UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7337
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTHONY LEWIS REED,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Mississippi
(1:93CR10-S)

(October 18, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges

PER CURIAM:[*]

Defendant-Appellant Anthony L. Reed was convicted of violating 18 U.S.C. § 922(g), which forbids a convicted felon from possessing firearms. He appeals the district court's denial of his motion to suppress two firearms that were seized by local law enforcement officers and related inculpatory statements. Reed alleges that the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court erred in finding that he consented to a search and seizure by the officers. We conclude that the district court's finding that Reed consented to the search and seizure was not clearly erroneous, and we therefore affirm.

I.

FACTS AND PROCEEDINGS

Reed was indicted on two counts of possession of a firearm in interstate commerce by a convicted felon.[1] He filed a pre-trial motion to suppress two firearms that were seized from his parents' house. After an evidentiary hearing, the district court denied Reed's motion. Reed then entered a conditional guilty plea to both counts of the indictment, but reserved his right to appeal the district court's denial of his motion to suppress. The district court accepted Reed's conditional guilty plea and sentenced him according to applicable sentencing guidelines. Reed now appeals the district court's denial of his motion to suppress.

Based on information provided by a confidential informant, two local law enforcement officers))Sheriff Bryan of Oktibbeha County and Captain Lindley of the Starkville Police Department))went to Reed's parents' home to question Reed about the recent murder of two Mississippi State University students. The officers had no probable cause for a warrant to arrest Reed or search his parents' home.

Bryan had known Reed's family for years, and he and Lindley were let into the house by Reed's parents. As there were several

[1] 18 U.S.C. § 922(g).

persons in the front of the house, Reed's mother showed the officers to her bedroom, where they could speak with Reed in private. Reed's mother remained in the bedroom with Reed and the officers during the ensuing conversation

Sheriff Bryan stated that he wanted to question Reed about the recent murder of the two Mississippi State University students. Reed became visibly upset and declared that he had not killed anyone. Reed was assured by Bryan that he did not think Reed had killed anyone, but that he thought Reed might know who did. After thus reassuring Reed, Sheriff Bryan asked him several questions; Reed was neither arrested nor given Miranda warnings.

During the conversation Reed initially denied having any firearms. However, after Sheriff Bryan referred to an incident at a nearby nightclub during which Reed was seen brandishing a gun, and after Reed learned that the officers were looking for a .380 caliber pistol, he admitted to having two pistols in the house: a 9 mm and a .22 caliber. When Sheriff Bryan asked Reed to show him the guns, Reed got up, went to the living room, removed some cushions from a fold-away couch, and showed the officers the two pistols that were hidden under the mattress. The officers took possession of the guns, but did not arrest Reed.

About two weeks later the Oktibbeha County Sheriff's Department requested that the Bureau of Alcohol, Tobacco, and Firearms ("ATF") assign an agent to assist with the ongoing murder investigation. In the course of rendering that assistance, ATF agent Joey Hall learned that Bryan and Lindley had seized two

firearms from Reed and that Reed was a convicted felon. Hall had Reed brought to the Oktibbeha County Sheriff's Department for questioning, and Reed was advised of his Miranda rights. Reed signed a form waiving his Miranda rights and admitted having possessed the two firearms. Reed was subsequently indicted on two counts of possessing a firearm in interstate commerce as a convicted felon.

II.

ANALYSIS

On appeal Reed argues that the district court's finding that he voluntarily consented to Sheriff Bryan's search and seizure is clearly erroneous. Regrettably, neither the parties nor the district court rigorously discuss whether the disputed conduct at issue was a search or a seizure or both. At the suppression hearing the district court endeavored to clarify the issue when it said: "I don't believe anyone is contending there was a search, are you?" "A seizure, not necessarily a physical search," responded Reed's counsel. Unfortunately, the parties' briefs did not incorporate that understanding. Because we are unsure whether Reed is alleging that the officers conducted an illegal search for weapons by coercing his consent, or is arguing that the seizure itself was illegal, independent of the search, we address both arguments.

