UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7303
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN ROBERSON, a/k/a
MARTIN ROBINSON,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Mississippi
(CR-J92-00130(B)(C))

(Arpil 15, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant Martin Roberson (Roberson) was convicted of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846; possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a) and 18 U.S.C. § 2; and use of a firearm during the commission of a crime, in violation of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

18 U.S.C. § 924(c)(1). He now appeals, raising various challenges to these convictions. We affirm.

Facts and Proceedings Below

On November 9, 1992, Larry Stewart (Stewart) met with an individual known to him only as "Stormy" and agreed to carry a quantity of crack cocaine by train from Los Angeles, California, to Jackson, Mississippi. Stormy told Stewart that when he got off the train in Jackson he would be met by someone who would take the cocaine from him and give him $500, after which he was to return to Los Angeles. While en route from Los Angeles to Jackson, the train stopped in Kansas City, and Stewart was approached by police officers. Stewart consented to a search, and the police discovered four kilograms of crack cocaine in his suitcase. He was then arrested. Stewart agreed to cooperate with authorities and he continued his trip with most of the cocaine removed from his suitcase, under constant surveillance.

Prior to Stewart's arrival at the Jackson Amtrak station on November 10, FBI agents observed Roberson and a female companion, Nicole Woods (Woods), arrive in a car driven by Woods (and not shown to belong to Roberson). When Stewart arrived at the Amtrak station, Roberson approached him, inquired about his trip, and said "let's go." As Roberson, Woods, and Stewart were leaving the terminal, Roberson took possession of the suitcase from Stewart as he (Roberson) opened the front entrance door of the terminal, Woods, Stewart, and then Roberson exited the terminal, and Woods then took the suitcase from Roberson and carried it until the three reached Woods' car, at which time Woods opened the trunk and

Roberson directed Stewart to put the suitcase in the trunk, which Stewart did.

Roberson, Woods, and Stewart then entered the vehicle. The signal to arrest was thereupon given, and police officers converged on Roberson and requested that he exit the car. When Roberson was removed from the vehicle, police officers conducted a pat-down search and discovered a lock-back knife in Roberson's pocket. The arresting officer asked Roberson if he had any other weapons and Roberson responded, "there is a pistol under the seat." The officer then removed a loaded, nine millimeter handgun from beneath the front passenger seat where Roberson had been sitting. Thereafter, an inventory search of the vehicle was made before it was impounded.

Roberson was transported to the FBI headquarters by Agent Patrick Fallon (Fallon). Prior to any interrogation, Fallon read Roberson a *Miranda* warning from an advice of rights form. After each inquiry, Roberson indicated that he understood his rights; however, he refused to sign the advice of rights form because he believed that if he signed the form it could be used against him. When Fallon explained that the form could not be used against him, Roberson replied that he would not sign the form because he could not read.

In response to questioning, Roberson gave his name, date of birth, and place of birth. When asked where he currently resided, he stated that he did not have a particular residence, but lived "everywhere." Thereafter, Fallon and Roberson engaged in a conversation about how long Fallon had been with the FBI and what

type of bullet-proof vests were used by the agents. During the conversation, Fallon asked Roberson why he was at the train station. Roberson responded that a day or two before he went to the station he had been standing by a phone booth when a man he did not know approached him, gave him $500, and told him to meet someone at the train station on November 10 at 9:30. He said that he was not told who he was going to meet, but that the person would know everything and would tell him what to do. Roberson said that he was given the gun by someone known to him only as "David." Roberson stated that he had the gun in the car for protection because, before he picked up Stewart, he had run an errand in a dangerous part of Jackson. When Fallon asked Roberson why he would have been paid $500 to go to the train station, Roberson stated that he wanted a lawyer. At this point, Fallon terminated the interview and transported Roberson to the United States Marshal's office.

After his arrest, Roberson was charged in the United States District Court for the Southern District of Mississippi with conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 (count 1); possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a) and 18 U.S.C. § 2 (count 2); and use of a firearm during the commission of a crime, in violation of 18 U.S.C. § 924(c)(1) (count 3).

