

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-41257

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHNNY RAY HILL,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Texas  
(1:94-CR-70)

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October 31, 1995

Before KING, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:\*

Petitioner Johnny Ray Hill appeals his conviction by a jury on one count of possession of a firearm by a convicted felon and one count of possessing a firearm made from an unregistered shotgun. Finding no error, we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

#### A. FACTUAL AND PROCEDURAL HISTORY

At approximately 1:50 a.m. on March 5, 1994, Officer Shawn Miller of the Port Arthur, Texas, Police Department, responded to a call alerting him that shots had been fired and a disturbance or fight was occurring at "Big D's" Lounge on Texas Street in Port Arthur. When the officer arrived at the scene, he saw a large group of people in the parking lot, and many people standing at the front entrance of the club. A number of these people approached Miller and told him that a Black man with a sawed-off shotgun had just entered a purple Ford Mustang. Two cars in the general direction to which Miller was directed matched that description, and, when Miller began to approach the Mustang closest to him, he was redirected to the second car in the area.

Miller approached the second car, knocked on the driver's-side window, and asked the driver to move the car out of the path of traffic. Miller asked both occupants of the car -- the driver and the front seat passenger -- to exit the car. He then performed a preliminary pat-down search on both of the car's occupants. Next, Miller asked the two occupants if there were any weapons in the car, and both responded negatively.

Miller then looked into the car and saw nothing unusual except that, when looking in the back of the car, he saw that the bottom cushion of the back seat was pulled out about five to six inches. When the officer lifted the bottom seat cushion to look underneath, the upright portion of the seat collapsed open,

exposing a short-barreled shotgun, which now lay in the middle of the back seat.

Once Miller exposed the gun, the two occupants bolted off in separate directions. Miller returned the gun to the car and began to chase the driver, who had been running across a field adjacent to the parking lot. After apprehending the driver, Miller identified the driver by his Texas driver's license as the defendant, Johnny Ray Hill ("Hill"). Neither Miller nor any other officer ever apprehended the car's other occupant.

After arresting Hill and taking him into custody, Miller conducted a criminal history check and discovered that Hill had been previously convicted of first-degree burglary, or Burglary of a Habitation. Miller also discovered that the car was registered to Hill. Miller contacted the Bureau of Alcohol, Tobacco and Firearms and informed them that he had arrested a convicted felon in possession of a firearm.

On May 4, 1994, a federal grand jury in the United States District Court for the Eastern District of Texas, Beaumont Division, returned a three-count indictment against Hill. Counts I and II charged Hill with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and count III charged him with possessing a firearm made from a shotgun which was not registered in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. § 5861(d).

On May 27, 1994, the magistrate judge placed Hill on a \$10,000 unsecured appearance bond and certain conditions of pre-

trial release. On July 1, 1994, after the United States Probation Office filed a petition to revoke Hill's pre-trial release due to violations of the pre-trial conditions, Hill's pre-trial release was revoked, and Hill was taken into custody.

Prior to trial, the government moved to dismiss count I and proceed to trial on counts II and III. On August 29, 1994, the district court heard argument on several of Hill's pre-trial motions, and the court announced that it would postpone the hearing on Hill's motion to suppress illegally obtained evidence until the following day, after voir dire.

On August 30, 1994, the district court impaneled the jury, held a motion hearing on Hill's motion to suppress, entered an order orally denying that motion, and began trial.

At trial, Miller testified that the shotgun was lying at an angle such that the stock was toward the driver's side with the barrel facing toward the passenger's side. Based on the position of the shotgun, Miller concluded that the driver and not the passenger had placed the gun behind the seat. Because most firearms are handled from the butt end, or the safe end, if the passenger had placed the firearm at such an angle, he would have had to point the gun at himself, which is extremely unsafe.

Hill testified that the passenger of the vehicle had possessed the shotgun and placed it behind the car seat. Hill also testified that he purchased the Ford Mustang two months before the offense occurred, and, thus, in Hill's view, the car could not have been registered to him.

Following one day of testimony by Miller, Hill, and two government witnesses, the jury returned guilty verdicts on both counts. On November 21, 1994, the district court sentenced Hill to 90 months on count II and 90 months on count III to run concurrently, three years of supervised release on each count to run concurrently, a \$1000 fine, and a \$100 special assessment. On November 28, 1994, Hill filed timely notice of appeal. We affirm.

