IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7262
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN L. JORDAN, JR.,

Defendant-Appellant.

Appeal from United States District Court
from the Southern District of Mississippi
(CR J92-00042-W-C)

(June 27, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

John L. Jordan appeals his conviction for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). For the following reasons, his conviction is affirmed.

BACKGROUND

The grand jury charged John L. Jordan, Jr., with possession of a Star model 30, 9mm semi-automatic pistol and ammunition after having been convicted of a felony. Represented by retained

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

counsel, Jordan entered a plea of not guilty, and the case proceeded to trial. The Government filed a notice that Jordan was eligible for sentencing under the enhanced penalty provisions of 18 U.S.C. § 924(e)(1).

At trial, O.P. McDaniel, an officer with the Jackson Police Department, testified that he was working a routine patrol when he stopped a gold Cadillac for speeding at approximately 1:40 a.m. McDaniel approached the car, shined his flashlight in the window, and asked the driver for his license. He noticed a loaded magazine for an automatic pistol "on a plastic console that fits over the transmission hump in front of the seat." Having noticed the magazine, McDaniel suspected that there might be a weapon and asked Jordan, who was the driver, to step out of the car and to the rear of the car. McDaniel patted down Jordan and found nothing. He asked Jordan where was the pistol, and Jordan answered that it was under the driver's seat. McDaniel retrieved the weapon and placed Jordan under arrest for carrying a concealed weapon.

The jury returned a verdict of guilty, and Jordan filed a motion for a new trial. The district court denied the motion for a new trial and sentenced Jordan to a term of imprisonment of 235 months, a three-year term of supervised release, and a special assessment of $50. The district court denied Jordan's motion to reconsider his sentence, and Jordan filed a timely notice of appeal.[1]

---

[1] Prior to the amendment to Fed. R. App. P. 4(b), effective December 1, 1993, a timely filed motion to reconsider extended the time in which to appeal so that it began to run when the motion was denied. See United States v. Lewis, 921 F.2d 563, 564 (5th Cir. 1991). The question whether amended Rule 4(b)

DISCUSSION

ISSUE 1:

Jordan asserts that the district court erred in declining to dismiss the indictment on grounds that his witness, Melvin Mason, was intimidated by Terry Kirkland, an agent for the Bureau of Alcohol, Tobacco, and Firearms, on the day of the trial. "Substantial government interference with a defense witness's free and unhampered choice to testify violates due process rights of the defendant." United States v. Goodwin, 625 F.2d 693, 703 (5th Cir. 1980). To prevail on this type of claim, the defendant must show that the prospective witness was intimidated or refused to testify. See United States v. Viera, 839 F.2d 1113, 1115 (5th Cir. 1988) (en banc). Although Goodwin established a per se rule requiring reversal "without regard to prejudice," 625 F.2d at 703, subsequent decisions demand that the defendant demonstrate prejudice to obtain relief. Viera, 839 F.2d at 1115; United States v. Weddell, 800 F.2d 1404, 1410-11 (5th Cir.) (interpreting intervening Supreme Court decisions as undermining per se rule in Goodwin), judgment modified on other grounds, 804 F.2d 1343 (5th Cir. 1986).

Jordan argues that while a motion to suppress was being argued, Kirkland approached Mason and tried to get him to testify against Jordan. Further, both Mason's and Jordan's cars were towed away for being illegally parked shortly after Mason refused to

---

applies to a motion to reconsider was scheduled for oral argument the week of March 27th. Because Jordan's notice of appeal was filed in April 1993, the amended Rule 4(b) does not apply to him.

testify against Jordan. After trial, Mason admitted that he was parked illegally. Kirkland denied ever trying to change Mason's testimony. Mason admits that he did not change his testimony because of any Kirkland's actions. Because Mason's testimony did not change and his car was legitimately towed, we can find no prejudice to Jordan in Kirkland's actions. We find this contention to be without merit.

ISSUE 2:

Jordan contends that the district court erred in denying his motion to suppress and admitting the pistol and Jordan's statements to the police officer into evidence. He argues that McDaniel's questions to Jordan "triggered an atmosphere of custodial interrogation requiring that the defendant be given Miranda[2] warnings."

