IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20367
Summary Calendar

United States of America,

Plaintiff/Appellee,

versus

Jesus Valdez Duarte a/k/a
Juan Jose Valdivia

Defendant/Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR H 93 291 1)

(April 12, 1995)

Before JOHNSON, JONES, and EMILIO M. GARZA, Circuit Judges.[*]

JOHNSON, Circuit Judge:

Jesus Valdez Duarte a/k/a Juan Jose Valdivia ("Duarte")[1] was convicted by a jury of two counts of being a felon in possession of a firearm. On appeal, Duarte challenges the propriety of the district court's denial of his motion to suppress the firearms found during the search of a vehicle he was driving and the court's

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] Duarte was indicted and tried under the alias Juan Jose Valdivia. At sentencing, however, the district court ordered that from that time forward all documents refer to the defendant by his true name, Jesus Valdez Duarte.

denial of his motion to sever the two counts. Additionally, Duarte contends that the district court erred in imposing a fine beyond his ability to pay. Finding no reversible error, we AFFIRM.

I. FACTS AND PROCEDURAL HISTORY

The charges against Duarte arise from two separate incidents. In the first incident, in April of 1992, Officer Christopher Malek of the Houston Police Department spotted a black Thunderbird automobile. Aware that vehicles of that type were commonly stolen and dumped in the area, Officer Malek decided to "run the plates." A computer check indicated that warrants were outstanding. Accordingly, Officer Malek pulled the vehicle over using his emergency equipment.

Duarte was the driver of the Thunderbird. When he was unable to produce a driver's license, Officer Malek asked him to step out of the car. As Duarte did so, Officer Malek observed what appeared to be a marijuana cigarette on the floorboard of the car. Officer Malek retrieved the cigarette and confirmed that it was marijuana by smelling its odor. At that point, the officer placed Duarte under arrest and put him in the patrol car.

Since Duarte did not own the Thunderbird, Officer Malek requested dispatch to contact the registered owner. This attempted contact was unsuccessful, though, and so Officer Malek decided to have the vehicle towed to a private storage lot. Prior to towing the vehicle, Officer Malek conducted an inventory search. In the trunk, in an unzipped nylon bag, the officer discovered a rubberized old man mask, two loaded firearms, and some clothes.

Upon being questioned about the firearms, Duarte stated that the clothes were his but the firearms were not.

The second incident occurred in May of 1992. In that incident, James Edward Walenta returned to his apartment during the middle of the day. When he entered the apartment, he discovered that it had been broken into and ransacked and that several items had been stolen. Moreover, several items were stacked next to the door suggesting to Walenta that the burglar would return. Walenta took out a pistol and called the police.

A short time later, Duarte climbed over Walenta's patio fence and stepped through the apartment's sliding glass door. Walenta pointed his gun at Duarte and told him to stop or he would shoot. Duarte fled, and, as he was jumping the patio fence, a pistol fell and hit the ground. Walenta gave chase and, with the aid of citizens nearby, apprehended Duarte several hundred yards down the street. The police arrived and took Duarte into custody.

The instant, two-count indictment charged Duarte with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), with the separate incidents forming the bases of the respective counts. Before trial, Duarte moved to suppress the two firearms found in the trunk of the Thunderbird contending that they were the fruits of an illegal search. After a hearing, the district court denied this motion. Additionally, Duarte moved to sever the two counts in the indictment. The district court denied this motion as well. A jury found Duarte guilty on both counts and the district court sentenced him to concurrent 298-month terms of

imprisonment followed by a three-year term of supervised release and assessed a fine of $17,500. Duarte now appeals.

II. DISCUSSION

A. The Motion to Suppress

The district court herein denied Duarte's motion to suppress the two firearms found in the trunk of the Thunderbird. This Court reviews a district court's findings of fact on a motion to suppress for clear error. *United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir.), *cert. denied*, 114 S.Ct. 155 (1993). The determination of whether the search or seizure was reasonable under the Fourth Amendment is reviewed *de novo*. *Id.* The evidence must be reviewed most favorably to the party prevailing in the district court. *United States v. Shabazz*, 993 F.2d 431, 434 (5th cir. 1993).

