

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8310
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CARL ODELL ECHARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

(P 92 CR 99)

(February 17, 1994)

Before THORNBERRY, DAVIS, and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:*

Defendant-Appellant Carl Odell Echard challenges his conviction of being a felon in possession of a firearm and ammunition, alleging that the evidence is insufficient to support his knowing possession of the contraband. Finding no merit to his claims, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Prior Proceedings

On April 26, 1992, Echard was en route from California to West Virginia through Texas.¹ Echard was stopped for speeding by two Texas Department of Public Safety troopers. Instead of immediately pulling over on the shoulder of the highway, Echard drove his vehicle onto an exit ramp, continued up a slight incline to the top of a hill to a crossover, and down the hill, bringing the vehicle to a stop at the bottom of the hill. He immediately exited the vehicle, stumbled and began swaying back and forth. The troopers smelled alcohol on his breath and, after performing intoxication tests, subsequently arrested Echard for driving while intoxicated. Rather than leaving his car on the highway, Echard chose to allow one of the troopers to drive his vehicle into town. Accordingly, the trooper performed an inventory inspection of the vehicle. The inventory inspection revealed that Echard was carrying a .380 caliber Jennings semi-automatic pistol and two boxes of .380 caliber ammunition. The pistol was found in a duffle bag that contained some of Echard's clothing. The ammunition was found in a garbage sack that also contained some of Echard's clothing. The trooper also found two ammunition magazines at the bottom of the trunk.

Echard told the troopers that the pistol belong to his girlfriend. The girlfriend, Judy Retter, testified that the pistol did belong to her, and she often used Echard's vehicle. She

¹ Echard was traveling to West Virginia following a falling-out with his girlfriend.

further testified that when she used Echard's vehicle, she kept the pistol and ammunition in the trunk of his car.

Echard was indicted and charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Count One), and being a felon in possession of ammunition in violation of 18 U.S.C. § 924(e)(1) (Count Two). Subsequently, the Government filed an enhancement information because Echard had three prior violent felony convictions. Echard went to trial before a jury and was found guilty on both counts.² A Presentence Report indicated that a guideline range of 210 to 262 months of imprisonment was warranted. The Government filed a recommendation for a downward departure based on Echard's substantial assistance in other cases. The district court granted the downward departure and sentenced Echard to 180 months of imprisonment on each count with the sentences to run concurrently.³

Discussion

Echard contends that there was insufficient evidence to support the two counts of possessing a gun and possessing ammunition. Echard argues that the Government did not prove that he *knowingly* possessed the gun and ammunition. Specifically, he contends that there is insufficient evidence to support that he

² Echard filed a motion to suppress the gun and the ammunition, but following an evidentiary hearing, the district court denied the motion.

³ The statutory term of imprisonment under 18 U.S.C. § 924(e)(1) is 15 years to life.

knew the weapon and ammunition were in the trunk.⁴ In deciding the sufficiency of the evidence, this Court determines whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offense beyond a reasonable doubt. **United States v. Pruneda-Gonzalez**, 953 F.2d 190, 193 (5th Cir.), **cert. denied**, ___U.S.___, 112 S.Ct. 2952, 119 L.Ed.2d 575 (1992).

The essential elements of possession of a firearm by a convicted felon under 18 U.S.C. § 922(g)(1) are: (1) knowing possession of a firearm by the defendant; (2) the defendant was previously convicted in a court for a crime punishable by imprisonment for a term in excess of one year; and (3) the firearm possessed by the defendant was in or affecting commerce. **United States v. Dancy**, 861 F.2d 77, 81 (5th Cir. 1988).

Echard's sole argument is that the Government did not prove that he actually or constructively possessed the gun and ammunition. A person has constructive possession if he knowingly has ownership, control or dominion over the item itself or over the premises where the item is located. **United States v. McKnight**, 953 F.2d 898, 901 (5th Cir), **cert. denied**, 112 S.Ct. 2975 (1992). Constructive possession may be established with circumstantial evidence. **Id.** This Court has not adopted a fixed rule regarding constructive possession. **Id.** at 902. The Court instead engages in

⁴ Echard has not challenged the district court's denial of his motion to suppress.

a common-sense, fact-specific approach to each particular problem of constructive possession. **Id.**

The evidence presented at trial showed that the gun was found in the blue duffle bag along with Echard's clothing. Additionally, the ammunition was found in a garbage sack containing more of Echard's clothing. Echard's girlfriend testified that she carried the pistol either in her truck or in Appellant's car, depending on what vehicle she was driving, and that she had been driving his vehicle on the day that she threw him out of her home. She also admitted that she could not remember whether she had the pistol in the trunk of Echard's car on the day that he left California. She also testified that she had thrown Echard's clothes into the trash bag and then into the trunk of his car on the day she threw him out. As pointed out by the Government, if Echard's girlfriend had left the gun and ammunition in the car or the trunk of the car, the gun and ammunition would not have been found in the duffle bag or garbage sack containing his clothing unless she put the contraband in the bag or sack. She did not so testify. Therefore, a jury could have found beyond a reasonable doubt that Echard had placed the contraband in the bags himself at some time prior to his arrest. Viewing the evidence presented with all inferences reasonably drawn therefrom in the light most favorable to the Government, any rational trier of fact could have found that Echard knew of the gun's presence in the trunk and therefore, knowingly possessed the firearm and the ammunition.

Conclusion

Based on the foregoing, we affirm Echard's conviction and sentence.

AFFIRMED.