No one disputes that Sheriff Bryan and Captain Lindley were voluntarily admitted into the Reed home when they arrived to question Reed. Thus, although the officers did not get Reed's

father's signed consent to search the house until the day after they seized the pistols, their presence there the day the pistols were seized was lawful.

After Reed's parents welcomed the officers into their home, Reed's mother led the officers to a back bedroom so they could talk with Reed in private, away from the persons who were present in the front of the house. It is at this point that Reed insists his will was overborne.

Reed avers that Sheriff Bryan "took advantage of [his] fear of being a murder suspect to overcome his will," and thereby got him to reveal the location of the pistols that formed the basis of his federal indictment. This "accusation of two counts of capital murder," argues Reed, amounted to a coercive police procedure, which the district court erroneously failed to recognize. In a nutshell, Reed's argument is that Sheriff Bryan coerced him into admitting that he possessed two firearms by holding out the prospect that he could clear himself as a murder suspect. Reed urges that this supposed coercion negates the voluntariness of his consent and renders the search illegal. We find his argument unpersuasive.

As an aside, it is questionable whether a search occurred at all. Arguably, Reed simply produced the guns voluntarily upon request. But even if Sheriff Bryan's request that Reed reveal his guns did result in a search))perhaps because Bryan followed Reed into the living room to look at and ultimately seize the pistols))the district court correctly found that Reed's consent to

that occurence was not coerced but voluntary.

A warrantless search is valid if conducted with an authorized individual's voluntary consent.[2] The government has the burden of proving by a preponderance of the evidence that consent was voluntary.[3] A district court's determination of the voluntariness of a search vel non is a finding of fact, which cannot be overturned unless clearly erroneous.[4] A district court determines whether a search was consensual based on the totality of circumstances.[5]

In finding that Reed voluntarily consented to Sheriff Bryan's search for the pistols, the district court considered several factors advanced by this court as indicators of whether consent is freely and voluntarily given:

> [V]oluntariness of the defendant's custodial status, the presence of coercive police procedure, the extent and level of the defendant's cooperation with the police, the defendant's awareness of his right to refuse to consent to the search, the defendant's education and intelligence, and, significantly, the defendant's belief that no incriminating evidence will be found.[6]

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[2] Schneckloth v. Bustamonte, 412 U.S. 218, 248-49, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

[3] U.S. v. Kelley, 981 F.2d 1464, 1470 (5th Cir.), cert. denied, 113 S. Ct. 2427, 124 L. Ed. 2d 648 (1993).

[4] United States v. Rich, 992 F.2d 502, 505 (5th Cir. 1993), petition for cert. filed (July 21, 1993).

[5] United States v. Davis, 749 F.2d 292, 294 (5th Cir. 1985), cert. denied, 479 U.S. 964 (1986).

[6] United States v. Phillips, 664 F.2d 971, 1023-24 (5th Cir. 1981), cert. denied sub nom. Meinster v. United States, 457 U.S. 1136 (1982)(the portion of Phillips that dealt with the substitution of jurors after deliberation has begun was overruled

Guided by these factors, the district court made several findings that militate in favor of the court's conclusion that Reed's consent was voluntary.

First, the court noted, that Reed was questioned at his residence, in his parents' bedroom, and in his mother's presence. These facts indicate the absence of a threatening, coercive atmosphere. Second, the district court pointed out that the officers informed Reed that he was not under arrest, that they did not think he murdered anyone, and that they simply wanted to ask him a few questions. These facts, again, indicate the absence of coercion; the officers did all that was reasonably required to reassure Reed and put him at ease. Reed was not threatened, manhandled, arrested, or promised any consideration to get him to reveal his weapons. The specter of coercive police practice was effectively banished by the comfortable surroundings and affable tenor of the police questioning.

