

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10130
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LEE WAYNE HAMMONDS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CR-102-P)

(December 22, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Lee Hammonds appeals his conviction for marihuana and firearm offenses in violation of 18 U.S.C. §§ 922(g)(1) and 924(c) and 21 U.S.C. § 841(a)(1). Finding no error, we affirm.

I.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

An undercover surveillance team suspected that Hammonds possessed firearms at his place of business. They obtained a warrant and conducted a search of the premises, revealing Hammonds, in his office, in possession of marihuana and firearms. The officers discovered approximately thirteen pounds of marihuana, several rifles and shotguns, and over \$5,000 cash from Hammonds's office and truck. Hammonds consented to a search of his residence, where officers located additional firearms that Hammonds admitted belonged to him.

The grand jury indicted Hammonds on three counts: (1) possession of marihuana with intent to distribute; (2) being a felon in possession of firearms; and (3) using a firearm in relation to a drug trafficking crime. Hammonds pleaded guilty to counts one and two. After a trial by jury, Hammonds was convicted on count three.

II.

A.

Hammonds alleges that the district court did not comply with the requirements of FED. R. CRIM. P. 11 at his guilty plea colloquy and that the court's omissions did not constitute harmless error. Specifically, Hammonds contends that the district court failed to explain the elements of the crimes or determine that he understood them and that the error is not harmless because the court also failed to establish a factual basis for the crimes.

Hammonds does not advance specific arguments regarding his lack of understanding of the marihuana possession charge.

Regarding the firearms possession charge, however, Hammonds maintains that he did not understand that he had to "knowingly possess the firearms." Hammonds contends that some of the firearms did not belong to him and that he believed he could legally possess firearms. Hammonds argues that the trial court's failure to "personally inform[] [him] of the charges and ascertain[] his understanding of those charges" affected his willingness to plead guilty.

Rule 11 requires the district court, before accepting a guilty plea, to address the defendant in open court and inform him of, and determine that he understands, inter alia, "the nature of the charge to which the plea is offered." United States v. Johnson, 1 F.3d 296, 299 (5th Cir. 1993) (en banc) (quoting FED. R. CRIM. P. 11(c)(1)). To satisfy rule 11, the court must personally advise the defendant of the nature of the charges against him and establish on the record that the defendant understands the charges. United States v. Shacklett, 921 F.2d 580, 582-83 (5th Cir. 1991). Moreover, "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." FED. R. CRIM. P. 11(f).

In reviewing a rule 11 challenge, this court utilizes a two-question, harmless-error analysis: "(1) Did the sentencing court in fact vary from the procedures required by rule 11, and (2) if so, did such variance affect substantial rights of the defendant?" Johnson, 1 F.3d at 298. To determine whether substantial rights

have been affected, this court focuses on whether the rule 11 error "may reasonably be viewed as having been a material factor affecting [defendant]'s decision to plead guilty." Id. at 302. Johnson requires reversal and vacatur only when the challenged variance affects the defendant's substantial rights. Id. at 298.

When the court reviews a rule 11 challenge, it "principally" considers the transcript of the plea colloquy hearing. Id. The court will review other portions of the record on appeal that are "temporally relevant" to the defendant's knowledge and understanding of the nature of the charges. Id. at 298, 302-03. Such sources must be clothed with "indicia of dignity, solemnity, and reliability sufficient to the purposes of the rule." Id. at 302-03.

During the rule 11 colloquy, the district court asked Hammonds whether he had received and reviewed a copy of the indictment. Hammonds responded affirmatively. The court informed Hammonds that he was charged with possession of marihuana with intent to distribute and of being a convicted felon in possession of a firearm. Several times the court asked Hammonds whether he understood the charges and the penalties associated with them. Each time, Hammonds answered, indicating that he understood. The court explained the rights Hammonds was waiving, the punishments associated with each count, and the terms of sentencing and supervised release. The court ascertained that Hammonds's attorney had discussed the nature of the charges with him and that Hammonds was entering his plea voluntarily and without coercion.

The court provided no explanation of the crimes or factual basis for the pleas. The court did not read the indictment or explain the elements of the crimes. There was no plea agreement or factual resume. Neither the court nor the prosecutor established a factual basis for Hammonds's guilt.

Hammonds did not admit to facts establishing the elements of the crimes. Rather, after the jury was reconvened to begin the trial on count three, the court had the prosecutor read the indictment. At that time, Hammonds's attorney responded that Hammonds "would plead guilty" to counts one and two. Immediately thereafter, the court explained to the jury that "Mr. Hammonds has determined that he will enter a plea of guilty to Counts One and Two."