Prior to trial, Roberson moved to suppress the cocaine and the gun found in the car he was occupying, as well as certain statements he made after his arrest. The district court held an evidentiary hearing on the suppression issues at which time the

court heard testimony from Roberson and three FBI agents involved in his arrest and questioning. At the hearing, Roberson testified that he had gone to the train station because he heard that Stewart, a friend from Los Angeles, was coming to Jackson for a family funeral. He also stated that he requested a lawyer before Fallon began questioning him and that, after he told Fallon his name, birthdate, and place of birth, he did not make any additional statements. This testimony was contradicted by that of agent Fallon, which was in substance the same in this respect as his above-described trial testimony. After the hearing, the court concluded that Roberson's testimony was not credible and held that (1) the agents had probable cause to arrest, (2) the gun was recovered in a search incident to arrest and pursuant to FBI policy for the agents' safety and that of the public, (3) no warrant was required to remove the suitcase, which the FBI agents knew contained cocaine and which they had seen being placed in the trunk moments before, and (4) Roberson's statements at the FBI office were made voluntarily after the agent gave proper *Miranda* warnings.

At trial, the government called eleven witnesses. Roberson testified in his own behalf. He was found guilty on all 3 counts and was sentenced to concurrent terms of 304 months on counts 1 and 2, followed by 60 months on count 3, followed by a 5 year term of supervised release on counts 1 and 2, with a concurrent 3 year term of supervised release for count 3. Thereafter, Roberson timely filed a notice of appeal to this court.

Discussion

On appeal, Roberson argues that the district court erred in denying his motion to suppress the drugs, the gun, and his allegedly incriminating statements. He contends that this evidence should have been suppressed because (1) no probable cause existed for his warrantless arrest; (2) he was not given his *Miranda* warning before surrendering the gun from his vehicle; and (3) his incriminating statements were made after a request for counsel.

In reviewing a district court's denial of a motion to suppress, this Court reviews the court's findings of fact for clear error, while questions of law are reviewed *de novo*. *United States v. Sanders*, 994 F.2d 200, 202-03 (5th Cir.), *cert. denied*, 114 S.Ct. 408 (1993); *United States v. Muniz-Melchor*, 894 F.2d 1430, 1433 (5th Cir.), *cert. denied*, 110 S.Ct. 1957 (1990). The evidence is viewed in the light most favorable to the prevailing party, "except where such a view is inconsistent with the trial court's findings or is clearly erroneous considering the evidence as a whole." *United States v. Shabazz*, 993 F.2d 431, 434 (5th Cir. 1993) (citing *United States v. Coleman*, 969 F.2d 126, 129 (5th Cir. 1992)). Finally, we "must give credence to the credibility choices and findings of fact of the district court unless clearly erroneous." *United States v. Ornelas-Rodriguez*, 12 F.3d 1339, 1346 (5th Cir. 1994) (quoting *United States v. Raymer*, 876 F.2d 383, 386 (5th Cir. 1989)).

I. Probable Cause for Arrest and Seizure of Drugs

Roberson argues that there was no probable cause for his warrantless arrest and, therefore, that the drugs and weapons

seized incident to his illegal arrest should have been suppressed. Roberson does not contend that the search was not incident to arrest, but only that the arrest itself was unlawful.

Police may make a warrantless arrest where there is probable cause to believe that an offense has occurred. *United States v. Chappell*, 6 F.3d 1095, 1100 (5th Cir. 1993), *cert denied*, 114 S.Ct. 1232 (1994). The existence of probable cause is a question of law and greatly dependent upon the factual findings. *United States v. Hernandez*, 825 F.2d 846, 849 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1032 (1988). Probable cause for a warrantless arrest "'exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed.'" *United States v. Rocha*, 916 F.2d 219, 238 (5th Cir. 1990) (quoting *United States v. Antone*, 753 F.2d 1301, 1304 (5th Cir. 1985)), *cert. denied*, 111 S.Ct. 2057 (1991). Probable cause requires substantially less evidence "than would be required for convictionsQthat is, less than proof beyond a reasonable doubtsQbut more than 'bare suspicion.'" *United States v. Raborn*, 872 F.2d 589, 593 (5th Cir. 1989) (quoting *Brinegar v. United States*, 69 S.Ct. 1302, 1310 (1949)). In determining whether probable cause exists, the "arresting officer does not have to have personal knowledge of all the facts constituting probable cause; it can rest upon the collective knowledge of the police when there is communication between them." *United States v. De Los Santos*, 810 F.2d 1326, 1336 (5th Cir.), *cert denied*, 108 S.Ct. 490 (1987). If probable cause to arrest exists, a search incident to the arrest

requires no additional justification. *Hernandez*, 825 F.2d at 852.