Third, the district court noted that Sheriff Bryan knew Reed to be a "streetwise individual," who was sufficiently knowledgeable and intelligent not to "readily incriminate himself." Nevertheless, he chose to incriminate himself))freely and voluntarily))and the district court indicated why: Reed admitted that he revealed his guns to the law enforcement officers to dispel any suspicion that he might be involved in the two recent murders. The district court clearly had sufficient facts upon which to base

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by United States v. Huntress, 956 F.2d 1317 (5th Cir. 1992)).

its finding that Reed voluntarily consented to the search.

Now Reed attempts to gainsay his decision to reveal his illegally possessed firearms by arguing that the officers never informed him of his right to refuse to consent to a search, by complaining that the officers never indicated that his mere possession of a firearm was a crime, and by suggesting that the circumstance of being a murder suspect overbore his will and rendered his consent to the search involuntary. None of these arguments has merit.

Reed cites Penick v. State for the proposition that the Mississippi Constitution requires a state law enforcement officer to inform a suspect of his right to refuse a search.[7] This seems to be a subtly inaccurate interpretation of Penick,[8] but, in any case, Reed's reliance on Mississippi law is misplaced. In the very case cited for authority by Reed, the Mississippi Supreme Court itself pointed out that Mississippi law offers no obstacle to the admission of seized evidence in a federal court proceeding.[9]

In United States v. Eastland, we indicated that "[t]he exclusionary rule is not a 'personal constitutional right,' but is

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[7] Penick v. State, 440 So. 2d 547 (Miss. 1983).

[8] The Mississippi Constitution))as interpreted by the Supreme Court of Mississippi))apparently requires the state to prove beyond a reasonable doubt that a defendant was aware of his right to refuse consent to a search. A policy of having police inform suspects of their right to refuse consent to a search is simply the best way for the state to meet its burden of showing that the suspect knowingly waived his legal right: it is apparently not an independent legal requirement. Id. at 550.

[9] Id. at 551.

a 'judicially created remedy designed to safeguard Fourth Amendment rights ... through its deterrent effect.' The rule was not 'created to discourage ... violations of state law.'"[10] In determining whether evidence is admissible in a federal court, the violation of state law in obtaining such evidence is irrelevant. The proper inquiry is "whether the actions of the state officials in securing the evidence violated the Fourth Amendment to the United States Constitution."[11] Thus, Reed's suggestion that Sheriff Bryan had an obligation under Mississippi law to inform him of his right to refuse consent to a search is both incorrect and irrelevant.

Similarly, Sheriff Bryan had no legal duty to inform Reed that firearms seized in the course of a murder investigation could be used to charge him with unlawful possession of a firearm. We resolved this very issue in United States v. Davis.[12] There, law enforcement officers arrived at Davis' home to investigate whether he had a machine gun. Hoping to convince the officers that he did not have a machine gun, Davis volunteered that he owned several other guns. He led the officers into his home, and showed them a variety of firearms. Davis was indicted for the unlawful receipt

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[10] United States v. Eastland, 989 F.2d 760, 765 (5th Cir. 1993)(quoting United States v. Calandra, 414 U.S. 338, 348 (1974) and United States v. Walker, 960 F.2d 409, 415 (5th Cir.), cert. denied, 113 S. Ct. 443 (1992)).

[11] United States v. Walker, 960 F.2d 409, 415 (5th Cir.), cert. denied, 113 S. Ct. 443, 121 L. Ed. 2d 362 (1992).

