UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7330
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SHAWN LITTLE and KENNETH LUCIOUS,

Defendant-Appellants.

Appeal from the United States District Court
for the Northern District of Mississippi
(CR-1:92-114-S-1)

(November 12, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

Kenneth Lucious and Shawn Little were convicted of conspiracy to possess with intent to distribute cocaine base, possession with intent to distribute cocaine base, and aiding and abetting the possession of a firearm during and in relation to a drug

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

trafficking crime. Lucious was also convicted of possession of a firearm by a previously convicted felon. Lucious was sentenced to 211 months' imprisonment and five years' supervised release, and Little was sentenced to 195 months' imprisonment and five years' supervised release.

On the night of May 27, 1992, Officer Craig Taylor of the Columbus Metro Narcotics Unit, Columbus Police Department, received information from three different sources that two black males driving a white Ford Escort bearing Alabama tag number 63JR132 were selling cocaine out of a house in the 300 block of 12th Avenue South in Columbus, Mississippi. About 8:30 p.m., Officer Taylor was informed that the cocaine dealers were getting ready to leave the area, and he and Officer Larry Taylor set up surveillance at a location where they thought the defendants would pass.

Approximately one hour and twenty-five minutes later, the officers spotted the white Ford Escort with the matching Alabama tag number and followed the vehicle. A check of the tag revealed that the car belonged to Universal Imports in Tuscaloosa, Alabama. The officers attempted to stop the vehicle at a red light in Columbus. After placing the blue police light on, Officer Larry Taylor got out and approached the vehicle on the passenger side, identifying himself as a police officer. The defendants sped off through the red light and Officer Craig Taylor pursued. Officer Larry Taylor was able to identify Shawn Little as the driver and Kenneth Lucious, a/k/a Wendell Sanders, as the passenger.

The defendants led the officers on a high speed chase to Alabama on Highway 82. The defendants' speed during the chase exceeded 80-100 miles per hour and they tried to ram the officers' cars on several occasions. Officer Larry Taylor, who had been picked up by another officer, pursued the defendants along with several other police cars and was again able to identify the defendants. During the chase, the defendants sideswiped a bridge, ran off the road to avoid an 18-wheeler, dodged two Alabama deputy cars blocking the road, and ran through barricades where the highway was incomplete. The chase ended on a gravel road where the defendants abandoned their car and fled the scene.

Officer Craig Taylor found the car sideways in the road, still running, with two doors and the hatchback open. He heard someone running through the woods on the north side of the road. The other officers arrived on the scene, and the car was checked and processed for prints by Detective Turner of the Columbus Police department.

Detective Turner recovered a fully loaded .32 caliber semi-automatic pistol under the front passenger seat and a fully-loaded .38 caliber revolver from a compartment in the hatchback area. The weapons functioned as designed and had travelled in interstate commerce. Lucious later stipulated to a prior conviction for possession of controlled substances.

Turner also found rental agreement papers which indicated that the white Ford Escort had been rented to Shawn Little from Tuscaloosa. The president of the car rental company identified the

rental papers of the Ford Escort and verified that Shawn Little had rented the car.

Detective Turner was able to lift three fresh fingerprints from the car, two on the outside front passenger side and one on the outside back of the hatchback. He stated that these latent prints were difficult to lift because they were so fresh. The prints matched those of Lucious. No prints of value were found on either of the guns, which Turner testified was not unusual.

The officers searched the woods with no success and the search was called off about 1:00 a.m. About 2:30 a.m., Officer Craig Taylor received a call from Pickens County, Alabama officials with information that the suspects may have been spotted near the area in which the car was abandoned. Officers Craig Taylor and Larry Taylor drove to the area where they spotted and arrested the defendants approximately two miles east of where the car was abandoned. Officer Craig Taylor testified that the defendants had leaves and brush on them and looked like they had been running through the woods.

At 6:30 a.m. on May 28, Officers Craig Taylor and Larry Taylor returned to the scene of the car and found a Crown Royal bag approximately 150 feet from the car containing a large amount of crack cocaine, $2,000 in cash, numerous plastic bags of various sizes, including 1- by 1-inch bags, and two razor blades. There were 177 small baggies with one to three rocks in each bag. The parties stipulated that the substance was cocaine base. The estimated street value of the cocaine was $20,000.

The officers transported the defendants back to Columbus, where Lucious gave the false name of Wendell Sanders. Lucious later admitted that his real name was Kenneth Lucious. Officer Craig Taylor testified that defendant Shawn Little told him he had stolen the crack cocaine from a guy in Tuscaloosa named "Dude" and that "Dude" had shot up his car the week before for stealing the cocaine.

