IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8851
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ANTHONY DUKES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CR-178)

(August 23, 1994)

Before SMITH, WIENER, and PARKER, Circuit Judges.

PER CURIAM:[*]

Anthony Dukes appeals his conviction of possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1). Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Officer Jimmy Treff of the Bexar County Sheriff's Department testified that he began an investigation of Dukes's narcotics activities after receiving information from Darryl Jones, a confidential informant. Treff stated that Jones had operated as a confidential informant before and was aware that Treff and Rueben Rodriguez, another officer involved in the investigation, were police officers. Treff and Rodriguez testified that on April 27, 1993, they arranged for Jones to make a controlled buy of $40 worth of crack cocaine from Dukes.

Rodriguez testified that, after he searched Jones for controlled substances, he dropped Jones off at the Point East Apartments and watched Jones enter the complex and walk toward Dukes's apartment. Rodriguez stated that he lost sight of Dukes after Dukes passed through several buildings. Rodriguez testified that Jones was out of sight for three or four minutes before returning with a substance that tested positive for cocaine, stating that he had bought the cocaine from Dukes.

After Jones made the controlled buy, Treff prepared the following warrant affidavit:

> Affiant did on the 27th day of April 1993, receive information from a credible and reliable person who has on previous occasions given Affiant information regarding the trafficking of controlled substances which has proven to be true and correct, but whose identity cannot be revealed for security reasons. Said credible and reliable person did within the past 24 hours observe a controlled substance, to wit[:] [sic] Cocaine, unlawfully possessed and sold, by the above mentioned Anthony Dukes and Bridgett Dukes, at the above described premises.

Treff, Rodriguez, and five other officers executed the search

warrant later that day. The apartment was unoccupied. The officers seized a 9mm semi-automatic pistol and a loaded magazine from beneath the couch, a small quantity of marihuana from the bedroom, a bong (used to smoke marihuana) from the kitchen cabinet, $280 and about 42 grams of crack cocaine from beneath the sink of the bathroom adjacent to the master bedroom, and a triple-beam scale (the type commonly used by drug-traffickers) from the closet of the master bedroom.

Dukes filed a motion to suppress prior to trial, arguing that the search was illegal because the warrant was facially deficient in that it listed the premises to be searched as 3735 W. Commerce apartment H-7, when the actual apartment that was searched was 3735 E. Commerce apartment H-7. The district court denied the motion to suppress, finding (1) that the mistaken address was the result of a typographical error; (2) that Treff had been to Dukes's apartment before and knew he was in the right location when executing the warrant; and (3) that officers keeping surveillance knew that the location to be searched was at the Point East Apartments. Dukes did not challenge the veracity of the affidavit supporting the warrant.

At trial, Jones testified that (1) he had never assisted law enforcement officers in any investigations; (2) he did not know that Rodriguez and Treff were police officers when he bought the cocaine from Dukes; (3) Dukes went inside the apartment to retrieve the cocaine; (4) he bought the cocaine outside the door of Dukes's apartment but did not ever enter the apartment; (5) he was not

searched by the officers before buying the cocaine; and (6) he bought the cocaine without the expectation of receiving a benefit from Treff and Rodriguez.

After Jones's testimony, Dukes moved to suppress evidence seized during the search of the apartment, arguing that Jones's testimony contradicted the affidavit supporting the search warrant because Jones stated that he never went into Dukes's apartment. The district court denied the motion.

II.

Dukes argues that the search warrant was invalid because (1) Jones testified at trial that he did not go into the apartment, and the warrant affidavit implies that he did enter the apartment, and (2) Jones testified at trial that he had never previously provided police officers with reliable information))directly contradicting a statement in the warrant affidavit. Motions to suppress evidence must be made before trial. FED. R. CRIM. P. 12(b)(3); see United States v. Knezek, 964 F.2d 394, 397 & n.7 (5th Cir. 1992). Failure to do so constitutes a waiver of the suppression issue, but the court may grant relief from the waiver for cause shown. FED. R. CRIM. P. 12(f); United States v. Cannon, 981 F.2d 785, 787 (5th Cir. 1993). In Cannon, this court held that, although the defendant alluded to an issue in his motion to suppress, his failure to develop or argue that issue at the suppression hearing could result in a waiver if good cause for relief from the waiver was not shown. Dukes argues, for the first

time in his reply brief, that he did not waive the issue, as he renewed the motion to suppress at trial and had "no reason to suspect the falsity of the information contained in the affidavit supporting the warrant" until after Jones's testimony at trial.

