

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8596
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JESSE FLORES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-92-CR-69-1)

(April 4, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Jessee Flores appeals his conviction of possession of firearms by a felon, making firearms, possession of an unregistered firearm, and possession of a nonserialized firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) and 26 U.S.C. §§ 861(d) and (f)(1) and 5871. Flores had been convicted and sentenced in an

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 Pursuant to that rule, the court has determined that this opinion should not be published.

earlier proceeding, but this court vacated and remanded for a new trial because Flores had been denied his right to represent himself. See United States v. Flores, No. 92-5717 (5th Cir. May 13, 1993) (unpublished). Finding no error in the second trial, we affirm.

I.

Special Agent Nathaniel Medrano of the Bureau of Alcohol, Tobacco, and Firearms executed a search warrant at Flores's residence on February 25, 1992. Medrano had previously learned that Flores was a convicted felon and verified that Flores lived at the residence. Flores was arrested outside his home before agents executed the search warrant. After being advised of his rights, Flores stated that a Ruger .22 pistol and a rifle were in an upstairs room. Agents recovered the Ruger pistol, a silencer that fit the pistol, a rifle, a bag containing components for making homemade silencers, six books on making silencers, and ammunition.

Before Flores's first trial, he filed a motion for disclosure of the confidential informant and a motion for disclosure of the search warrant affidavit that had been sealed pursuant to a motion by the government. These motions were denied after an in camera hearing. Flores also filed a motion to suppress evidence seized during the execution of the search warrant, claiming that the affidavit for the warrant was inadequate to support a finding of probable cause and that the "good faith" exception did not apply. The magistrate judge found that there was probable cause to support

the search warrant and recommended that the district court deny the motion. The district court denied Flores's motion.

At retrial, proceeding pro se, Flores renewed his earlier motions. The district court denied the motion for disclosure of the confidential informant, after an in camera hearing, based upon a finding that the disclosure of the identity of the informant would not assist Flores in his defense and was not essential to a fair determination of the charges against him. The district court also denied Flores's motion to suppress¹ but determined that Flores should be provided with a redacted copy of the sealed affidavit supporting the warrant.

During the retrial, Flores attempted to call Larry Gann as a witness. The government objected and requested a proffer as to what testimony Flores sought from Gann. Flores stated that the testimony was relevant to the events leading to his arrest. The prosecutor responded that the testimony proffered was irrelevant because Flores was only charged with offenses concerning events after his arrest. The district court determined that the testimony he sought concerned the search warrant and was irrelevant.

The district court asked Flores for a proffer of proof. Flores responded that he believed Gann would testify that he was the confidential informant and that the testimony would show the falseness of statements in the search warrant affidavit that Flores was involved in prison gang activity and that he was a member of

¹ The district court held an in camera hearing on the motion to suppress that was filed before the retrial. A hearing was held on the motion to suppress in the first trial.

the Mexican Mafia. The government again objected to the relevancy of the testimony sought.

The district court stated, "Mr. Flores . . . this is an evidentiary matter . . . that . . . is in connection with your reurging of your motion to be furnished with the name of the confidential informant whose affidavit supported the search warrant." Flores agreed with the district court's characterization of his proffer of proof. The district court then stated, "The Court has acted on that matter and has[,] in accordance with the discretion of the Fifth Circuit[,] . . . conducted . . . an in camera hearing and has placed that explanation in the record in connection with its ruling."

Flores then argued that Gann's testimony was necessary to impeach Medrano's testimony. The district court determined that, because Medrano's testimony did not concern events prior to the execution of the search warrant, there was no testimony that could be impeached.

II.

Flores argues that his Fifth and Sixth Amendment rights to call and confront a witness were violated when the district court refused to allow Flores to call Gann as a witness.² A defendant's right to call witnesses for his defense is fundamental. Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Washington v. Texas, 388 U.S. 14, 18 (1967). The right is violated when a defendant is

² Flores does not challenge the denial of the motion to suppress.

denied the opportunity to present at trial "a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." Washington, 388 U.S. at 23 (footnote omitted); see also Roviario v. United States, 353 U.S. 53, 63-64 (1957).

The district court's evidentiary rulings are reviewed under the "heightened" abuse-of-discretion standard employed in criminal cases. United States v. Carrillo, 981 F.2d 772, 774 (5th Cir. 1993). Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Relevant evidence is admissible; irrelevant evidence is not. FED. R. EVID. 402. Flores's proffers of proof regarding the testimony sought from Gann demonstrate that the testimony he sought had no bearing on whether Flores committed the charged offenses. The district court did not abuse its discretion in excluding the testimony as irrelevant. See, e.g. United States v. Medel, 592 F.2d 1305, 1313-14 (5th Cir. 1979).

Flores also argues that the district court did not allow him an opportunity to litigate his claim that the affidavit supporting the search warrant was made with a reckless disregard for the truth. "There . . . is a presumption of validity with respect to the affidavit supporting the search warrant." Franks v. Delaware, 438 U.S. 154, 171 (1978). "To suppress evidence from a search on

the basis that the affidavit used to obtain the warrant is false, the defendant must show that the affiant made the statement with deliberate falsity or with reckless disregard for the truth." United States v. Ivy, 973 F.2d 1184, 1188 (5th Cir.) (citation omitted), cert. denied, 113 S. Ct. 1826 (1993). The defendant must also allege that the false statements were necessary to the finding of probable cause. Franks, 438 U.S. at 156, 171-72.

At trial, when reurging the motion to suppress, Flores questioned the veracity of statements in the affidavit that he was involved in prison gang activity and that he was a member of the Mexican Mafia. Flores did not make a preliminary showing that the statements were false or that Medrano made false statements intentionally or with a reckless disregard for the truth.

Prior to the retrial, the district court held an in camera hearing regarding the veracity of the search warrant affidavit and the identity of the confidential informant. The court found that the confidential informant's life would be in jeopardy if his identity were made public and reviewed a redacted copy of the affidavit. The district court advised that further information should be stricken from the affidavit before the affidavit was submitted.

A review of the redacted affidavit reveals two references to Flores's being a member of the Mexican Mafia. The fact of Flores's association or lack of association with the Mexican Mafia does not negate the district court's finding that there was probable cause to support the search warrant. See Franks, 438 U.S. at 171-72.

Therefore, because Flores did not make a showing that the challenged statements were necessary for a finding of probable cause, the district court did not abuse its discretion by not allowing Flores to call Gann as a witness or by denying Flores the opportunity to litigate the issue during the retrial. See id. at 156.

AFFIRMED.