IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5614
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CORDELL GENE FORD,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas
(1:93-CR-50)

(December 29, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Cordell Gene Ford was convicted by a jury of possession with intent to distribute cocaine. He received a 121-month term of incarceration, a five-year term of supervised release, and a $50 special assessment. Prior to trial, Ford filed a motion to suppress, which the district court denied after an evidentiary hearing with live testimony.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I

On April 2, 1993, Ford was pulled over by Beaumont Police Officers Froman and LaChance who allegedly clocked him "doing 63 miles an hour in a 55 posted speed zone." Froman approached the driver's side of Ford's vehicle as LaChance approached the passenger's side. Ford exited the vehicle and met Froman at the rear. Froman testified that as Ford handed his driver's license to Froman, Ford's "hands were shaking so badly that he all but dropped his license on the ground." Froman further testified that Ford was extremely nervous, could not stand still, was visibly shaking, was breathing very rapidly, would not make eye contact, was talking rapidly, and had "every indication of somebody that was very, very nervous or frightened."

Froman inquired as to Ford's itinerary, ascertained that Ford was returning home to New Orleans from Houston where he had been visiting his brother, and then Froman inquired as to the ownership of the vehicle Ford was driving. In response, Ford "unlocked the passenger's door, opened the door just enough so he could reach in and open the glove box," retrieved the registration, and then relocked the door.

Froman further testified that Ford stated he was unemployed and that the vehicle had over 180,000 miles on the odometer, which Froman found to be "a little unusual, in that it was a relatively late model vehicle, a 1988." Froman's suspicions were aroused

because he considered the milage to be abnormally high, especially for someone who is unemployed.

Based on Ford's extreme nervousness, the high mileage, Ford's unemployment, and because Ford was coming from a "major source location for narcotics," LaChance asked for permission to search the vehicle. Approximately three minutes had elapsed from the time Ford was initially pulled over until consent was requested. LaChance explained the contents of the written consent form to Ford in, according to Froman, a nonthreatening manner. Froman testified that LaChance never touched his gun nor threatened Ford, that LaChance was standing approximately two feet away from Ford, that Ford was fully apprised of the contents of the consent form, that Ford was asked to read it and initial various paragraphs, and that Ford then read and signed the consent form. The officers searched the vehicle and discovered approximately eight kilograms of cocaine.

Both Froman and LaChance executed incident reports that listed the time of the initial stop as 2:13 and 2:15, respectively. The consent form noted a time of 2:13. The officers requested a computer check at approximately 2:15. The requested information was received by the officers from the dispatcher at 2:18.

II

Ford argues that the district court improperly denied his motion to suppress because: 1) the initial stop was pretextual; 2)

the officers' questioning of Ford exceeded the bounds of a Terry stop; and 3) Ford's consent was not voluntary.

A

In reviewing a district court's denial of a motion to suppress, this court reviews the district court's findings of fact for clear error, and the ultimate determination whether the search or seizure was reasonable under the Fourth Amendment is reviewed de novo. U.S. v. Seals, 987 F.2d 1102, 1106 (5th Cir.), cert. denied, 114 S.Ct. 155 (1993). The evidence must be viewed most favorably to the party prevailing in the district court, unless such a view is inconsistent with the trial court's findings or is clearly erroneous considering the evidence as a whole. U.S. v. Shabazz, 993 F.2d 431, 434 (5th Cir. 1993).

Because the Fourth Amendment prohibits unreasonable searches and seizures and because a routine traffic stop that detains the occupants of the car is a seizure, we apply the analysis set forth in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). See U.S. v. Kelley, 981 F.2d 1464, 1467 (5th Cir.), cert. denied, 113 S.Ct. 2427 (1993). The reasonableness of a search or seizure is analyzed by determining whether the officer's action was justified at its inception and whether the officer's action was reasonably related in scope to the circumstances that justified the interference in the first place. Terry, 392 U.S. at 19-20.

In U.S. v. Causey, 834 F.2d 1179, 1185 (5th Cir. 1987) (en banc), we foreclosed suppression challenges to the pretext prong of

the underlying Terry test by holding that "where the officers have taken no action except that which the law objectively allows, their subjective motives in doing so are not even relevant to the suppression inquiry." With regard to the second prong, we have also rejected the proposition that a "police officer's questioning, even on a subject unrelated to the purpose of the stop, is itself a Fourth Amendment violation." Shabazz, 993 F.2d at 436. We went on to hold that questioning that takes place during the pendency of a computer check incident to a valid traffic stop does not change the scope of the stop. Id. at 437.

Here, the district court correctly determined that because the initial stop of Ford's vehicle was justified by the officers' radar-based determination that Ford was speeding, the first prong of the Terry test was satisfied. Ford's suggestion that the stop was a pretext for the officers' primary purpose of drug interdiction is pretermitted by the legitimacy of the stop for the traffic violation. Causey, 834 F.2d at 1185; see also U.S. v. Roberson, 6 F.3d 1088, 1092 (5th Cir. 1993) (suppression challenge based on pretext eliminated when seizure has otherwise legal basis), cert. denied, 114 S.Ct. 1322 (1994).

