorrell at the police station later that afternoon. Agent Binkley asked Davis and Sorrell if they had been advised of their rights and both responded affirmatively. Binkley told Davis and Sorrell that their rights were "still in effect" and that they did not have to talk to Binkley if they did not want to. Both Davis and Sorrell indicated that they wanted to waive their rights. Davis stated that he "needed to do something to work this thing out" because he had a one-year-old daughter and he "couldn't do a twenty-year sentence." Davis then told Agent Binkley how he and Sorrell had obtained the cocaine and how they were supposed to deliver it in Baton Rouge. Davis made other incriminating statements to Trooper Mahan.

[1] Miranda v. State of Arizona, 384 U.S. 436, 478, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Davis testified that he was asleep when Trooper Mahan stopped the car. He denied acting "stoned" during his conversation with Mahan or telling Mahan that he had eaten his "stash" of marijuana. He said that he had not smoked any marijuana and that there was no marijuana in the car. He professed ignorance when asked whether Sorrell had been smoking the drug.

Davis stated that he and Sorrell were arrested and taken to the Corrigan police station without being informed of their Miranda rights. At the police station, the defendants were briefly left in a room where an unidentified man wearing street clothes was working at a desk. Davis did not know if the man was a police officer. Davis allegedly asked the man if he could use the telephone to call an attorney, but the man refused. Davis and Sorrell were then placed in a holding cell. About thirty minutes later, Mahan came to the cell, showed them the cocaine, advised them of their rights, and told them that they were under arrest for possession of cocaine. About an hour later, Agent Binkley arrived to question the defendants. Davis stated that Binkley threatened Davis with a life sentence. Davis agreed that neither Trooper Mahan nor Agent Binkley had been present when he asked the unidentified man if he could use the telephone, and he confirmed that he never told either Mahan or Binkley that he wanted to call a lawyer.

Agent Binkley was recalled as a witness, and he testified that he had told Davis and Sorrell that "they were looking at serious time, probably at least ten years minimum." He denied that he had ever mentioned the possibility of life imprisonment to either

defendant. Trooper Mahan was recalled and he verified that Davis had not been threatened with a life sentence and that he had been free to call an attorney.

The district court denied the motion to suppress because it determined that Trooper Mahan had probable cause to arrest both Davis and Sorrell for possession of marijuana. The court noted Davis' concession that he lacked standing to challenge the search of the car, and it found that Davis had been informed of his Miranda rights before he was questioned about the cocaine. The court determined that Davis' assertion that he had asked to call an attorney was not credible, and the court rejected Davis' contention that Agent Binkley had used coercion to obtain his statement.

Probable Cause to Arrest for Possession of Marijuana

Davis relies on a number of Texas court cases that examine the sufficiency of evidence to support a conviction for possession offenses. But, probable cause is not dependent upon an arresting officer having sufficient evidence to support a conviction at trial or evidence of proof beyond a reasonable doubt. Rather, "probable cause exists where the facts and circumstances within the arresting officers' knowledge are sufficient in themselves to warrant a man of reasonable caution in the belief that the person to be arrested has committed or is committing an offense." U.S. v. Mendez, 27 F.3d 126, 129 (5th Cir. 1994). The evidence presented at the suppression hearing clearly shows that Trooper Mahan had probable

cause to arrest Davis for possession of marijuana. See U.S. v. Garcia, 616 F.2d 210, 211 n.1 (5th Cir. 1980).[2]

Postarrest Statements

Davis urges that his statements to Trooper Mahan and Agent Binkley should be excluded pursuant to Edwards v. Arizona[3] because the officers solicited incriminating statements after Davis had asked to call an attorney. See U.S. v. Rodriguez, 993 F.2d 1170, 1174 (5th Cir. 1993), cert. denied, 114 S. Ct. 1547 (1994).

In reviewing the district court's ruling on a motion to suppress a confession, this Court gives credence to the credibility choices and findings of fact of the district court unless they are clearly erroneous. U.S. v. Restrepo, 994 F.2d 173, 183 (5th Cir. 1993). Davis admitted that he received Miranda warnings and that he never told either Trooper Mahan or Agent Binkley that he wanted to talk to an attorney. The district court's rejection of Davis' assertion that he asked an unidentified person to allow him to call an attorney is not clearly erroneous. Restrepo, 994 F.2d at 183. Because Davis never requested to talk to an attorney, Edwards does not apply to this case.

---

[2] We note additionally that the statements which Davis seeks to exclude were made in response to the subsequent discovery that the car contained a large quantity of cocaine rather than as a result of his arrest for possession of marijuana. Davis does not challenge the search of Sorrell's car, nor the seizure and examination of the bag of marijuana found at Sorrell's feet.

[3] 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

Davis also argues that the "totality of the circumstances" suggest that his confession should be excluded under 18 U.S.C. § 3501, the statutory provision governing the admissibility of confessions.

In reviewing the voluntariness of a confession, the Court considers all of the circumstances, including the following factors:

> (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness.

U.S. v. Perez-Bustamante, 963 F.2d 48, 51 (5th Cir.), cert. denied, 113 S. Ct. 663 (1992) (citing 18 U.S.C. § 3501(b)) (emphasis omitted).

The evidence at the suppression hearing showed that Davis knew the nature of the charges against him, that he had been advised of his right to remain silent and his right to counsel, and that he was without counsel when he made the incriminating statements. The district court sua sponte raised the issue of the timeliness of Davis' arraignment. Although no one at the hearing was certain exactly when Davis was arraigned, Davis' attorney did not object

that his arraignment had been untimely or that it otherwise violated § 3501.

Because Davis did not object on the grounds that his statements were involuntary under § 3501, this Court reviews his claim for plain error. See Fed. R. Evid. 103(a)(1) and 103(d).

Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, this Court may remedy the error only in the most exceptional case. U.S. v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. U.S. v. Olano, ___ U.S. ___, 113 S. Ct. 1770, 1777-79, 123 L. Ed. 2d 508 (1993) (interpreting "plain error" of Fed. R. Crim. P. 52(b)).

First, an appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain ("clear" or "obvious"), and that it affects substantial rights. Olano, 113 S. Ct. at 1777-78; Rodriguez, 15 F.3d at 414-15; Fed. R. Crim. P. 52(b). This Court lacks the authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is `plain' and `affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Olano, 113 S. Ct. at

1778 (quoting Fed. R. Crim. P. 52(b)). As the Court stated in Olano:

> the standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, [297 U.S. 157] (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Olano, 113 S. Ct. at 1779 (quoting Atkinson, 297 U.S. at 160). Thus, this Court's discretion to correct an error pursuant to Rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

Davis' argument fails at the first step of the Olano analysis because there is no clear or obvious error in the district court's determination that his statements were admissible.

For the foregoing reasons, the judgment of conviction is **AFFIRMED.**