IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8575

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

AUBREY GARRETT,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-91-CR-16-ALL)

(August 15, 1994)

Before REYNALDO G. GARZA, SMITH, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Aubrey Garrett appeals the revocation of his term of supervised release. Finding no error, we affirm.

I.

Pursuant to a plea agreement, Garrett was convicted in 1991 of distributing crack cocaine within 1,000 feet of a school and sentenced to a term of thirty months' imprisonment and six years'

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

supervised release, and fined $3,000 and a $50 assessment. Among the conditions of Garrett's supervised release were that he (1) not commit "another federal, state, or local crime," (2) "shall not illegally possess a controlled substance," (3) "shall participate in a Drug Aftercare Program at the direction of the U.S. Probation Office and submit to regular urinalysis," and (4) "shall not associate with any persons engaged in criminal activity."

On July 20, 1993, Garrett's probation officer filed a petition requesting that the district court order Garrett to show cause why his term of supervised release should not be revoked. The petition alleged that Garrett had failed to participate in a Drug Aftercare Program by not attending weekly; that on July 3, 1993, Garrett associated with persons engaged in criminal activity (possession of marihuana); that Garrett failed to notify the probation office of his arrest within 72 hours; and that Garrett violated the law by knowingly possessing a useable amount of marihuana. The district court conducted a revocation hearing, finding that the supervised release order entered in 1991 should be revoked and that Garrett should be remanded to custody for a period of twenty months.

II.

Garrett contends that the district court erred in revoking his supervised release because there was insufficient evidence to support the court's factual findings. The district court's findings need only be made by a preponderance of the evidence.

18 U.S.C. § 3583(e)(3); United States v. Montez, 952 F.2d 854, 859 (5th Cir. 1992). We review those findings for clear error. Id.

A.

Garrett argues that the district court erred in finding him in possession of a useable quantity of marihuana because the car in which the marihuana was found did not belong to Garrett and he did not drive the car. Possession may be actual or constructive and may be established by circumstantial evidence. United States v. Ornelas-Rodriguez, 12 F.3d 1339, 1346 (5th Cir.), cert. denied, 1994 U.S. LEXIS 4729 (1994). Suspicious circumstances, in conjunction with control over illegal narcotics, can give rise to an inference of knowing possession. United States v. Pineda-Ortuno, 952 F.2d 98, 102 (5th Cir.), cert. denied, 112 S. Ct. 1990 (1992). Additional evidence of guilt may come from nervousness, inconsistent statements, implausible stories, or possession of large amounts of cash by the defendants. United States v. Shabazz, 993 F.2d 431, 442 (5th Cir. 1993).

The evidence present at the revocation hearing indicated that the police had reliable information that the car in which Garrett was riding contained marihuana. When the police attempted to stop the car, "unusual activity" was observed in the back seat; thirty bags of marihuana, rolling paper, and scales were found in the car. Moreover, five other bags of marihuana were found outside the driver's door, and a sixth bag was found on the car's front windshield. The vehicle's four occupants had been in the car for

several hours, and Garrett had at some point been sitting where the marihuana was located. Finally, Garrett claimed not to have seen the marihuana and did not know how it got onto the windshield or outside the car.

Mere proximity to contraband does not establish possession. United States v. Cardenas, 748 F.2d 1015, 1021-22 (5th Cir. 1984). But Garrett's implausible story and amount of time in the vehicle support the inference of possession. These facts therefore support the district court's conclusion, based upon a preponderance of the evidence, that Garrett knowingly possessed the marihuana.

B.

In addition, it is obvious that Garrett associated with others engaged in criminal activity. He did so knowingly (The district court's conclusion that Garrett must have been able to smell the marihuana was not clearly erroneous.), although the specific condition on his supervised release did not require a showing of culpability. Therefore, we need not resolve whether mens rea was an implied requirement of the condition.

C.

Garrett also claims that the district court erred in concluding that he failed to attend the drug aftercare program. Since he could not obtain transportation, he claims that it was not "reasonably possible" for him to attend. The executive director of the program testified at the revocation hearing that Garrett failed

to attend eight weekly sessions in two months. Garrett did not attend urinalysis or group sessions. Garrett's excuse that he could not get a ride is simply insufficient. He was seen riding around with others and never called the program to notify someone that he could not attend. Based upon the evidence presented at the hearing, the district court did not err in revoking Garrett's supervised release.

III.

Garrett also complains that the district court erred in failing to consider the policy statements in the sentencing guidelines when it sentenced him. We uphold the sentence imposed by the district court upon revocation of supervised release unless the sentence was imposed in violation of law or was plainly unreasonable. United States v. Headrick, 963 F.2d 777, 779 (5th Cir. 1992). Interpretations of statutes and sentencing guidelines are reviewed de novo. Nevertheless, since Garrett did not object at the revocation hearing as to this alleged error, we review this claim for plain error. Montez, 952 F.2d at 860.

Garrett's supervised release was revoked pursuant to 18 U.S.C. § 3583(g) (possession), not 18 U.S.C. § 3583(e)(3) (violation of other conditions of release). Section 3583(g) provides, "If the defendant is found to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release." See United States v.

Courtney, 979 F.2d 45, 47 (5th Cir. 1992). The district court cited § 3582(g) at sentencing, which obviously meant § 3583(g) and not § 3583(e)(3). Therefore, the district court complied with this provision by sentencing Garrett to twenty months' imprisonment.[1]

AFFIRMED.

[1] The court actually miscalculated the term. Garrett should have received a minimum of 24 months (one-third of six years). Furthermore, as we have recently held in United States v. Mathena, 23 F.3d 87 (5th Cir. 1994), chapter 7 policy statements are advisory only.