

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5475

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CLIFFORD CHESTER SIAS, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas
(93-CR-100)

(September 30, 1994)

Before Judges GARWOOD, JOLLY, and STEWART, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

Sias was convicted of possession with the intent to distribute a controlled substance. The only evidence presented at trial of Sias's intent to distribute the controlled substance was the testimony of Officer Hearn who observed Sias engaged in what he believed to be three separate drug transactions. Sias appeals his conviction and sentence arguing the evidence was insufficient to

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

support his conviction. He also contends that the district court erred in upwardly departing from the guidelines in sentencing him.

I

Shortly before sunrise on June 3, 1993, Beaumont Police Officer Sklyer D. Hearn was patrolling a section of Beaumont, Texas. He observed a man, later identified as the defendant, Clifford Chester Sias, Jr., approaching the passenger door of a car that was stopped in the street. Sias later walked away from the car to a group of people standing on the sidewalk. Officer Hearn circled the block and stopped at a location where he could observe the activity among the group. Using binoculars, Officer Hearn watched Sias approach a second car and "apparently make some kind of exchange" by reaching his arm inside the door of the car. Sias then returned to the sidewalk, rejoining the group of people.

Officer Hearn relocated to observe the group from behind a large tree at a distance of about twenty or thirty yards. Officer Hearn saw Sias return to the street where he leaned into a red mini-van window and appeared to be engaged in still another transaction. As Officer Hearn approached, Sias left the van, ran to the porch of a house, and flicked a match box behind a column of the house and sat down. Officer Hearn retrieved the match box, which contained 1.86 grams of cocaine, a razor blade, and a piece of Brillo.

Sias was convicted by a jury of possession with the intent to distribute a controlled substance within 1000 feet of a playground in violation of 21 U.S.C. § 841(a)(1), and § 860. The district court departed from the guidelines sentence, imprisoning Sias for 115 months followed by six years supervised release. On appeal Sias argues that (1) the evidence of intent to distribute was insufficient to support his conviction for possession with the intent to distribute a controlled substance; and (2) the district court erred in upwardly departing from the guidelines sentence. Finding no error, we affirm Sias's conviction and sentence.

II

Sias first challenges the sufficiency of the evidence supporting his conviction. We review the evidence in the light most favorable to the verdict. United States v. El-Zoubi, 993 F.2d 442, 445 (5th Cir. 1993). Ordinarily, the standard for reviewing a conviction based on insufficient evidence is "whether a reasonable jury could find that the evidence establishes the guilt of the defendant beyond a reasonable doubt." El-Zoubi, 993 F.2d at 445. However, because Sias failed to move for a judgment of acquittal at the close of the evidence, we review his conviction under the plain error standard and reverse only for a "manifest miscarriage of justice." United States v. Thomas, 12 F.3d 1350, 1358 (5th Cir. 1994), cert. denied, 114 S.Ct. 1861 (1994). "Such a miscarriage would exist only if the record is devoid of evidence pointing to guilt, or ... [if] the evidence on a key element of the

offense was so tenuous that a conviction would be shocking." Thomas, 12 F.3d at 1358 (quoting United States v. Galvan, 949 F.2d 777, 782 (5th Cir. 1991)).¹

In order to prove the offense of possession with the intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a), the government was required to prove beyond a reasonable doubt Sias's (1) knowing (2) possession of a controlled substance (3) with the intent to distribute it. United States v. Pruneda-Gonzalez, 953 F.2d 190, 194 (5th Cir. 1992), cert. denied, 112 S.Ct. 2952 (1992). The only evidence introduced at trial to prove

¹Under 28 U.S.C. § 2254, an applicant is entitled to federal habeas relief if it is found upon examination of the record that no "rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324 99 S.Ct. 2781, 2792, 61 L.Ed.2d 560 (1979). Judging sufficiency of the evidence in a case such as this, first on direct review for plain error, and later on habeas review under the due process standard, leads to inconsistent results. Applying the present standards, the court may first affirm a conviction on direct review looking for plain error as the record is not entirely "devoid of evidence." However, on habeas review under the due process standard, the court may reverse this conviction as no "rational trier of fact could have found proof of guilt beyond a reasonable doubt." Compare Jackson, 443 U.S. at 320, 324 (applying due process standard and rejecting "no evidence" standard to a case under habeas review) with Thomas, 12 F.3d at 1358 (finding plain error standard as proper review when defendant fails to move for judgment of acquittal at close of evidence). Although without resolution, we have recognized the conflict between these standards. See United States v. Pennington, 20 F.3d 593, 597 (5th Cir. 1994) (applying Jackson standard because motion for acquittal at close of evidence would be "empty ritual"); United States v. Davis, 583 F.2d 190, 199 (5th Cir. 1978)(Clark, J., concurring) (urging court to apply same standard on review regardless of whether motion for judgment of acquittal is made). We are bound by our prior earlier precedent, as reflected in Thomas, to apply the plain error standard of review in this case. Only the court sitting en banc can reverse this precedent.

