

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40479  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GREGORY SPENCER MCGOWAN,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 9:94-CV-016 (9:92-CR-2-02)

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(January 27, 1995)

Before POLITZ, Chief Judge, and HIGGINBOTHAM and DeMOSS,  
Circuit Judges.

PER CURIAM:\*

Gregory Spencer McGowan's motion to proceed in forma pauperis (IFP) on appeal is DENIED. "To proceed on appeal in forma pauperis, a litigant must be economically eligible, and his appeal must not be frivolous." Jackson v. Dallas Police Dep't, 811 F.2d 260, 261 (5th Cir. 1986) (citations omitted). The Court will grant IFP if the appellant has raised "legal points arguable on their merits." Id. (quotation and citation omitted). McGowan has failed to present arguable legal points for appeal.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

McGowan argues that the district court erred in treating his offense as a crime of violence for sentencing purposes.

McGowan's argument is meritless because the district court did not sentence him for committing a crime of violence but, rather, sentenced him to the mandatory minimum five year sentence for possession of a firearm during a drug trafficking offense pursuant to 18 U.S.C. § 924(c)(1).

McGowan argues that his guilty plea was defective because the firearm was not in his possession or control and he was not "using and carrying [the] firearm in relation to 18 U.S.C. § 924(c)(1)." To prove that McGowan used or carried a firearm during a drug trafficking crime for purposes of § 924(c), the Government need not prove that McGowan "had actual possession of the weapon or used it in any affirmative manner." United States v. Raborn, 872 F.2d 589, 595 (5th Cir. 1989). Rather, the Government must prove that the "firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking." Id.

At McGowan's arrest, officers found a quantity of crack cocaine "laying under the rear of the vehicle" in which McGowan was traveling as well as an Intra-tech Tec-9 nine millimeter pistol (the "firearm") in the truck bed. At the guilty plea hearing, McGowan testified he purchased the firearm in Houston on July 24, 1990, and that he owned the firearm. He testified that on September 20, 1991, police officers stopped him in a vehicle while he was in possession of the firearm, and he admitted that crack cocaine was located in the same vehicle. McGowan also

admitted that he knew that both the cocaine and the firearm were in the vehicle, that he had access to both, that the firearm was available to him or to any of the vehicle's occupants for protection of them or the cocaine, and that he had the firearm in his possession while illegal drugs were in the vehicle.

Thus, McGowan has not raised a nonfrivolous issue on appeal. Because McGowan has failed to raise a nonfrivolous issue on appeal, the appeal is DISMISSED. See 5th Cir. R. 42.2.