### **III. DISCUSSION**

Hill raises six issues on appeal. Although only the first issue was argued at any length at oral argument, we discuss all six issues in turn.

#### **A. The trial court properly denied Hill's motion to suppress.**

Hill contends that the district court committed reversible error by denying his motion to suppress the evidence. Hill argues that Miller's search of his automobile violated his Fourth Amendment rights because the police exceeded the scope of their authority to search the car before any arrests were made and without a warrant. Thus, Hill argues, the weapon was illegally obtained and should have been suppressed.

##### **1. Standard of Review**

In an appeal from a district court's ruling on a motion to suppress, this court reviews factual findings in support of the ruling under the clearly erroneous standard and legal conclusions

de novo. United States v. Seals, 987 F.2d 1102, 1106 (5th Cir.), cert. denied, 114 S. Ct. 155 (1993). Furthermore, we view the evidence in the light most favorable to the party who prevailed in the district court -- in this case, the government. United States v. Cardenas, 9 F.3d 1139, 1147 (5th Cir. 1993), cert. denied, 114 S. Ct. 2150 (1994). We view not only the evidence taken at the suppression hearing, but also the evidence taken at trial. Id.

## **2. Discussion**

In its Memorandum Opinion, entered after Hill had already filed his appellate brief,<sup>1</sup> the district court credited the government's version of the facts and held that it was not unreasonable for Miller to detain Hill and search the rear seat of the Ford Mustang "in order to ensure [Miller's] own safety and the safety of others." The court found that Miller had arrived at the "Big D's" parking lot after having received a report of shots fired and a disturbance there. After having been told by a number of people that a Black man with a sawed-off shotgun had entered a purple Mustang, and after having been directed specifically to Hill's car, Miller acted reasonably and prudently in searching the back of Hill's car. Thus, the district court

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<sup>1</sup> Hill filed his motion to suppress on July 12, 1994. On August 30, 1994, the morning of the trial date, the district court conducted a hearing regarding, and then denied, Hill's motion. The court did not enter findings of fact and conclusions of law regarding the motion to suppress until April 10, 1995, well into the appellate briefing schedule, and about six weeks after Hill had filed his appellate brief. Hill, however, did not file a reply brief on appeal addressing any of the district court's findings of fact or conclusions of law.

held that "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed]" the search of the back seat of the car. United States v. Hill, Cr. No. 94-70, (E.D. Tex. April 10, 1995) (unreported memorandum opinion) (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

The district court correctly concluded that the gun was admissible. This case is clearly controlled by Terry v. Ohio and Terry's subsequent application in Michigan v. Long, 463 U.S. 1032 (1983).

In Terry v. Ohio, the Supreme Court held that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." Terry, 392 U.S. at 22. In Long, the Court extended Terry's reach to automobiles, holding that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses "an articulable and objectively reasonable belief that the suspect is potentially dangerous" and that "the suspect may gain immediate control of [the] weapon[]." Long, 463 U.S. at 1049-50. "[The] issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was endangered.'" Id. at 1051 (quoting Terry, 392 U.S. at 27).<sup>2</sup>

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<sup>2</sup> In Long, police officers stopped and investigated a

In evaluating the reasonableness of an officer's actions under Terry and its progeny, we consider (1) whether the actions were justified at the inception and (2) whether the actions were reasonably related in scope to the circumstances which justified the interference in the first place. Terry, 392 U.S. at 19-20. Also, "additional factors which develop after a legal stop may precipitate the ripening of reasonable suspicion into probable cause." United States v. Head, 693 F.2d 353, 358 (5th Cir. 1982).

Under the standards articulated above, Miller's actions in searching the car for weapons were justifiable and reasonable.

The parties conceded during oral argument that the general facts surrounding Miller's search of the vehicle are undisputed.<sup>3</sup> Although Miller did not obtain written consent to search the car, he lacked the time to procure written consent because of the

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speeding, erratically driven car that had swerved into a ditch in a rural locale late at night. After the driver, Long, exited the car, the officers observed that he appeared intoxicated. One officer followed Long back to the vehicle and observed a hunting knife on the floorboard. At that point, the officer frisked Long. In the course of a plain-view search of the car for weapons, the officers observed, by flashlight, something protruding from under the armrest which was subsequently determined to be a pouch of marijuana. 463 U.S. at 1036, 1050. The Court concluded that the officers did not act unreasonably in taking preventive measures to ensure that there were no other weapons within the driver's immediate grasp before permitting him to reenter his automobile. Id. at 1052.