The district court further found that no violation of the second Terry prong occurred. The questioning and detention did not exceed the reasonable scope of the stop's original purpose because the questioning occurred while the officers were waiting for the results of the computer check on Ford's license and vehicle

registration. The district court specifically found, based upon the testimony of the officers, that the questioning and the consent to search took place while the officers were awaiting the results of the computer check and that this process took approximately ten minutes. These findings are supported by the evidence viewed most favorably to the government. Consequently, the district court did not clearly err in its determination that the period of detention was not unreasonably lengthy and that it did not extend beyond the period justified by the valid traffic stop.

B

The government has the burden of proving by a preponderance of the evidence that a consent to search was voluntary. U.S. v. Yeagin, 927 F.2d 798, 800 (5th Cir. 1991). The voluntariness of consent is a question of fact to be determined from a totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). This court reviews the district court's findings respecting voluntariness for clear error. U.S. v. Olivier-Becerril, 861 F. 2d 424, 425-26 (5th Cir. 1988). "Where the judge bases a finding of consent on the oral testimony at a suppression hearing, the clearly erroneous standing is particularly strong since the judge had the opportunity to observe the demeanor of the witnesses." U.S. v. Sutton, 850 F.2d 1083, 1086 (5th Cir. 1988).

We have noted some six factors that are relevant in evaluating whether a consent was voluntary: 1) the voluntariness of custody;

2) the presence of coercive police tactics; 3) the extent and level of the defendant's cooperation; 4) the defendant's awareness of his right to refuse to consent; 5) the defendant's education and intelligence; and 6) the defendant's belief that no incriminating evidence will be found. Olivier-Becerril, 861 F.2d at 426. Although all six factors are relevant, none is dispositive. Id.

The district court made specific findings respecting four of these six factors. The district court found that: 1) although Ford was not voluntarily detained, i.e., not free to leave during the pendency of the computer check; 2) the officers did not employ any coercive tactics; 3) Ford was cooperative; and 4) Ford was informed that he had a right to refuse consent, the written consent form that he signed also informed him of that right, he understood his right to refuse, and never indicated that he did not understand the consent request.

The district court did not make specific findings regarding Ford's educational level and whether he believed incriminating evidence would be found. However, based on the district court's specific findings and considering the totality of the circumstances from the testimony at the suppression hearing, the district court did not clearly err in determining that Ford's consent was voluntarily given. Kelley, 981 F.2d at 1470-71.

III

Ford also contends that the district court erred in denying his motion for an acquittal, asserting that the government failed

to prove that Ford knowingly possessed the cocaine found in his vehicle. In support of his position, Ford points to the government's expert witness's trial testimony, which stated that individuals are often duped into transporting narcotics. Ford's argument is not persuasive.

Although Ford moved for a judgment of acquittal at the close of the government's case, the district court denied the motion. Ford failed to renew his motion for a judgment of acquittal at the close of all the evidence, and neither the pleadings in the record nor the docket sheet reflect that any posttrial motions for acquittal were filed by Ford.

Therefore, the insufficiency-of-the-evidence claim is reviewable only to determine whether there was a manifest miscarriage of justice. U.S. v. Shaw, 920 F.2d 1225, 1230 (5th Cir.), cert. denied, 500 U.S. 926 (1991). "Such a miscarriage of justice would exist only if the record is devoid of evidence pointing to guilt, or . . . because the evidence on the key element of the offense was so tenuous that a conviction would be shocking." U.S. v. Pierre, 958 F.2d 1304, 1310 (5th Cir.) (en banc) (internal quotations and citations omitted), cert. denied, 113 S.Ct. 280 (1992).

The elements of possession with intent to distribute cocaine, a violation of 21 U.S.C. § 841(a), are 1) knowing, 2) possession, 3) with intent to distribute. See U.S. v. Munoz, 957 F.2d 171, 174 (5th Cir.), cert. denied, 113 S.Ct. 332 (1992). Ford does not

contest his constructive possession nor does he contest that the amount of cocaine was sufficient to infer the intent-to-distribute element. See U.S. v. Ivy, 973 F.2d 1184, 1188 (5th Cir. 1992), cert. denied, 113 S.Ct. 1826 (1993).

"In the nature of things, proof that possession of contraband is knowing will usually depend on inference and circumstantial evidence." U.S. v. Richardson, 848 F.2d 509, 514 (5th Cir. 1988). Furthermore, "knowledge of the presence of the contraband may ordinarily be inferred from the exercise of control over the vehicle in which it is concealed." Id. at 513.

Although reliance may not be placed solely on control when a case involves hidden compartments in a vehicle, see Olivier-Becerril, 861 F.2d at 426-27, the drugs in question were discovered in a shopping bag on the right front floorboard of the vehicle that Ford owned, operated, and was the sole occupant of when the drugs were found. Froman testified at trial that the shopping bag containing the cocaine was open at the top and that he could actually see the cellophane wrapped packages of cocaine. A jury could have reasonably inferred that Ford knowingly possessed the drugs. See Richardson, 848 F.2d at 513. Ford has not shown a manifest miscarriage of justice. See Pierre, 958 F.2d at 1310.

IV

For the reasons stated herein, the judgment of conviction of Cordell Gene Ford is

A F F I R M E D.