On appeal, Duarte argues that the firearms should have been suppressed because the officer lacked probable cause to search the trunk and because the officer did not conduct a valid inventory search. Concluding that the firearms were discovered pursuant to a valid inventory search of the vehicle, we do not address whether probable cause existed.[2]

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[2] Duarte's probable cause argument concerns Officer Malek's seizure of the marijuana cigarette. According to Duarte, Officer Malek did not have probable cause to seize the cigarette because its criminality was not immediately apparent. However, neither the cigarette nor any testimony concerning its seizure was presented at trial. Hence, this argument is only relevant if we find that the seizure of this cigarette provided the sole basis for the search of the trunk and thus the discovery of the firearms. We do not find that the marijuana was the sole basis for the search of the trunk. Officer Malek testified that he would have arrested Duarte for not having a license even absent any marijuana. Such an arrest would have necessitated the inventory search of the vehicle that was conducted herein.

Inventory searches are a well-recognized exception to the warrant requirement of the Fourth Amendment. *Colorado v. Bertine*, 479 U.S. 367, 371, 107 S.Ct. 738, 741 (1987). Under this exception, the police may inventory the contents of an impounded vehicle to protect the owner's property while it remains in police custody, to protect the police against claims of lost or stolen property and to protect the police from potential danger. *South Dakota v. Opperman*, 428 U.S. 364, 369, 96 S.Ct. 3092, 3097 (1976). Such inventories may be lawfully conducted while the vehicle is on the highway awaiting towing. *United States v. Prescott*, 599 F.2d 103, 105 (5th Cir. 1979). Evidence of an established inventory procedure must be present, though, "to prevent the police from conducting inventory searches as a ruse for general rummaging to discover incriminating evidence." *United States v. Gallo*, 927 F.2d 815, 819 (5th Cir. 1991).

In this case, Duarte argues that this inventory was invalid because it was not conducted pursuant to specific, written guidelines on how to conduct the search.[3] However, it is clear from Officer Malek's testimony that even if he had not seen any written guidelines, standard procedures did exist and he had received extensive instruction concerning them.[4] *See United States*

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[3] In particular, Duarte points to testimony by Officer Malek to the effect that while the manual says that a complete inventory search must be done, there are no specific guidelines as to how to conduct the search.

[4] In the hearing on the motion to suppress, Officer Malek testified as follows:

Q: Okay, what is HPD policy and procedure with

respect to towing the vehicles?

A: Any vehicle towed to a private storage lot or a police compound, an inventory search will be conducted on the vehicle.

Q: Why is an inventory conducted?

A: For the protection of the officer and the defendant's personal property.

Q: Okay. Is that to protect you from charges that certain property was left in the vehicle?

A: That's correct.

Q: Have you been trained as to how to conduct inventories?

A: Yes.

Q: And what do you do in an inventory? What are you allowed to look at? What are you not allowed to look at?

A: Well, you need to do an inventory of all property in the vehicle that is accessible.

Q: What do you mean by "accessible"?

A: Where--to where somebody, as the wrecker driver--they could be accessible to the property or somebody else could get to the property.

Q: Okay. Does that mean you get to open closed containers?

A: If they are accessible to myself or somebody else, yes.

Q: Okay. Would a locked container that you did not have the key to be accessible?

A: No that wouldn't be accessible.

Q: Would a locked container that you had the key to be accessible?

A: If it's a--if the key goes with the suspect, then it wouldn't be accessible to me.

v. Andrews, 22 F.3d 1328, 1335 (5th Cir.) *cert. denied*, 115 S.Ct. 346 (1994) (upholding police inventory procedures that, though unwritten, were orally communicated by police captain). Given that Officer Malek did follow these procedures, this search was reasonable under the Fourth Amendment. Accordingly, there was no error in refusing to suppress the firearms.

B. The Motion to Sever

Duarte alleges that the district court erred in failing to sever the two counts charged in the indictment. In reviewing a district court's denial of a motion to sever, "the preliminary inquiry is whether, as a matter of law, initial joinder of the counts was proper" under Fed. R. Crim. P. 8(a). *United States v. Holloway*, 1 F.3d 307, 310 (5th Cir. 1993). Although claims of misjoinder are completely reviewable on appeal, Rule 8(a) is to be broadly construed in favor of initial joinder. *United States v. Fortenberrry*, 914 F.2d 671, 675 (5th Cir. 1990), *cert. denied*, 113 S.Ct. 1333 (1991).

Rule 8(a) provides that two or more offenses may be charged in separate counts in the same indictment if they "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." The rule's "transaction"

Q: I see. But if the key goes with the vehicle, then it would be accessible?

A: Yes.

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requirement is flexible and may "comprehend a series of occurrences, depending not so much on the immediateness of their connection as on their logical relationship." *United States v. Robichaux*, 995 F.2d 565, 569 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 322 (1993). In this case, the logical relationship is that both counts constituted violations of the same criminal statute. Thus, the crimes charged were of "the same or similar character." Rule 8(a). Moreover, both counts required proof that the firearms travelled interstate commerce, elicited from a single witness, as well as proof that Duarte had a prior felony which was established by the introduction of a single exhibit.

