IN THE UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-40850
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REGINALD AUSTIN GREEN,

Defendant-Appellant.

Appeal from United States District Court
for the Eastern District of Texas
(6:93 CR 68 2)

(April 19, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Reginald A. Green appeals his conviction for three counts of possession of cocaine with intent to distribute because the district court failed to grant his motion to suppress evidence seized during his arrest. He also appeals his sentence alleging that the United States Sentencing Guidelines are discriminatory and that the district court failed to grant a downward departure. For

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the following reasons, both Green's conviction and sentence are affirmed.

FACTS

On July 31, 1991, Officer Barry Washington was patrolling on Highway 59 in Panola County, Texas, when he stopped a white Chevrolet Lumina because the car had no rear license plate. After Washington stopped the car and turned on his "take-down" lights he saw a paper tag in the rear window. Washington had not seen the tag before he stopped the car because the rear window was tinted.

Washington approached the driver, Charles Alford Green, Jr., (Charles), who had already gotten out of the car, to tell him the reason for the stop. Charles appeared unusually nervous. Following his usual procedure during traffic stops, Washington asked to see the paperwork on the car. The passenger, Reginald Austin Green (Green), who also appeared unusually nervous, gave Washington the papers. The paperwork indicated that the car was owned by Avis Rent-A-Car and had been leased by Tara L. Johnson with Charles listed as the only additional driver.

After getting the lease papers, Washington returned to the rear of the car to talk to Charles. Washington could see Green moving around in the car and became concerned that Green might be reaching for a weapon. Washington returned to the passenger-side of the car and asked Green to get out. As he stepped out of the car Green pushed Washington twice. Washington handcuffed Green and then noticed that he had something in his mouth. Washington called for backup, and when the backup arrived they notice a white,

powdery substance, which appeared to be cocaine, and blood running out of Green's mouth. After Green spit out the substance, Washington called for an ambulance and arrested Green for possession of cocaine. Because Washington found two rolled-up one-dollar bills with a white powdery substance in Green's pocket and Charles appeared unusually nervous during the stop, Washington also arrested Charles for possession of cocaine.

The car was taken to the Panola County Detention Center. During a canine search the dog alerted on the right and left rear doors. A kilogram of cocaine was found in the left door, and a sack with five to six crack cocaine cookies was found in the right door.

Green was charged in three counts of a five-count indictment with possession of cocaine base with intent to distribute, possession of cocaine with intent to distribute, and conspiracy to possess cocaine base and cocaine with intent to distribute. Green filed a motion to quash his arrest and suppress the evidence found in the car. Following an evidentiary hearing, the magistrate judge recommended denying the motion. After Green filed objections to the magistrate judge's report and recommendation and the district court held a hearing, the district court denied the motion.

Green entered a conditional guilty plea to the three counts, expressly reserving his right to appeal the denial of the motion to suppress and any sentencing issues. At the sentencing hearing Green objected to the Government's failure to file a

U.S.S.G. § 5K1.1 motion for a downward departure and the constitutionality of the 100:1 ratio of cocaine to crack cocaine under § 2D1.1. Id. at 12-14; see § 2D1.1, comment. (n.10), drug equivalency table, cocaine and other schedule I and II stimulants. The district court overruled both objections. Green was sentenced to 136 months imprisonment, five years supervised released, and a $150 special assessment.

DISCUSSION

Motion to Suppress

Green argues that the district court improperly denied his motion to suppress because the initial stop was invalid; there was no probable cause to arrest the driver and take custody of the car; and there was no probable cause to make a warrantless search of the car. When reviewing the denial of a motion to suppress this court reviews questions of law de novo and accepts the district court's factual findings unless they are clearly erroneous or influenced by an incorrect view of the law. United States v. Carrillo-Morales, 27 F.3d 1054, 1060-61 (5th Cir. 1994), cert. denied, 115 S.Ct. 1163 (1995). The evidence is viewed in the light most favorable to the prevailing party. Id. at 1061.

In general, a passenger without a possessory interest in a car has no legitimate expectation of privacy entitling him to challenge the search of the car. United States v. Roberson, 6 F.3d 1088, 1091 (5th Cir. 1993), cert. denied, 114 S. Ct. 1230, 1322, 1383 (1994). A passenger does have standing, however, to challenge the stop. Id. Therefore, Green can challenge the initial stop.

Washington testified that he initially stopped the car because he could not see the paper license tag in the rear window. Therefore, the initial stop was valid. See United States v. Shabazz, 993 F.2d 431, 435 n.3 (5th Cir. 1993) (so long as an officer does no more than is objectively permitted, his subjective motives for making a stop are irrelevant). Green argues, however, that once Washington saw the paper tag in the window he should have immediately ended the inquiry and permitted Charles to leave.