When reviewing the denial of a motion to suppress, this court reviews questions of law de novo and accepts the district court's factual findings unless they are clearly erroneous or influenced by an incorrect view of the law. United States v. Carrillo-Morales, 27 F.3d 1054, 1060-61 (5th Cir. 1994), cert. denied, 115 S. Ct. 1163, 130 L.Ed.2d 1119 (1995). The evidence is viewed in the light most favorable to the prevailing party. Id. at 1061.

"The defendant's Fifth Amendment right against self-incrimination does not attach until custodial interrogation has begun." United States v. Howard, 991 F.2d 195, 200 (5th Cir.), cert. denied, 114 S. Ct. 395, 126 L.Ed.2d 444 (1993). Once the

---

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

defendant is in custody, he must be informed of his right to remain silent and his right to counsel during questioning. Miranda, 384 U.S. at 437. For a defendant's Fifth Amendment right to attach, there must be more than an intimidating environment; the defendant's freedom must be curtailed "to a degree associated with formal arrest." Howard, 991 F.2d at 200 (quoting Berkemer v. McCarty, 468 U.S. 420, 440 (1984) and United States v. Collins, 972 F.2d 1385, 1404 (5th Cir. 1992), cert. denied, 113 S. Ct. 1812, 123 L.Ed.2d 444 (1993)).

For Miranda warning purposes, "the usual traffic stop is more analogous to a so-called `Terry stop,' see Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968), than to a formal arrest." Berkemer, 468 U.S. at 439-40. "[T]he officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." Id. at 439.

In this case, Miranda warnings were not warranted. The officer had reasonable suspicion to believe that there was a weapon because he saw the loaded magazine on the console. See United States v. Baker, 47 F.3d 691, 692, 695 (5th Cir. 1995) (officer observed a box of .9 millimeter bullets on the floor of the car). The officer asked Jordan questions to obtain information concerning his suspicions, but Jordan was not obliged to respond. See Berkemer, 468 U.S. at 439-40; see Baker, 47 F.3d at 692, 695 (officer asked Baker's wife where the gun was and interpreted her reply that she did not know that there was a pistol in the car).

There is also no indication that Jordan's detention was of excessively long duration, that the environment was intimidating, or that Jordan's movement was significantly restrained to the degree associated with arrest. See Howard, 991 F.2d at 200; Shabazz, 993 F.2d at 437. Accordingly, Jordan was not in custody prior to his arrest, and his rights under Miranda did not attach. The district court did not err in denying the motion to suppress Jordan's statements and the subsequent discovery of the pistol.

ISSUE 3:

Jordan contends that the district court erred in denying his motion for a transfer of venue. He argues that it was impossible for him to get a fair trial before an impartial jury because of pretrial publicity. Specifically, his photograph was placed on at least two billboards in the Jackson area with the caption "This man sells drugs," and he was featured on a local television program called "Bottom Line" by Frank Melton, the CEO of WLBT. Jordan asserts that prejudice is presumed when there is such poisonous publicity.

Rule 21(a) of the Federal Rules of Criminal Procedure vests substantial discretion in the district court to grant or deny a motion to transfer venue. United States v. Parker, 877 F.2d 327, 330 (5th Cir.), cert. denied, 493 U.S. 871, 110 S. Ct. 199, 107 L.Ed.2d 153 (1989). This court does not disturb the district court's order on appeal absent an abuse of discretion. Id. The defendant must "demonstrate[d] that prejudicial, inflammatory publicity about his case so saturated the community from which his

jury was drawn as to render it virtually impossible to obtain an impartial jury." Id. at 330 (internal quotation and citation omitted).

During voir dire, the district court inquired whether any of the potential jurors knew Jordan. Melissa Gail Johnson, juror number 37, responded that, although she did not know Jordan personally, she knew his family and she recognized him. The district court asked Johnson if she knew anything else about the defendant but instructed that she not tell the district court what she knew at that time. Johnson answered yes, and the district court told Johnson that he would come back to her and that she was not to discuss the matter with anyone.