Tondra Guyton testified that on the afternoon of May 27, 1992, she saw the defendants near the campus of the Mississippi University for Women, and she told them to follow her to her house. She stated that they were riding in a white four-door car. The defendants followed her home and waited outside of her house in their car while she took her children to her mother's house. When she returned, they went into her house. Her house was located at 320 12th Avenue South.

The defendants began cutting up a big rock of cocaine into small rocks with razor blades and putting them in small baggies. They carried the cocaine in a Crown Royal bag. Tondra testified that another female named Barbara Watson came over, and after the defendants finished cutting the rocks of cocaine, they all went outside. Watson was sent to get beer, Crown Royal, and chicken, and when she got back, they began selling the crack cocaine.

Tondra testified that the defendants sold crack cocaine to nine or ten people. Lucious (whom Tondra identified as Wendell) stayed inside the house while she and Little were outside. Wendell handed the rocks to the buyers, collected the money, and gave the

money to Shawn (Little). Tondra saw the defendants count the money from the sales, which came to about $1,000. They did not pay her any money but gave her two or three rocks to smoke.

Watson testified that she also saw both defendants sitting at Tondra's kitchen table packaging cocaine, cutting it up with razor blades and putting it into little baggies. She heard the defendants say that they had $3,500 worth of crack cocaine bagged up, and she saw them put the cocaine in a Crown Royal bag. She testified that they sold crack to nine or ten people.

Watson also testified that she saw Lucious (whom she identified as Wendell) with a handgun on the couch, and that he picked the gun up, held it down by his side, and cupped it in his hand when four people came to the door to buy crack. Lucious told the people that he did not have any drugs and that they would have to come back when his partner came back.

Lucious testified on his own behalf and denied all allegations against him. He denied ever being in Columbus before May 27, 1992, ever seeing Tondra or Barbara Watson before or on May 27, and being in Tondra's house on May 27. He stated that he and Little were in Columbus to go to some clubs. He denied that he had ever seen the crack cocaine or the weapons introduced by the Government.

Lucious admitted that the testimony about the chase was accurate. He testified that when he and Little saw a man with a gun at the intersection, it scared them and Little drove off. At the end of the chase when the car finally came to a stop, he was so scared he just ran. He was unable to explain why his fresh

fingerprints were found on the hatchback of the car if he ran immediately when the car stopped.

OPINION

Speedy Trial

Little and Lucious argue that their rights to a speedy trial, both under the Speedy Trial Act and the Sixth Amendment, were violated. They argue that their arrest by the state on May 27, 1992, should be attributed to the federal government, and that the speedy trial time delays began to run on that date.

Little and Lucious were indicted by a federal grand jury on October 2, 1992, and federal arrest warrants were issued on October 5. Little and Lucious were arrested and made their initial appearances in federal court on October 15. Trial was scheduled for December 14, 1992.

Lucious moved for dismissal of the indictment on November 16, arguing that his right to a speedy trial had been violated because his original arrest by state narcotics officers should be attributed to the federal government, because the case was intended to be prosecuted on the federal level. He attached as an exhibit to his motion a state evidence submission form which indicated that it was anticipated that this case would be federally prosecuted.

The district court held a hearing on this motion on November 25, 1992. It was established at the hearing that Lucious and Little were arrested by state and local authorities on May 27, 1992, and that no federal officers participated in the arrest or even knew that it was occurring. They were charged by the City of

Columbus with possession of cocaine with intent to distribute and conspiracy to distribute cocaine. By June 2, state and federal authorities had reached an understanding that the case would be presented to the United States Attorney for possible federal prosecution. Little and Lucious were held in state custody until they were transferred to federal custody on federal arrest warrants on October 15, and the state charges were dropped. The district court denied the motion, holding that Lucious' statutory speedy trial rights were not triggered by the state arrest, and that the delay was not that great for Sixth Amendment purposes.

Little moved for a continuance on December 7, and the trial was continued to February 1, 1993. On January 12, 1993, Little filed a pro se writ of habeas corpus, arguing that his rights to a speedy trial were also violated. He asked for dismissal of the charges. It does not appear that the district court took any action on this writ. Trial actually began on February 8, 1993.

The appellants' argument regarding violation of the Speedy Trial Act focuses on violation of the provisions of 18 U.S.C. § 3161(b). Section 3161(b) provides that "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges."

Appellants' entire argument is premised on their assertion that their arrest on May 27, 1992, constituted an arrest within the meaning of the Act, and thus, their federal indictment on October

2 was too late, requiring dismissal of the indictment as provided in 18 U.S.C. § 3162(a)(1). The Government argues that the state arrest did not trigger the Speedy Trial Act time delays.