Applying these standards to the case at hand, we agree with the district court's finding of probable cause. Viewing the evidence in the light most favorable to the government, the FBI agents who arrested Roberson had enough information to give them probable cause to arrest. The arresting agents knew that Stewart had been directed to transport to Jackson a suitcase containing cocaine, and they knew that Stewart was to meet a man at the train station who would give him further instructions concerning the cocaine. They saw Roberson approach Stewart, an admitted drug courier, and offer him a ride. They saw Roberson lead Stewart to a car, and they saw Stewart place the suitcase in the trunk of a car over which Roberson had some control. Based on this information, the arresting agents had reasonable grounds to believe that Roberson was involved in a conspiracy to transport and distribute cocaine. Hence, the agents had probable cause to arrest Roberson.

II. Seizure of the Gun

Roberson also argues that the district court erred in admitting the gun found on the floor of the car. Roberson contends that the gun should have been suppressed as inadmissible evidence because it was seized based on information elicited from an interrogation after arrest, but before Roberson was advised of his *Miranda* rights.

The district court determined that (1) the statement directing the FBI agents to the gun was made voluntarily, (2) the gun was recovered in a search incident to arrest, and (3) no *Miranda*

warning was necessary when conducting a search for weapons in the interest of the agents' safety and that of the public.

The questioning of Roberson regarding the existence of any other weapons fits squarely into the public safety exclusion to *Miranda* carved out by the Supreme Court in *New York v. Quarles*, 104 S.Ct. 2626 (1984). In *Quarles*, the Court concluded that

> "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers [who are looking for weapons] in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them." *Id*. at 2632.

After discovering the knife in Roberson's back pocket, the arresting officer was justified in his inquiry about additional weapons, and both the gun and Roberson's response to the officer's inquiry were admissible under *Quarles*.

III. Incriminating Statements

Next, Roberson argues that any statements he made during custodial interrogation should have been suppressed because FBI agents ignored his request for counsel.

If a suspect in custody requests counsel during his interrogation, all questioning must cease until he is given the opportunity to consult with an attorney. *United States v. Dougall*, 919 F.2d 932, 934-35 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2860 (1991). Information obtained through interrogation of a suspect

after he has requested counsel is inadmissible. *Edwards v. Arizona*, 101 S.Ct. 1880, 1884-85 (1981).

Roberson alleges that he asked for an attorney immediately after the interrogation began. Agent Fallon, however, testified that Roberson did not request an attorney until the end of a thirty minute interview. Here, the district court observed both witnesses, and credited the testimony of the interrogating agents. We will not disturb the court's credibility assessment.

IV. Deliberate Ignorance Instruction

Roberson argues that the district court erred in instructing the jury on deliberate ignorance. He contends that there was no factual basis for the instruction and that the evidence presented at trial supports only a finding that Roberson was a knowing and active participant or that he was truly innocent.

Because Roberson did not object to the district court's instructions at trial, "we will reverse only if the instruction constituted plain error, *i.e.*, if 'considering the entire charge and evidence presented against the defendant, there is a likelihood of a grave miscarriage of justice.'" *United States v. Stone*, 960 F.2d 426, 434 (5th Cir. 1992) (quoting United States v. Sellers, 926 F.2d 410, 417 (5th Cir. 1991)). The charge "does not amount to plain error 'unless it could have meant the difference between acquittal and conviction.'" *United States v. Anderson*, 987 F.2d 251, 256 (5th Cir.) (quoting *United States v. Contreras*, 950 F.2d 232, 240 (5th Cir. 1991)), *cert. denied*, 114 S.Ct. 157 (1993). In deciding whether the evidence sufficiently supports the charge, the court should examine the evidence and all reasonable inferences

therefrom in the light most favorable to the government. *United States v. Cartwright*, 6 F.3d 294, 301 (5th Cir. 1993).