"For simple charges . . . a reading of the indictment, followed by an opportunity given the defendant to ask questions about it will usually suffice." United States v. Green, 882 F.2d 999, 1005-06 (5th Cir. 1989). Moreover, if the record shows that defense counsel explained the nature of the offense to the defendant or that the defendant otherwise understood the charge, the failure of the trial court to explain those elements does not render the plea involuntary. Henderson v. Morgan, 426 U.S. 637, 645-47 (1976); Davis v. Butler, 825 F.2d 892, 893-94 (5th Cir. 1987).

In support of his position, Hammonds contends that he did not understand that possession of a firearm outside of his home was illegal and that some of the firearms did not belong to him. The

critical element of the offense, however, is "knowing possession." See, e.g., United States v. Willis, 6 F.3d 257, 264 (5th Cir. 1993); United States v. Evans, 950 F.2d 187, 192 n.7 (5th Cir. 1991). Moreover, "[i]llegal possession of firearms may be either actual or constructive." United States v. Knezek, 964 F.2d 394, 400 (5th Cir. 1992). Constructive possession includes "ownership, dominion, or control over the contraband itself or over the premises in which the contraband is located. United States v. McKnight, 953 F.2d 898, 901-03 (5th Cir.), cert. denied, 112 S. Ct. 2975 (1992).

Although the district court did not comply strictly with the requirements of rule 11, neither Hammonds nor his attorney objected to the court's rule 11 colloquy at the hearing or in the presentence report. Furthermore, Hammonds admitted his guilt to the essential elements of counts one and two when he testified in the trial on count three that (1) he was in possession of marijuana; (2) he intended to distribute it; (3) he was a felon; and (4) he was in possession of firearms. Hammonds's testimony also indicated that he understood that ownership of the guns was irrelevant to the firearms possession charge.

In his brief, Hammonds does not indicate how the court's failure to explain the elements of the crimes affected his understanding of the offenses or his willingness to plead guilty. Because Hammonds testified to his guilt to the elements of the crimes, a sufficient factual basis exists for his pleas, and it is plain from the temporally relevant records that he understood and

admitted the elements of the offenses. Therefore, the court's errors are harmless.

B.

Hammonds argues that his conviction should be reversed because the government constructively amended the indictment by implicating the firearms recovered from Hammonds's residence in a hypothetical, mobile, drug-trafficking enterprise. Hammonds contends that the trial court acquiesced in the amendment of the indictment by denying Hammonds's motion for a bill of particulars, which sought to have the government designate the firearms alleged in count three; by allowing the firearms retrieved from Hammonds's residence into evidence; and by overruling Hammonds's evidentiary objections and motion for judgment for acquittal.

Hammonds further contends that the guns retrieved from his residence had no connection to the marihuana trafficking charge and that their type and lethal appearance prejudiced the jury's consideration of the facts. Id. Hammonds maintains that the guns discovered with the marihuana in his office and truck were "old, single shot, shotguns in need of repair" and "a pump shotgun . . . [placed in his truck] for aesthetic reasons."

A constructive amendment occurs if the trial court's instructions and evidentiary rulings allow proof of an essential element of a crime on an alternative basis permitted by statute but not charged in the indictment. United States v. Restivo, 8 F.3d 274, 279 n.20 (5th Cir. 1993), cert. denied, 115 S. Ct. 54 (1994). If

this occurs, reversal is required. Id.

An appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain ("clear" or "obvious"), and that it affects substantial rights. United States v. Olano, 113 S. Ct. 1770, 1776-79 (1993) (interpreting "plain error" of FED. R. CRIM. P. 52(b)). Plain errors are "readily apparent" errors with "clear answers under the current law" in effect at the time of the decision. United States v. Calverley, No. 92-1175, 1994 U.S. App. LEXIS 29226 (5th Cir. Oct. 24, 1994) (en banc).

Even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Olano, 113 S. Ct. at 1778 (quoting rule 52(b)).

In his reply brief, Hammonds asserts that his relevance and FED. R. EVID. 404(b) objections preserved the constructive amendment argument that he now raises on appeal. Hammonds, however, never argued specifically that the government was using the firearms retrieved from his residence to amend the indictment. Thus, Hammonds's constructive amendment challenge arguably was not raised adequately in the district court, and we could choose to review the district court's ruling for plain error only. See United States v. Condren, 18 F.3d 1190, 1192 n.5 (5th Cir.), cert. denied, 115 S. Ct. 161 (1994). Even assuming that Hammonds adequately raised the objection in the district court, however, his argument is without

merit.