[12] United States v. Davis, 749 F.2d 292 (5th Cir. 1985), cert. denied, 479 U.S. 964 (1986).

and possession of firearms in interstate commerce by a convicted felon. He filed a motion to suppress the firearms, complaining that his consent to the officers' search was involuntary because it was induced by misrepresentation and deceit. He asserted that the officers had tricked him "by leading him to believe that they were [only] looking for a machine gun and by failing to inform him that they were looking for any firearm."[13]

The district court granted Davis' motion to suppress, but we reversed, explaining that "[t]he mere failure of the officers to give an encyclopedic catalogue of everything they might be interested in does not alone render the search involuntary."[14] Citing United States v. Andrews for support, we concluded that the failure of a federal agent to disclose one of his purposes in asking to see a defendant's guns does not render the defendant's consent to the search involuntary.[15] We discern even less of a federal need for a state law enforcement officer to make such a disclosure. Thus, Sheriff Bryan clearly had no legal duty to inform Reed that firearms seized in the course of their murder investigation could be used to indict him for another crime, particularly a federal crime.[16]

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[13] Id. at 294.

[14] Id. at 295.

[15] Id. (citing United States v. Andrews, 746 F.2d 247 (5th Cir. 1984).

[16] At his suppression hearing, Reed argued that Graves v. Beto, 424 F.2d 524 (5th Cir. 1970), contradicts Davis, but this is not the case. In Graves, police urged the defendant Graves to submit a blood sample for the ostensible purpose of determining

As noted, Reed insists that the circumstance of being a murder suspect overbore his will and rendered his consent to the search involuntary. In our opinion, no responsible court would hold that the circumstance of being a murder suspect automatically renders a defendant's consent coerced. Such a rule would immunize criminal suspects from legitimate police inquiry and would thus be unwise as a policy matter. More importantly, the district court weighed a variety of factors and found Reed's confession to be voluntary. The court identified several facts that specifically demonstrated the absence of a coercive atmosphere. Furthermore, even if Reed were correct that Sheriff Bryan engaged in a coercive police procedure by somehow manipulating Reed's fear of being a murder suspect, the presence or absence of coercive police procedure is but one factor in the totality of circumstances analysis undertaken by the district court.[17] In view of all these considerations, we are unable to say that the district court's finding that Reed voluntarily consented to the search was clearly erroneous.

Finally, in the interest of thoroughness, we briefly address

Graves' blood alcohol content. In truth, the police wanted Graves' blood to determine if it was the same type as blood found on the bedding of a rape victim. The police officers' claim that they wanted Graves' blood to test his blood alcohol content was a complete ruse intended to trick Graves' into consenting to the blood test. Id. at 525. Because Graves' consent was won by deceit and trickery, this court affirmed the district court's finding that the search violated Graves' constitutional rights. Id. at 526. But no comparable ruses occurred in the case sub judice or in Davis. In both those cases, the law enforcement officers made no disingenuous representations about why they wanted to see the defendants' firearms.

[17] United States v. Phillips, 664 F.2d 971, 1023-24 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982).

Reed's remaining argument))sparsely advanced))that the officers' seizure of the guns may have been illegal even if the search was not. Whether we view Reed's revelation of the guns as simply a placing of evidence in the officers' plain view, or as a search by the officers to which Reed consented, the officers had done nothing illegal prior to being presented with two pistols that Reed))a convicted felon))admitted to having. At this point, the officers could justifiably seize the pistols))even if they were not plausibly connected to the murder under investigation))because they were contraband. For a seizure to be valid there must be a nexus between the item seized and some criminal behavior, but in the case of contraband that nexus is automatically provided.[18] Possession of firearms by a convicted felon under both federal and Mississippi law,[19] so Sheriff Bryan's seizure of Reed's pistols as contraband was permissible, as long as his actions up to that point were lawful. And, we hold that they were.

III.

CONCLUSION

In summary, all of Reed's arguments lack merit. The district court properly weighed the evidence and determined that Reed voluntarily consented to the search and seizure. That determination is entitled to considerable deference, and we have seen nothing to suggest that the district court's finding was clearly erroneous. For the foregoing reasons, the district court's

[18] Warden v. Hayden, 387 U.S. 294, 306-07 (1967).

[19] MISS. CODE ANN. § 97-37-5 (1972 & Supp. 1993).

denial of Reed's motion to suppress the two firearms is AFFIRMED.