UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40698
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEFAN SEAN ANTOINE,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1:93 CR 208 (2))

August 24, 1995

Before DAVIS, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appellant, Stefan Sean Antoine was convicted by a jury of carrying two firearms during and in relation to a drug offense even though a mistrial was declared on the charge of possession with intent to distribute cocaine base. On appeal, he seeks to challenge the search of the car in which he was a passenger,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sufficiency of the evidence, and the timing of the jury's receipt of a copy of the charge. We find no reversible error and affirm.

Antoine first argues that the district court erred in denying his motion to suppress, and the subsequent motion for reconsideration of the motion to suppress, the items found in the search of the co-defendant's vehicle.

"An individual alleging a [F]ourth [A]mendment violation must demonstrate `a legitimate expectation of privacy in the invaded place.'" Elwood, 993 F.2d at 1151 (footnote omitted). Although several factors are considered in determining whether a particular defendant has such an expectation, see id. (listing the factors), Antoine "bears the burden of establishing standing to challenge a search under the Fourth Amendment." United States v. Pierce, 959 F.2d 1297, 1303 (5th Cir.), cert. denied, 113 S. Ct. 621 (1992). Neither the evidence presented at the suppression hearing nor Antoine's trial testimony, see R. 3, 3-60 (testimony by two law enforcement officers); R. 2, 148-87 (Antoine's testimony), indicates that Antoine had a legitimate expectation of privacy in Kirklin's car. See Elwood, 993 F.2d at 1152 (noting no evidence to support inference of standing).

"A non-owning passenger of a vehicle has no standing to challenge the search of the vehicle." Id. at 1151 (footnote omitted); see Rakas v. Illinois, 439 U.S. 128, 148-49 (1978). Therefore, the district court did not err in denying Antoine's motion to suppress the items found within the vehicle.

Antoine next challenges the sufficiency of the evidence to convict him by arguing that under the facts of this case -- his unloaded firearm in the trunk of the car and drugs on the backseat floorboard -- his firearm played no role in the drug-trafficking offense.[1]

Section 924(c)(1) requires the Government to prove that Antoine "(1) used or carried a firearm during and in relation to (2) an underlying drug-trafficking crime." United States v. Munoz-Fabela, 896 F.2d 908, 911 (5th Cir.), cert. denied, 498 U.S. 824 (1990). The first element requires the firearm to "have played an integral part [in] the felony." Id. (internal quotation and citations omitted).

> It is not necessary that the weapon be employed or brandished. It is enough that the firearm was present at the drug-trafficking scene, that the weapon could have been used to protect or facilitate the operation, and that the presence of the weapon was in some way connected with the drug trafficking. The weapon may be hidden . . . or unloaded . . . .

Id. (internal quotation and citations omitted).

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[1] The Government contends that Antoine failed to preserve the issue by moving for judgment of acquittal at trial, thus lessening the standard of review. Although Antoine failed to move for judgment of acquittal at the close of the Government's case and at the close of all evidence, see R. 2, 148, 188, the Government filed a motion to impose sentence on Antoine, arguing that the jury's failure to reach a verdict on the drug-possession count did not affect the validity of the firearms conviction. R. 1, 259-62. The district court ordered a hearing on the motion. See R. 1, 264, 273. Antoine filed an opposition to the Government's motion, but this does not appear to raise the sufficiency argument he now makes. Because Antoine failed to move for judgment of acquittal at the close of all the evidence, and because the record does not indicate that he filed such a post-trial motion, the standard for review is manifest miscarriage of justice, whether the record is devoid of evidence of Antoine's guilt. See United States v. Laury, 49 F.3d 145, 151 (5th Cir. 1995). Even if Antoine had preserved the issue for review under the higher standard -- "whether a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt, viewing the evidence in the light most favorable to the verdict," United States v. Benbrook, 40 F.3d 88, 93 (5th Cir. 1994) (footnote omitted), the end result would be the same.

Antoine, testifying at trial, admitted the .45-caliber firearm was his. See R. 2, 155. The gun, along with co-defendant Kirklin's gun, was found in the truck of the vehicle with a bag full of cocaine on the floor behind the front passenger seat. See R. 2, 8-9, 12. Antoine, sitting in the front passenger seat, had the clip to his gun in his pocket. See R. 2, 6-7, 42. Kirklin's testimony supports the inference that the defendants had the weapons for protection of their drug trafficking. See R. 2, 88, 90, 102; see also R. 2, 70-71, 75 (ATF agent's testimony that firearms are tools of the drug trade and an unloaded gun in a trunk could be used to protect the drugs in the vehicle).

Under either standard of review, the evidence was sufficient to show that the firearms played a role in Antoine's and Kirklin's drug trafficking. See Thomas, 12 F.3d at 1361-62 (concluding that defendant used or carried the firearm within the meaning of § 924(c)(1) when the firearm was found unloaded in a zippered gun bag in a second-floor closet of the house where drugs and large sums of cash were found); United States v. Capote-Capote, 946 F.2d 1100, 1103-04 (5th Cir. 1991) (machine gun, next to a loaded clip, found in zippered case inside a drawer in an apartment, and apartment also contained drugs and two other firearms), cert. denied, 504 U.S. 942 (1992); United States v. Coburn, 876 F.2d 372, 374-75 (5th Cir. 1989) (unloaded shotgun on gunrack in pickup truck, and gas tank contained marijuana).

Antoine's final contention is that the district court reversibly erred by failing to provide in a timely manner to the

jury a written copy of the jury instructions. According to the trial minute entries, the jury began deliberations at 10:15 a.m. Id. At 10:50, the jury requested a copy of the charge. R. 1, 233. At 11:05, the court instructed the jury that it would take time to transcribe the instructions and that they should continue deliberations using memory to recall the instructions. R. 1, 238. The court supplied a copy of the instructions to the jury at 1:10 p.m. R. 1, 258 (back side of page); see R. 1, 237, 239-51. At 1:38, the jury foreman sent word that the jury had not reached unanimity on either count. R. 1, 256. By 1:58, the jury had reached its verdict on the firearms count. See R. 1, 232. Even after additional instruction from the court, see R. 1, 234-35, the jury remained deadlocked on the drug count. See R. 1, 257-58.

The decision to provide a written copy of the charge to the jury is within the district court's discretion. See United States v. Oreira, 29 F.3d 185, 191 (5th Cir. 1994). Moreover, controlling precedent disapproves of supplying a written copy of the charge to the jury. Id. Antoine premises his argument on the assumption that the case was complex because of the "issue" of inconsistent verdicts. See blue brief, 17. This "issue" was not a fact issue for the jury to decide; how to respond to inconsistent verdicts is a legal matter for the courts. Further, Antoine fails to explain, outside of stating that the jury was confused, how any delay in providing a copy of the written instructions prejudiced him. See id. With a copy of the written instructions, the jury

found Antoine guilty on one count and deadlocked on the other charged count. Therefore, no abuse of discretion has been shown.

For these reasons, the judgment of conviction is AFFIRMED.