The district court later called a recess and questioned only Johnson. Johnson said that she had seen the billboards and believed that Jordan was a drug dealer. She recognized Jordan as the man on the billboards when she entered the courtroom and had not spoken to anyone about the information. The district court excused Johnson only from serving on Jordan's jury. No other member of the jury, other than Johnson, had indicated that they knew Jordan.

Jordan has not shown that Johnson spoke with anyone concerning the publicity or that any member of the jury was aware of the billboards or recognized him as the man depicted on the billboards. He has not demonstrated that any prejudicial, inflammatory publicity about his case so saturated the community the jury pool as to render it virtually impossible to obtain an impartial jury."

See Parker, 877 F.2d at 330. Moreover, the district court took reasonable steps during voir dire to assure that any prejudice of the jurors would be discovered. Id. at 331. There was no abuse of discretion in denying the motion to transfer venue.

ISSUE 4:

Jordan argues that the district court erred in failing to provide written instructions to the jury. Jordan did not object to the lack of written instructions. Parties are required to challenge errors in the district court. 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, and that it affects substantial rights. United States v. Olano, 113 S. Ct. 1170, 1777-78 (1993); United States v. Rodriguez, 15 F.3d 408, 414-15 (5th Cir. 1994); Fed. R. Crim. P. 52(b). Plain error is one that is "clear or obvious, and, at a minimum, contemplates an error which was clear under current law at the time of trial." United States v. Calverley, 37 F.3d 160, 162-63 (5th Cir. 1994), cert. denied, 115 S. Ct. 1266, 131 L.Ed.2d 145 (1995) (internal quotation and citation omitted). "[I]n most cases, the affecting of substantial rights requires that the error be prejudicial; it must affect the outcome of the proceeding." Id. at 164.

Jordan's argument fails at the first step of the analysis because he has not demonstrated that there was an error. Jordan did not request a written charge, and it was within the district court's discretion to decide whether to provide a written charge.

See United States v. Acosta, 763 F.2d 671, 677 (5th Cir.), cert. denied, 474 U.S. 863, 106 S. Ct. 179, 88 L.Ed.2d 148 (1985).

Jordan also contends that the district court's refusal to reread an instruction on the defense theory left the jury with an unbalanced impression of the law. In response to a jury note asking "What does the law say about a convicted felon possessing a firearm or ammunition?", the district court decided to reread to the jury the substantive instruction for 18 U.S.C. § 922(g)(1). Jordan had no objection. Another note was written by a juror in the courtroom following the substantive instruction asking "Does the law state a firearm and ammunition or a firearm or ammunition?" In response, the district court read directly from the statute that the law stated firearm or ammunition.

"A trial court generally may limit a supplemental charge to the specific instruction requested by the jury." United States v. Ehrlich, 902 F.2d 327, 330 (5th Cir. 1990), cert. denied, 498 U.S. 1069 111 S. Ct. 788, 112 L.Ed.2d 851 (1991). "[T]here is no error if the trial judge in supplemental instructions charges exactly as he was requested." Id. (internal quotation and citation omitted). The concern in giving any additional charge is that the district court is careful not to give an unbalanced charge. Acosta, 763 F.2d at 678.

In its initial charge, the district court instructed the jury fully that the defendant was presumed innocent and that the burden was on the Government to prove the guilt of the defendant beyond a reasonable doubt. Before rereading a portion of the substantive

charge, the district court told the jury the following: "You are to consider this instruction along with all of the other instructions that I read to you. You are not to single out one instruction alone as stating the law, but you must consider all of the instructions in their entirety."

In view of the entire charge and the jury's specific inquiry, we conclude that the district court's instruction did not confuse the jury nor did it result in an unbalanced charge. There was no abuse of discretion in the district court's response to the jury's requests or in its denial of Jordan's request to reread the charge on the defense theory.

CONCLUSION

For the foregoing reasons, Jordan's conviction is AFFIRMED.