<sup>3</sup> Initially there was a factual dispute regarding whether Hill had given Miller consent to search his car. However, because the district court neither made any factual findings regarding consent nor relied on it to any extent in finding Miller's search of the automobile reasonable, we decline to address it on appeal.



exigent nature of the circumstances. In particular, because a large, agitated crowd was present, because he was alone, because it was late at night, because he was located in an area where people were drinking alcohol, because he was in an area where there was a fight and shots had been fired, and because he had been informed that there was a firearm in the vehicle, Miller had a reasonable belief that his safety was potentially in jeopardy. This reasonable belief was further bolstered by the fact that, on separate and unrelated occasions prior to Hill's arrest, he made approximately seven or eight weapons arrests in that particular nightclub parking lot.

Further, when Miller visually observed the back-seat area of the vehicle's interior, he possessed a reasonable suspicion that a weapon had perhaps been stashed behind the back seat when he "saw the bottom cushion of the seat, the seat cushion . . . had been pulled out about five to six inches." Having possessed this reasonable suspicion, it was reasonable for Miller to adjust the seat. Because he was responding to a call that reported shots having been fired, he had reason to believe that a gun was present somewhere, and because he had received information that a sawed-off shotgun was located in a certain purple Ford Mustang, he had reason to search anywhere such a weapon might be hidden within the passenger compartment of the vehicle. He testified that, because the car was small, the back seat area was readily accessible from the front seat. Although Hill argues correctly that Miller would not have had the same ability to search Hill's

trunk, Miller had no way of knowing that, after adjusting the seat to check underneath it for weapons, a short-barrelled shotgun would fall onto the seat from the trunk.

Thus, the district court correctly held that Miller reasonably searched the automobile in order to protect himself and others.

**B. The district court did not err in denying Hill's motion for acquittal**

Hill next contends that the evidence presented at trial was insufficient to prove constructive possession of the firearm. Specifically, he claims that, particularly because there were no fingerprints on the weapon, and because another person was occupying the car at the time that the weapon was found there, the evidence against him was inconclusively circumstantial, only showing that he was near the firearm, not that he possessed it. Hill argues that as a result of such insufficient evidence, the district court committed reversible error by denying the motion for acquittal. Hill moved for a judgment of acquittal at the close of his case and after the close of all the evidence. The district court denied both motions.

**1. Standard of Review**

The scope of our review of the sufficiency of the evidence after conviction by a jury is narrow. We must affirm if a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. United States v.

Mergerson, 4 F.3d 337, 341 (5th Cir. 1993). We consider the evidence in the light most favorable to the government, including all reasonable inferences that can be drawn from the evidence. United States v. Pigrum, 922 F.2d 249, 253 (5th Cir.), cert. denied, 500 U.S. 936 (1991). The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence. Id. at 254. On the other hand, if the evidence, viewed in the light most favorable to the prosecution, gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, the conviction must be reversed. United States v. Sanchez, 961 F.2d 1169, 1173 (5th Cir. 1992).

## **2. Discussion**

The trial court properly denied Hill's motions for judgment of acquittal. Possession of a firearm may be actual or constructive. United States v. Wright, 24 F.3d 732, 734 (5th Cir. 1994). Constructive possession is "defined as ownership, dominion, or control over the contraband itself or dominion or control over the premises or vehicle in which the contraband is concealed." Id. The court applies "a common sense, fact-specific approach" to a determination whether constructive possession exists. Id. at 735. Constructive possession may be established with circumstantial evidence. United States v. McKnight, 953 F.2d 898, 901 (5th Cir.), cert. denied, 504 U.S. 989 (1992). However, ownership or control, without knowledge, will not

support a conviction based on constructive "possession of contraband." United States v. Freeze, 707 F.2d 132, 136 (5th Cir. 1983).