We do not address issues raised for the first time in a reply brief. United States v. Prince, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, 493 U.S. 932 (1989). In Stephens v. C.I.T. Group/Equip. Fin., Inc., 955 F.2d 1023, 1026 (5th Cir. 1992), we stated, however, that an appellant's reply brief can properly respond to arguments raised for the first time in the appellee's brief (citing 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE and PROCEDURE § 3974, at 428 (1977)). In the present case, the government first raised the issue of waiver in its brief, so we will address it.

Dukes did not allude to any issue regarding the warrant affidavit in his pretrial motion to suppress. In United States v. Dewitt, 946 F.2d 1497, 1502 (10th Cir. 1991), cert. denied, 112 S. Ct. 1233 (1992), the court held that the waiver provision of FED. R. CRIM. P. 12(f) "applies not only to the failure to make a pretrial motion, but also to the failure to include a particular argument in the motion." Decisions by this court indicate at least tacit approval of the rule in Dewitt. See United States v. Medina, 887 F.2d 528, 533 (5th Cir. 1989) (holding that in order to preserve an issue for appeal, the grounds of an objection must be stated specifically); see also Cannon, 981 F.2d at 788 (noting the importance of the mandate of rule 12 that suppression issue be raised before trial). Thus, Dukes waived the issue of the veracity

of the warrant affidavit.

In the alternative, assuming that Dukes's unawareness of the affidavit issue until the presentation of Jones's testimony at trial qualifies as good cause for failing to raise the affidavit challenge before trial, Dukes still is not entitled to relief. We construe the sufficiency of a warrant affidavit independently of the district court and are not bound by the "clearly erroneous" standard for findings of fact. United States v. McKeever, 5 F.3d 863, 865 (5th Cir. 1993) (citations omitted). Nevertheless, we owe deference to the probable cause determination by the issuing magistrate and must construe the affidavit in a common-sense manner.

To suppress evidence on the basis that the warrant affidavit is false, Dukes 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. 1992) (citation omitted), cert. denied, 113 S. Ct. 1826 (1993). Construing the statement "at the above described premises" in a common-sense manner, we conclude that Jones's testimony that he purchased the cocaine outside the door of the apartment does not demonstrate that Treff acted with deliberate falsity or with reckless disregard for the truth.

Jones's testimony at trial directly contradicted Treff's statements in the warrant affidavit and at trial that Jones had provided reliable information on previous occasions. When we review live testimony at a suppression hearing, we view the

evidence in the light most favorable to the prevailing party and may also consider the trial evidence. United States v. Rideau, 969 F.2d 1572, 1576 (5th Cir. 1992) (en banc). Thus, Treff's testimony that Jones provided reliable information in the past must be favored over Jones's statement that he had never before provided information to Treff or other officers.

Moreover, if probable cause remains after the allegedly false statement is redacted, the search is still valid. Ivy, 973 F.2d at 1188. Eliminating the statement that Jones had provided information to officers on previous occasions, probable cause remains for officers to believe that drugs would be found in the place searched, as the statement that Jones bought cocaine from Dukes at the threshold of Dukes's apartment is unchallenged.

III.

Dukes argues that the district court abused its discretion by admitting the 9mm pistol found during the search of Dukes's apartment because the firearm was not relevant to the offense of conviction. 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. P. 401. Relevant evidence is admissible while irrelevant evidence is not.

FED. R. EVID. P. 402.

The essential elements of possession with the intent to distribute narcotics are (1) possession, (2) knowledge, and (3) an intent to distribute. United States v. Chavez, 947 F.2d 742, 745 (5th Cir. 1991). This court has held that possession of a firearm by a defendant engaged in drug-trafficking is relevant to show intent for drug offenses because firearms are "tools of the trade" for drug-traffickers. United States v. Martinez, 808 F.2d 1050, 1056-57 (5th Cir.), cert. denied, 481 U.S. 1032 (1987). The evidence that Dukes possessed the pistol is relevant to the same extent that his possession of the triple-beam scale was relevant to showing his intent to engage in a drug-trafficking enterprise. See United States v. Perez, 648 F.2d 219, 224 (5th Cir. Unit B June 1981), cert. denied, 454 U.S. 970, 1055 (1981). The possession of the pistol also demonstrates Dukes's intent to protect the contraband and cash he possessed.

AFFIRMED.