The Government is correct. The Speedy Trial Act is triggered only by federal action. United States v. Charles, 883 F.2d 355, 356 (5th Cir. 1989), cert. denied, 493 U.S. 1033 (1990). In Charles, the defendant was arrested on February 20, 1988, by the local sheriff on state drug charges pursuant to a state warrant. The arrest occurred during a raid in which a federal agent of the Bureau of Alcohol, Tobacco, & Firearms (ATF) participated. The defendant was held in the county jail for four months, and no state charges were ever filed. On June 20, 1988, the defendant was arrested by federal authorities on the basis of a complaint by the ATF agent who had participated in the raid. The defendant was indicted by a federal grand jury on July 15, 1988. This Court held that because the arrest was not a federal one, the thirty day time limit of the Speedy Trial Act was not triggered. This Court stated that the ATF agent's presence at the raid was not sufficient to transform the state arrest into a federal one. "An arrest made by a state officer, even if state and federal officers are cooperating at the time, does not start the running of the thirty day time period." Id. at 356 (quoting United States v. Taylor, 814 F.2d 172, 175 (5th Cir.), cert. denied, 484 U.S. 865 (1987).

Other Fifth Circuit cases have held likewise in similar situations. "[A]n individual is not arrested under 3161(b) until he is taken into custody after a federal arrest for the purpose of

responding to a federal charge." United States v. Johnson, 815 F.2d 309, 312 (5th Cir. 1987), cert. denied, 484 U.S. 1068 (1988). "An arrest for a violation of state law does not implicate the federal Speedy Trial Act, even when federal officers participate in the arrest." Id. (citations omitted). A state arrest does not trigger the provisions of the Speedy Trial Act. United States v. Gomez, 776 F.2d 542, 550 (5th Cir. 1985).

Appellants cite some older Fifth Circuit cases and a First Circuit case in support of their argument that their arrest by state authorities on state drug charges is chargeable to the federal government. In United States v. Cabral, 475 F.2d 715, 718 (1st Cir. 1973), the state arrest was held to have triggered the defendant's right to a speedy trial under the Sixth Amendment because the state authorities turned over the evidence, the weapon, to federal authorities a few days after the arrest. In Gravitt v. United States, 523 F.2d 1211, 1214-16 (5th Cir. 1975), this Court held that the defendant's right to a speedy trial attached when he was in state custody pursuant to a state arrest, federal authorities knew where to locate him, a formal federal complaint was filed, and a federal arrest warrant was issued. This Court did note that the right did not attach on the date of the arrest itself on state charges.

Cabral and Gravitt are distinguishable because in this case, no evidence was turned over to the federal government, and a federal arrest warrant was not issued until October 5. See United

States v. Mejias, 552 F.2d 435, 442 (2nd Cir.), cert. denied, 434 U.S. 847 (1977).

The Speedy Trial Act was not triggered by the appellants' arrests on May 27, 1992. They were indicted by a federal grand jury on October 2, 1992, before they were arrested by federal authorities on October 15, and so § 3161(b) did not come into play. The appellants did not make any argument about the delays between their federal indictment and trial, and so this aspect of the Speedy Trial Act will not be addressed.

Sixth Amendment

In Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), the Supreme Court set out four factors to consider when determining whether a defendant's Sixth Amendment right to a speedy trial has been violated. These factors are: 1) the length of the delay; 2) the reason for the delay; 3) the assertion of the right; and 4) the prejudice to the defendant. Id. at 530. The first factor, length of delay, is a triggering mechanism. If the length of the delay does not reach a threshold level regarded as "presumptively prejudicial," then the court need not consider the remaining three factors. Id. The relevant period of delay is that following arrest or indictment, whichever comes first. Robinson v. Whitley, ___ F.3d ___ (5th Cir. Sept. 10, 1993, No. 90-4554), slip p. 6681.

The relevant event in this case is the federal indictment on October 2, 1992. Appellants' state arrests did not trigger their speedy trial rights under the Sixth Amendment. See United States

V. Gomez, 776 F.2d at 549 ("A prior state arrest, however, even if based upon the same operative facts as a subsequent federal accusation, does not trigger the sixth amendment right to a speedy trial."). Trial began on February 8, 1993, a delay of approximately four months. "This circuit generally requires a delay of one year to trigger speedy trial analysis. Robinson, slip p. 6681. This Court has previously held that four months' delay was not presumptively prejudicial. United States v. Juarez-Fierro, 935 F.2d 672, 676 (5th Cir.), cert. denied, 112 S. Ct. 402 (1991). The appellants were not deprived of their right to a speedy trial under the Sixth Amendment.