Although initial joinder was proper, Fed. R. Crim P. 14 provides that if it appears that a defendant is prejudiced by the joinder of offenses, the court may order a separate trial of the counts. We review the district court's denial of a severance for an abuse of discretion. *United States v. Stouffer*, 986 F.2d 916, 924 (5th Cir.), *cert. denied*, 114 S.Ct. 115 (1993). Furthermore, the district court's decision will not be reversed unless there is clear prejudice to the defendant. *Fortenberry*, 914 F.2d at 675.

In this case, Duarte argues that there was prejudice because the jury might use evidence relevant only to one of the counts to convict Duarte on both counts. In particular, in the second incident that was the basis for the second count, an eyewitness saw Mr. Duarte drop a firearm as he fled from an apartment. Duarte argues that the jury would be unable to disregard this eyewitness testimony when it deliberated on whether Duarte constructively

possessed the two firearms found in the trunk of the Thunderbird in the first incident that was the basis for the first count.[5] We disagree. The evidence at trial was easily separable as relevant to one count or the other. Thus, the danger of jury confusion was minimal. *See United States v. Bermea*, 30 F.3d 1539, 1574 (5th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3564 (Feb. 21, 1995) (No. 94-1224) (finding no prejudice where evidence as to each charged offense in single indictment was easy to separate). Moreover, the district court gave a jury instruction separating the counts. Under these circumstances, we do not find sufficient prejudice to conclude that the district court abused is discretion in denying the motion to sever.

C. The Fine Imposed

In this point of error, Duarte challenges the district court's imposition of a $17,500 fine contending that he has no ability to pay it. The Guidelines provide that the court shall impose a fine in all cases, "except in cases where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." U.S.S.G. § 5E1.2(a). The burden of proof is on the defendant to show his inability to pay the fine.[6] *United States v.*

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[5] *See Fortenberry*, 914 F.2d at 675 (clear prejudice may result when the jury is unable to separate the evidence and apply it to the proper offenses, or where the jury might use the evidence of one of the crimes to infer criminal disposition to commit the other crimes charged).

[6] A fine may be appropriate even if it constitutes a "significant financial burden." *United States v. Matovsky*, 935 F.2d 719, 723 (5th Cir. 1991). In addition, neither the Constitution nor the Sentencing Guidelines categorically prohibit a court from imposing a fine even after the defendant has proved

Fair, 979 F.2d 1037, 1041 (5th Cir. 1992). A district court's finding on a defendant's ability to pay a fine is a factual one, subject to review only for clear error. *United States v. Rodriguez*, 15 F.3d 408, 414 (5th Cir. 1994).

In this case, the district court adopted the pre-sentence report ("PSR"). The PSR reflected that Duarte was currently destitute, but it made no recommendation regarding Duarte's future ability to pay. In light of this, the district court imposed a fine after it determined that, although Duarte did not have the ability to pay a fine in excess of the minimum,[7] he would be able to pay the minimum fine from his prison earnings. *See United States v. Hagmann*, 950 F.2d 175, 185-86 (5th Cir. 1991), *cert. denied*, 113 S.Ct. 108 (1992) (a defendant's indigency at the time of sentencing does not preclude the fine); *United States v. Williams*, 996 F.2d 231, 234-35 (10th Cir. 1993) (upholding $13,000 fine to be paid from future prison earnings or other future earning capacity); *United States v. Taylor*, 984 F.2d 618, 622 (4th Cir. 1993) (upholding $2,000 fine to be paid from prison earnings). Accordingly, the district court recommended that Duarte participate in the "Bureau of Prisons Inmate Responsibility Program," from which he should contribute fifty percent of his inmate earnings.

In his brief to this Court, Duarte argues that his earnings

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his inability to pay. *United States v. Altamirano*, 11 F.3d 52, 53 (5th Cir. 1993).

[7] Under the Sentencing Guidelines for a defendant with Duarte's offense level, the minimum fine is $17,500 and the maximum fine is $175,000. U.S.S.G. § 5E1.2(c)(3). The district court imposed a fine at the very bottom of that range--$17,500.

from his participation in that Inmate Responsibility Program would be insufficient because he could expect to earn no more than $12,500 during his incarceration. We do not find this assertion alone to be sufficient to carry Duarte's burden of proof. Accordingly, we cannot conclude that the district court clearly erred in imposing this fine on Duarte.

III. CONCLUSION

For the reasons stated above, the judgment of the district court is AFFIRMED.