Deliberate ignorance "'denotes a conscious effort to avoid positive knowledge of a fact which is an element of an offense charged, the defendant choosing to remain ignorant so he can plead lack of positive knowledge in the event he should be caught.'" *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990) (quoting *United States v. Restrepo-Granda*, 575 F.2d 524, 528 (5th Cir. 1978)). A deliberate ignorance instruction is "'properly given only when [the] defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate ignorance.'" *Lara-Velasquez*, 919 F.2d at 951 (quoting *United States v. Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1098 (9th Cir. 1985)). In deciding whether the district court erred in giving a "deliberate ignorance" instruction, we apply a two-part test:

> "First, evidence at trial, viewed in the light most favorable to the Government, must show that the defendant was *subjectively* aware of a high probability of the existence of the illegal conduct. Second, the evidence must show that the defendant purposely contrived to avoid learning of the illegal conduct. The purpose of this test is clear: if there is no evidence indicating the defendant subjectively knew his act to be illegal, a deliberate ignorance instruction 'poses the risk that a jury might convict the defendant on a lesser negligence standardSQthe defendant *should* have been aware of the illegal conduct.'" *United States v. Breque*, 964 F.2d 381, 388 (5th Cir. 1992) (quoting *Lara-Velasquez*, 919 F.2d at 951 (emphasis in original)), *cert. denied*, 113 S.Ct. 1253 (1993).

When "the circumstances of [a] defendant's involvement in [a] criminal offense [are] *so overwhelmingly suspicious*[,] the defendant's failure to question the suspicious circumstances

establishes the defendant's purposeful contrivance to avoid guilty knowledge." *Lara-Velasquez*, 919 F.2d 952.

In the instant case, Roberson denied any knowledge of the existence of cocaine in Stewart's suitcase. Roberson initially stated that he was given $500 by a stranger to go to the train station and pick up a person whom he did not know; Roberson, however, never inquired why such a simple task should receive such a large payment. Before going to the train station, Roberson put a fully loaded, nine millimeter handgun in the car. When he met Stewart, Roberson took control and hurried Stewart from the train station to the car with little conversation. Roberson then directed Stewart to place the suitcase containing the crack cocaine into the trunk. He never asked Stewart any questions, nor did he inspect the suitcase. From this evidence, a rational jury could conclude that Roberson was (1) subjectively aware of a high probability of the existence of illegal conduct and (2) contrived to avoid learning of the illegal conduct. Hence, the court's inclusion of a deliberate ignorance instruction was not plain error, if, indeed, error at all. *See United States v. Daniel*, 957 F.2d 162, 169 (5th Cir. 1992).

Moreover, the danger inherent in a deliberate indifference instructionsSQ"that a jury might convict the defendant on a lesser negligence standard," *Lara-Velasquez*, 919 F.2d at 951SQwas mitigated by the district court's instructions. At trial, the court outlined the elements of the charged offenses; *i.e.*, that Roberson knowingly possessed a controlled substance with the intent to distribute, that Roberson conspired to possess a controlled

substance with the intent to distribute, and that Roberson knowingly used a firearm during a drug trafficking crime. As part of the instruction on the element of knowledge, the district court explained the concept of deliberate indifference as a form of knowledge, stating that "[w]hile knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligen[t], careless or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact."

V. Sufficiency of the Evidence

Finally, Roberson argues that there was insufficient evidence to sustain his convictions. In reviewing challenges to sufficiency of the evidence, this Court views the evidence in the light most favorable to the jury verdict and affirms if a rational trier of fact could have found that the government proved all essential elements of the crime beyond a reasonable doubt. *See United States v. Ruiz*, 987 F.2d 243, 259 (5th Cir.), *cert. denied*, 114 S.Ct. 163 (1993).

A. Possession with Intent to Distribute

Roberson was convicted of possession with intent to distribute, and conspiracy to possess with intent to distribute, cocaine. To prove possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a), the government must show that the defendant (1) knowingly (2) possessed cocaine (3) with the intent to distribute.