Sias's guilt was Officer Hearn's testimony concerning his observations on the morning of Sias's arrest. Undoubtedly, this testimony was sufficient evidence to prove Sias was in knowing possession of the cocaine as Officer Hearn observed Sias flick the matchbox containing the cocaine behind a column on the porch.

The more difficult question is whether Officer Hearn's testimony is sufficient evidence to establish Sias's intent to distribute the cocaine i.e., whether the transactions were sales to customers and not merely purchases for personal use. Mere possession of a controlled substance alone is insufficient to establish the intent necessary to support a conviction of possession with the intent to distribute. Turner v. United States, 396 U.S. 398, 422-23, 90 S.Ct. 642, 655-56, 24 L.Ed.2d 610, 627 (1970); see United States v. White, 969 F.2d 681, 684 (8th Cir. 1992). However, possession of an amount of the substance, even a small amount as in this case, together with additional evidence will sustain the jury's verdict. United States v. Olvera, 523 F.2d 1252, 1253 (5th Cir. 1975); see White, 969 F.2d at 684.

We conclude that the record is not devoid of any evidence of guilt, nor is the evidence on a key element of the offense so tenuous that a conviction would be shocking under the "manifest miscarriage of justice" standard of review. Officer Hearn testified that he observed Sias approach three different cars and engage in what he believed to be a drug transaction. Furthermore, the seized cocaine, broken into seven separate rocks, was found

with a razor blade and a piece of Brillo. From this evidence, it surely is not unreasonable to infer that Sias possessed the substance in a form and manner ready for distribution and sale and with the intent to distribute the cocaine. Therefore, we hold that under the plain error standard of review, the evidence is clearly sufficient to convict Sias of possession with the intent to distribute a controlled substance and affirm the judgment of the district court.²

III

Sias also argues that the district court erred in upwardly departing from the guidelines sentence when imposing his term of imprisonment. We will affirm a departure from the guidelines sentence if the district court articulates "'acceptable reasons' for the departure and the departure is 'reasonable.'" United States v. Lambert, 984 F.2d 658, 663 (5th Cir. 1993) (en banc) (quoting United States v. Velasquez-Mercado, 872 F.2d 632 (5th Cir. 1989)). However, if the district court has misapplied the guidelines, we will remand the case unless the error was harmless or did not affect the selection of the sentence imposed. Lambert, 984 F.2d at 663 n.11.

When determining the degree to depart from the guidelines sentence, the district court should evaluate each intermediate

²We need not address whether the evidence meets the sufficiency test under a due process analysis, and our opinion is not to be construed to prejudge such future consideration if presented in another case.

criminal history category before deciding on the appropriate sentence. Id. at 662. In addition, the court should state why the calculated category is inappropriate and why the chosen category is appropriate. Id. Finally, if the court finds a departure necessary, it should give adequate reasons why the guidelines calculation is inadequate and the sentence imposed is appropriate. Id. Nevertheless, Lambert does not require the court to follow a "ritualistic exercise in which it mechanically discusses each criminal history category it rejects en route to the category that it selects," but rather these reasons are ordinarily implicit in the court's explanation for departure. Id.

After evaluating Sias's total offense level of twenty and his criminal history category of VI, the district court determined Sias's guidelines range under the United States Sentencing Guidelines to be between seventy and eighty-seven months imprisonment. During the sentencing hearing, however, the court departed upwardly from this range to impose on Sias a sentence of 115 months imprisonment.

To justify this upward departure, the court gave numerous reasons, noting first that Sias was previously convicted of three separate controlled substance offenses and two firearm offenses, according to his criminal history category. The court further found that after months of abstinence and incarceration in state and county jails, Sias had continued to use drugs and had withdrawn from a drug inpatient program before completion. The court

continued by stating that Sias had an extensive criminal history, which significantly under-represented his criminal history category, and which suggested that he would continue to commit offenses. Finally, the court stated that his previous terms of imprisonment had no deterring effect on his willingness to engage in criminal conduct. For these reasons, the district court found that an upward departure from the guidelines sentence appropriate to serve the purposes of punishment, deterrence and incapacitation.

We conclude that because of Sias's repeated criminal behavior and prior lenient sentencing, the district court was justified in imposing the increase of Sias's term of imprisonment. Further, the district court clearly supported the increase with acceptable reasons and the departure was reasonable.³ Therefore, we affirm the upward departure in Sias's term of imprisonment imposed by the district court.

IV

In conclusion, we hold that the evidence is sufficient to uphold the conviction for possession with the intent to distribute a controlled substance against Sias under the manifest miscarriage

³Sias unpersuasively argues that the district court incorrectly based the increase on an improper comparison of the Texas sentences that Sias had previously served to the proposed sentencing guidelines. Sias had not served the full duration of any of his prior terms of imprisonment in Texas. Consequently, Sias argued that because parole was available in the Texas penal system but not in the federal system, his prior sentences could not be found to have had no deterring effect on his behavior. To the contrary, we find the lenient prior sentencing as a justification for the upward departure from the guidelines sentence.

of justice standard of review. Further, we hold that the district court was correct in upwardly departing from the guidelines sentence. Accordingly, the judgment of the district court is

A F F I R M E D.