Sufficiency of the evidence - drug convictions

Lucious and Little both argue that the evidence was insufficient to show that they were in possession of the cocaine and that they had knowledge of a conspiracy to distribute cocaine or intended to join such a conspiracy. Both argue that their mere presence and association with one who possesses cocaine is insufficient to support their convictions. They contend that Tondra's testimony was not credible because she stated that she feared being arrested if she did not cooperate with the authorities.

In reviewing the sufficiency of the evidence, this Court must examine the evidence in the light most favorable to the verdict and uphold the convictions if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. United States v. Gallo, 927 F.2d 815, 820 (5th Cir. 1991).

To establish a drug conspiracy, the Government must prove: 1) the existence of an agreement between two or more persons to violate federal narcotics laws; 2) that the defendant knew of the agreement; and 3) that the defendant voluntarily participated in the agreement. Id. The Government is not required to prove the existence of the conspiracy and the agreement between the conspirators by direct evidence, but may present circumstantial evidence, such as the conspirators concerted actions, from which a jury may infer the existence of a conspiracy and the intent to join it. Id. Mere presence at the scene of a crime or close association with conspirators will not alone support an inference of participation in a conspiracy; however, presence and association are factors that the jury may rely on, along with other evidence, to find participation in a conspiracy. Id.

In order to prove that the appellants were guilty of the substantive offense of possession with intent to distribute, the Government had to prove that they 1) knowingly 2) possessed cocaine 3) with intent to distribute it. United States v. Ayala, 887 F.2d 62, 68 (5th Cir. 1989).

The evidence supports the conclusion that Lucious and Little were much more than "merely present." The evidence was sufficient to show that by their concerted acts, they had agreed to participate in a conspiracy to distribute cocaine. The evidence was also sufficient to show that they had possession of the cocaine and engaged in distribution of cocaine. In the light of on the testimony of Tondra and Watson, their argument that the evidence is

insufficient is not persuasive. Tondra testified that she observed both men using a razor blade to divide a large rock of crack into smaller pieces and placing the smaller rocks into small baggies. She also observed them selling the crack to nine or ten people from her house. Lucious would hand the crack to the buyers and give the money to Little.

Appellants' argument that Tondra's testimony was not credible because she feared being arrested if she did not cooperate does not affect this Court's review of the sufficiency of the evidence. The credibility of witnesses is within the sole province of the jury. United States v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989).

Weapons convictions

Lucious and Little also challenge the sufficiency of the evidence supporting their convictions on the weapons charges. Little argues that the evidence was insufficient to show that he had possession of a weapon, or that he participated in a drug trafficking crime. Lucious argues that the evidence was insufficient to show that he had possession of a weapon, because he did not have dominion or control over the vehicle in which the weapons were found, nor knowledge of the presence of the weapons in the vehicle. With regard to testimony by a witness who stated that she actually saw Lucious handling a gun, Lucious again attacks the witness's credibility.

In order to prove a violation of 18 U.S.C. § 924(c), the Government must establish that the defendant 1) used or carried a firearm during and in relation to 2) an underlying drug trafficking

crime. United States v. Munoz-Fabela, 896 F.2d 908, 911 (5th Cir.), cert. denied, 498 U.S. 824 (1990). It is sufficient to show that the weapon facilitated, or could have facilitated, a drug trafficking offense. United States v. Capote-Capote, 946 F.2d 1100, 1104 (5th Cir. 1991), cert. denied, 112 S. Ct. 2278 (1992). Under 18 U.S.C. § 922(g)(1), it is a crime for a convicted felon to possess a firearm that has been transported in interstate commerce. The requisite proof by the Government for a conviction under 18 U.S.C. § 922(g)(1) includes: knowing possession of a firearm; the firearm or weapon must have an interstate nexus; and the defendant must have been previously convicted of a felony. United States v. Dancy, 861 F.2d 77, 80-81 (5th Cir. 1988).

Watson testified that she observed Lucious with a gun on the couch of Tondra's house, and that when four people came to the door to buy cocaine, Lucious picked up the gun, cupped it in his hand, and held it down by his side. Lucious told the people they would have to come back when his partner returned. The evidence establishes that Lucious had possession of a weapon, and that it was used to facilitate the distribution of the cocaine. A jury could reasonably conclude from Watson's testimony that Lucious had the gun to protect the cocaine. The credibility of Watson's testimony regarding her observation of Lucious with the weapon is for the jury to decide. Lucious' possession is attributed to Little as a member of the conspiracy. United States v. Raborn, 872 F.2d 589, 595-96 (5th Cir. 1989).

AFFIRMED.