

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8338  
Summary Calendar

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GREGORY EARL JONES,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,  
Texas Department of Corrections,

Respondent-Appellee.

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Appeal from the United States District Court for the  
Western District of Texas  
(W 92 CA 155 )

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(September 15, 1993)

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

PER CURIAM:\*

I

Appellant Gregory Earl Jones was convicted by a Texas state jury of possessing less than 28 grams of cocaine with intent to deliver it. The jury also found that Jones used or exhibited a deadly weapon in committing the offense and set his sentence at 50

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

years in prison. On direct appeal, the judgment was affirmed in an unpublished opinion.

At Jones's trial, Deputy Sheriff Mark Wynne testified that on the evening of December 29, 1989, he and Deputy Sheriff Tommy Page went to Jones's residence to execute a search warrant. As Wynne knocked on Jones's door, Deputy Page saw Jones coming out of a nearby cafe. Wynne testified that when Jones reached the side of the deputies' vehicle, he recognized who Wynne was. Jones then reached into his right front pants pocket and threw something onto the ground. Deputy Page testified that he was then three or four feet from Jones and saw him throw down a small black object and a piece of tinfoil. The black object was a small canister.

As Page was picking up the canister, he saw Cindy Becks, Jones's girlfriend, pick up the tinfoil that Jones had thrown down. Page made Becks give him the tinfoil, which contained a rock of crack cocaine. The canister contained eight rocks of crack cocaine.

Wynne took Jones into Jones's residence in order to execute the search warrant. Upon searching Jones, Wynne found a nine millimeter semiautomatic pistol loaded with 17 cartridges, stuffed into Jones's pants at the small of his back. Wynne also recovered \$85 in U.S. currency from Jones during the search.

In his federal habeas petition, Jones raised the same two grounds that he now raises on appeal. The magistrate judge filed a report recommending denial of relief, without an evidentiary

hearing. Jones filed objections. The district court, adopting the magistrate judge's report, denied habeas relief.

## II

Jones contends, first, that the evidence was insufficient to prove that he intended to deliver the cocaine he possessed. He argues that "the facts are as consistent with the inference that [he] purchased [the] drugs for his own personal use."

"Insufficiency of the evidence can support habeas corpus relief only where the evidence, viewed in the light most favorable to the prosecution, is such that no rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." Marler v. Blackburn, 777 F.2d 1007, 1011 (5th Cir. 1985). "Because [Jones] was convicted of a violation of state law, the substantive law of [Texas] defines the elements of the crime that must be proved." Young v. Guste, 849 F.2d 970, 972 (5th Cir. 1988). "The evidence need not exclude every reasonable hypothesis of innocence, however, and a jury may choose any reasonable construction of the evidence." Story v. Collins, 920 F.2d 1247, 1255 (5th Cir. 1991). In a habeas case, "[a] federal court may not substitute its own judgment regarding the credibility of witnesses for that of the state courts." Marler, 777 F.2d at 1012.

Under Texas law, "[i]ntent to deliver may ... be proved by circumstantial evidence, such as the quantity of drug possessed, the manner of packaging, and the presence of large amounts of money." Smith v. State, 737 S.W.2d 933, 941 (Tex. Ct. App. 1987).

The evidence in Jones's case most favorable to the verdict shows that he possessed nine rocks of crack cocaine, which he threw down when he recognized Deputy Wynne. The chemist testified that the rocks were two to three times bigger than the ones he usually sees.

When Jones possessed the crack, he also was armed with a loaded semiautomatic pistol and he had \$85 on his person. Deputy Wynne testified that in his experience as an undercover officer, crack dealers often are armed with weapons in order to prevent anyone from stealing their drugs or money.

Jones's common-law wife, Norma Bishop, testified that Jones sold cocaine for a living. She testified that she had seen Jones sell crack cocaine for \$20 to \$40 per rock, depending on the size. Bishop testified further that on the day Jones was arrested, he told her he would be getting a new batch of crack cocaine that day. Jones's girlfriend, Cindy Becks, testified that on the day of his arrest a man came to Jones's house to buy cocaine. Jones told the man he did not have any, but that he would "like to go get him some." Thus, there was ample evidence to support Jones's conviction of possession of cocaine with intent to deliver.

### III

Jones contends that the evidence was insufficient to support the jury's finding that he used or exhibited a deadly weapon during the commission of the offense. He asserts that the evidence was contradictory because, although Deputy Wynne testified that he recovered the handgun from Jones's person, Deputy Page testified

that it was lying on a bench when he entered the house. Jones argues that it was physically impossible for the handgun to be on his person and on the bench at the same time. The testimony is not contradictory because both deputies testified that Wynne and Jones entered the house before Page and Cindy Becks did. Just before Page entered, he heard Wynne say "Gun; put your hands on your head."

Jones contends that he could not properly be found to have used or exhibited the gun if it was concealed on his person. The language "used ... a deadly weapon ... during the commission of a felony offense," in Tex. Crim. Proc. Code Ann. art. 42.12 § 3g(a)(2) (West Supp. 1993), "`extends ... to any employment of a deadly weapon, even its simple possession, if such possession facilitates the associated felony.'" Patterson v. State, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989) (en banc) (quoting Patterson v. State, 723 F.W.2d 308, 315 (Tex. Ct. App. 1987)). The Court of Criminal Appeals held further "`that a rational trier of fact could find that appellant "used" the firearm during the felony offense of possessing the [controlled substance], in a sense that the firearm protected and facilitated appellant's care, custody, and management of the contraband.'" Patterson v. State, 769 S.W.2d at 942 (quoting Patterson v. State, 723 S.W.2d at 315).

There was sufficient evidence introduced at Jones's trial to support the jury's finding that he `used' the loaded pistol that he was carrying in order to facilitate his retention of custody of the

cocaine that he intended to sell. Deputy Wynne testified that in his experience as an undercover officer, many times he has found sellers of crack cocaine to possess weapons. The purpose for the weapon, Wynne testified is "[t]o facilitate custody of the drugs and money." Wynne concluded that that was why Jones was carrying a pistol. Because Jones's contention that he did not "use" the pistol by carrying it concealed has no merit under Texas law, the "use" evidence was constitutionally sufficient. See Young v. Guste, 849 F.2d at 972.

IV

For the reasons stated herein, the judgment of the district court is

A F F I R M E D.