Hammonds's argument that the district court and the government constructively amended the indictment is based upon United States v. Pedigo, 12 F.3d 618, 629-31 (7th Cir. 1993), and United States v. Willoughby, 27 F.3d 263, 265-68 (7th Cir. 1994). In Pedigo, the indictment charged the defendant with the use of a firearm in relation to a specific drug charge: count two, possession with intent to distribute marihuana. Pedigo, 12 F.3d at 629. Evidence of a gun belonging to an alleged co-conspirator was introduced, and the jury was informed by the court and by the government that either the marihuana charge or a conspiracy charge, a charge alleged in the count one indictment, could be used as a basis for the defendant's conviction on the weapons charge. Id. at 630. The court determined that conviction on the § 924(c) charge could not be based upon co-conspirator liability, as the firearms count of the indictment specifically did not include that charge. Id. at 631. Thus, the court concluded that the jury charge, the prosecution's arguments, and the admission into evidence of the co-conspirator's gun impermissibly amended the indictment. Id.

In Willoughby, the indictment charged the use of a firearm in relation to distribution of cocaine. Willoughby, 27 F.3d at 266. The defendant was also charged with possession with intent to distribute cocaine, but that charge was not contained within the indictment on the § 924(c) count. Id. The court determined that the government, by the way it framed the indictment, narrowed the weapons charge to use of a firearm only with the cocaine distribu-

tion charge. No evidence linked the gun to the distribution of cocaine, and no evidence indicated that any distribution occurred where the gun was located. Id. at 267. The court determined that a "hypothetical future distribution is not a legitimate basis" for a conviction. Id. The court further explained that the possession charge could have provided the basis for the weapons charge on a protection theory, but not when the possession charge fell outside the scope of the indictment. Id. Thus, the court concluded that the indictment had been constructively amended and reversed the conviction. Id.

The Pedigo case is distinguishable, because the court allowed evidence of a co-conspirator's weapon to be imputed to the defendant when the conspiracy charge was not included in the indictment on the § 924(c) charge. Willoughby also differs from the case at hand because weapons evidence connected to the possession charge was used to convict the defendant on a § 924(c) indictment alleging use of a firearm in connection with distribution. Like these cases, Hammond's indictment on count three specifies that a firearm was used in connection with a specific drug charge. Unlike these cases, the evidence presented did not broaden the indictment beyond its own terms.

The indictment charged that on October 30, 1992, Hammonds "knowingly use[d] and carr[ied] a firearm during and in relation to a drug trafficking crime, namely: possession of marihuana, a Schedule I controlled substance, with intent to distribute." The indictment did not allege the use of any particular firearm.

Hammonds testified to his guilt on the marihuana charge, a crime that the trial court defined as drug-trafficking. Hammonds admitted possession of the guns in his office and testified that the guns were within his reach. He testified that the shotgun recovered from his truck belonged to him. He had marihuana and guns in his office and in his truck. Thus, without considering the firearms retrieved from Hammonds's residence, the jury reasonably could have concluded that a firearm was available for Hammonds's use or protection in connection with his drug-trafficking activities. See Coburn, 876 F.2d at 375; United States v. Velgar-Vivero, 8 F.3d 236, 241-42 (5th Cir. 1993) (holding that loaded guns within defendant's reach satisfy requirement that firearm need only be available to provide protection during the commission of offense), cert. denied, 114 S. Ct. 1865 (1994).

To convict Hammonds under § 924(c), the government was required to prove beyond a reasonable doubt only that he (1) committed the drug-trafficking crime; (2) knowingly used or carried a firearm; and (3) used or carried the firearm during and in relation to the crime. United States v. Willis, 6 F.3d 257, 264 (5th Cir. 1993). "Conviction under [18 U.S.C. § 924(c)(1)] does not depend on proof that the defendant had actual possession of the weapon or used it in any affirmative manner[,] [but only that] the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking." Id. (internal quotation and citation omitted).

The government need not prove that the gun was actually used

or brandished; the evidence is sufficient if it shows that "the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or to intimidate others." United States v. Coburn, 876 F.2d 372, 375 (5th Cir. 1989). We recently concluded that "the focus of [§ 924(c)] is upon the use of any firearm so long as it is used in the commission of an enumerated predicate crime." United States v. Correa-Ventura, 6 F.3d 1070, 1085 (5th Cir. 1993).

No constructive amendment occurred in this case, as the evidence presented at trial established the essential elements of the offense as they were alleged in the indictment. Therefore, there was no error, plain or otherwise. Hammonds does not argue on appeal, as he did in the district court, that the evidence of firearms at his house should have been excluded as irrelevant or too prejudicial. Accordingly, Hammonds's conviction on count three must be upheld.

AFFIRMED.