Roberson contends that because there "is not one iota of evidence that [he] had actual knowledge of the contents of

Stewart's bag," the government failed to establish the knowledge requirement. Although Roberson is correct that actual knowledge is an element of the offense, such knowledge may be proved by circumstantial evidence, including evidence of a defendant's deliberate ignorance. *See Lara-Velasquez*, 919 F.2d at 951 (noting that a jury may consider evidence of the defendant's charade of ignorance as circumstantial proof of guilty knowledge). As set forth above, there is ample evidence that Roberson either knew of or, at the least, was deliberately ignorant about the contents of Stewart's bag and thus ample circumstantial evidence of Roberson's guilty knowledge.

Roberson also contends that the evidence was insufficient to establish that he "possessed" cocaine. Possession under section 841 may be actual or constructive. *United States v. Sanchez*, 961 F.2d 1169 (5th Cir.), *cert. denied*, 113 S.Ct. 330 (1992). Constructive possession can be established by demonstrating the defendant's "ownership, dominion or control" over the contraband or the vehicle in which the contraband was concealed. *United States v. Richardson*, 848 F.2d 509, 512 (5th Cir. 1988) (citation omitted). "Constructive possession need not be exclusive, it may be joint with others, and it may be proven with circumstantial evidence." *United States v. McKnight*, 953 F.2d 898, 901 (5th Cir.), *cert. denied*, 112 S.Ct. 2975 (1992). Here, Stewart was to meet a person at the train station, turn the cocaine over to that person, and the person would then instruct Stewart on what he should do next. This evidence, coupled with the evidence establishing that Roberson briefly carried the bag, directed

Stewart to the car and instructed him to put the bag in the trunk, which Stewart did, would allow a rational jury to conclude, in the context of the overall transaction and scheme as disclosed by the evidence, that Roberson exercised control over the drugs.[1]

B. Conspiracy to Possess with Intent to Distribute

Roberson also contends that there was insufficient evidence to sustain his conviction for conspiracy to possess with intent to distribute. To prove a conspiracy under section 846, the government must show "(1) the existence of an agreement between two or more persons to violate the narcotics laws, (2) knowledge of the conspiracy, and (3) voluntary participation in the conspiracy." *United States v. Rosas-Fuentes*, 970 F.2d 1379, 1381-82 (5th Cir. 1992) (citation omitted). A formal agreement need not be shown; instead, the government must show that "'two or more persons in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan . . . .'" *United States v. Williams-Hendricks*, 805 F.2d 496, 502 (5th Cir. 1986) (quoting *Pattern Jury Instructions: Criminal Cases*, 61-62). The elements of a conspiracy may be established by circumstantial evidence, including concert of action. *United States v. Lewis*, 902 F.2d 1176, 1181 (5th Cir. 1990); *United States v. McGee*, 821 F.2d 234 (5th Cir. 1987). Although mere presence at the scene or association with those in control of illegal drugs "will not alone support the inference of a conspiracy, both are

[1] Roberson does not separately challenge the intent to distribute element, and, given the quantities involved, the proof on this score was clearly adequate.

factors that the jury may rely on, together with the other evidence, in finding that a conspiracy existed." *United States v. Simmons*, 918 F.2d 476, 484 (5th Cir. 1990) (citation omitted).

Here, a tacit agreement between Stormy or those for whom he was acting and Roberson could be inferred from their concert of action. Stormy furnished Stewart the cocaine and told him to take it to Jackson. Stormy also told Stewart that he would be met by someone at the train station in Jackson who would then instruct Stewart as to what he should do next in respect to the cocaine. Roberson met Stewart at the train station and directed him to put the suitcase in the trunk of the car. And, as discussed above, a conclusion that Roberson knew that the bag contained a controlled substance was supported by the evidence. Obviously, Roberson was acting in concert with those who shipped the cocaine to him. Hence, the evidence was sufficient to support Roberson's conviction for conspiracy under section 846.

Roberson also argues that the evidence was insufficient to convict him for the use of a firearm in connection with a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). However, as Roberson concedes, this argument hinges on the conclusion that the evidence was insufficient to support his possession and conspiracy convictions. Because we find that the evidence was indeed sufficient to support these convictions, we also find that the evidence was sufficient to support his conviction for the use of a firearm under section 924(c)(1).

Conclusion

For the reasons stated above, Roberson's arguments are rejected and his convictions are hereby

AFFIRMED.