A police officer's questions, even on a subject unrelated to the purpose of the stop, is not itself a Fourth Amendment violation. Roberson, 6 F.3d at 1092. Rather, the court looks to the scope of the detention and the degree to which the driver and passengers reasonably perceive restraints on their liberty. Id.

Washington stopped the car because he could not see a valid license plate. Although he saw the paper tag as he approached Charles, Washington immediately noticed that Charles appeared unusually nervous for a routine traffic stop. Given Charles's nervousness, Washington's routine question to see documentation for the car was not unreasonable. Washington noticed that Green also appeared unusually nervous, and that Green w`as moving in the car, potentially to locate a weapon. Therefore, Washington acted reasonably in asking Green to step out of the car. Once Green pushed Washington, and Washington noticed a white, cocaine-like substance in Green's mouth, Washington could properly arrest Green. A total of four minutes had elapsed when Washington

arrested Green. The stop and arrest did not violate the Fourth Amendment. See Roberson, 6 F.3d at 1092.

Green also challenges the validity of Charles's arrest and the subsequent warrantless search of the car. Green cannot assert Charles's Fourth Amendment right not to be arrested without probable cause because Fourth Amendment rights are personal. See United States v. Mendoza-Burciaga, 981 F.2d 192, 196 (5th Cir. 1992), cert. denied, 114 S. Ct. 356 (1993).

Green also does not have standing to challenge the search of the car. A non-owning passenger has no standing to challenge the search of the car. Roberson, 6 F.3d at 1093; United States v. Elwood, 993 F.2d 1146, 1151-52 (5th Cir. 1993). The Lumina was rented by Tara L. Johnson and Charles was listed as the only additional driver; thus, Green does not have a possessory interest in the car. Consequently, Green does not have standing to challenge the search.

Sentencing Issues

Equal Protection

Green argues that the 100:1 ratio of cocaine to cocaine base (crack) under § 2D1.1 violates equal protection because blacks use crack at a statistically greater rate than whites and therefore receive significantly greater sentences. He contends that, although the statute is neutral on its face, the disparate impact on blacks mandates a higher level of scrutiny than the rational basis test.

This court has held that the sentencing guidelines should not be subject to a heightened level of scrutiny. See United States v. Watson, 953 F.2d 895, 898 (5th Cir.), cert. denied, 112 S. Ct. 1989 (1992); United States v. Galloway, 951 F.2d 64, 65-66 (5th Cir. 1992) (no discriminatory intent behind the enactment of § 2D1.1). Because crack cocaine is more addictive, more dangerous, and can be sold in smaller quantities there is a rational basis for the harsher penalties for possession with intent to distribute crack cocaine. Watson, 953 F.2d at 898. Green cannot demonstrate an equal protection violation.

Downward Departure

Green also contends that the Government breached the plea agreement by refusing to file a § 5K1.1 motion for a downward departure. To determine whether the Government breached the plea agreement, the court must consider "whether the government's conduct is consistent with the parties' reasonable understanding of the agreement." United States v. Garcia-Bonilla, 11 F.3d 45, 46 (5th Cir. 1993) (internal quotations and citation omitted). The Government may sacrifice its discretion and obligate itself to file a § 5K1.1 motion as part of a plea agreement. Id. at 46-47.

In this case, the Government retained its discretion to determine unilaterally whether to file a § 5K1.1 motion and Green does not allege that this discretionary provision induced him to plead guilty. He has not shown that the Government breached the plea agreement by not filing a § 5K1.1 motion and therefore he is not entitled to relief. See Garcia-Bonilla, 11 F.3d at 47.

To the extent that Green argues that the Government improperly refused to file a § 5K1.1 motion because he provided all of the information available, he also cannot obtain relief. The Government has the power, but not a duty, to file a § 5K1.1 motion if a defendant provides substantial assistance. Wade v. United States, 112 S. Ct. 1840, 1843, 118 L.Ed.2d 524 (1992). The district court may review the Government's refusal to file a § 5K1.1 motion only if the refusal was based on an unconstitutional motive, such as race or religion. Id. at 1843-44.

Green admits that his information was stale, but argues that because he is not a "major" criminal who can provide useful information, the refusal to file a § 5K1.1 motion amounts to an equal protection violation. This court has rejected this argument. See United States v. Rojas-Martinez, 968 F.2d 415, 419-20 (5th Cir.) (equal protection challenge to 18 U.S.C. § 3553(e)), cert. denied, 113 S. Ct. 828 (1992), 995 (1993); United States v. Horn, 946 F.2d 738, 746 (10th Cir. 1991) (same).

CONCLUSION

For the foregoing reasons, Green's conviction and sentence are AFFIRMED.