To support a conviction for the unlawful possession of a firearm under § 922(g), the Government must prove that Hill had a previous felony conviction, that he knowingly possessed the firearm, and that the firearm traveled in or affected interstate commerce. Wright, 24 F.3d at 734. Hill challenges the sufficiency of the Government's proof on the second element, that he knew the gun was in the car.

At trial, Miller testified that Hill owned, and had registered in his name, the vehicle which contained the sawed-off shotgun. Miller also testified that:

the way that the weapon was located appeared to be as if it had been placed in this manner into the trunk of the car, the trunk area, which would indicate that the driver of the vehicle had placed it back there. Had the passenger placed it, he would have had to take the weapon and point it at himself and place it back there. Most people wouldn't handle the weapon in this manner. It's just extremely unsafe.

Finally, as discussed in greater detail above, Miller testified that upon arriving at the lounge, "several members of the crowd approached [him] and advised that two men had just gotten into a small purple Mustang and they were armed with a sawed-off shotgun."

The fact that Hill owned and was operating the vehicle, combined with the fact that the gun was angled in a manner that suggested that Hill had placed it there, provides support for the jury's finding that Hill had authority and control of the car.

The fact that Hill ran after Miller discovered the gun provided evidence of Hill's knowledge of the gun. Thus, even though none of the patrons testified at trial, the identity of these patrons was never obtained, and Miller never saw anyone in actual possession of the shotgun, the jury's verdict was sufficiently supported, viewing the evidence that was put forth in the light most favorable to the verdict.

**C. The district court properly instructed the jury on joint and constructive possession.**

In his third and fourth arguments on appeal, Hill contends that the jury instruction given by the district court regarding constructive possession misled the jury. He also contends that the district court erred in instructing the jury that possession could be sole or joint. He made both specific objections at trial, and the district court overruled both.

**1. Standard of Review**

We review a district court's refusal of a criminal defendant's tendered jury instruction under the abuse of discretion standard. United States v. Correa-Ventura, 6 F.3d 1070, 1076 (5th Cir. 1993). We afford the district court great latitude in choosing jury instructions that are tailored to the evidence presented. Id. When the trial court refuses a defense-tendered instruction, abuse of discretion is presumed if the instruction (i) is a substantially correct statement of the law, (ii) is not substantially covered in the charge actually given, and (iii) concerns an important point in trial so that failure to

give instruction seriously impairs the defendant's ability to effectively present a given defense. Id. Nonetheless, "[e]ven if we preferred the nuances found in one instruction to the other, it is not our role to edit for style any jury instructions that accurately state the law and allow for consideration of the defendant's theory of the case." United States v. Kucik, 909 F.2d 206, 211 (7th Cir. 1990), cert. denied, 498 U.S. 1070 (1991).

## **2. Discussion -- Constructive Possession**

Hill contends that the jury instruction regarding constructive possession should have contained a "mere proximity" component. This argument is frivolous.

The district court instructed the jury as follows:

"Possession," as that term is used in this case, may be of two kinds, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion and control over a thing, either directly or through another person or persons, is then in constructive possession of it.

In addition, possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Specifically, Hill argues that the court was obligated to instruct the jury that, specifically, proximity alone may not be used to infer actual or constructive possession. This failure to

give Hill's proposed "mere presence" instruction, Hill contends, shifted the burden of proof from the government to Hill on the constructive possession charge. Hill is incorrect. Although a "mere presence" jury instruction "is abstractly an accurate statement of the law," United States v. Shabazz, 993 F.2d 431, 439 (5th Cir. 1993), the jury instruction given by the district court was sufficient. Id. at 440 (jury instruction identical to that given in the instant case found to be sufficient to obviate "a separate mere presence charge" in drug-possession case). See also McKnight, 953 F.2d at 904 (identical jury instruction sufficient in drug-possession case).

Furthermore, although Miller contested possession of the gun, "mere presence" was not an issue because Hill's ownership of the vehicle raised issues of dominion and control. Constructive possession was only an issue because the shotgun was discovered in Hill's vehicle, and was not discovered in anyone's actual possession. Thus, the instruction was proper; it was a correct statement of the law and plainly instructed the jurors regarding the factual issue of possession.

### **3. Discussion -- Joint or Sole Possession**

Hill also contends that the district court erred by instructing the jury that possession could be sole or joint, but offers no case law in support for this argument. This argument is frivolous. Miller testified that two individuals were in the vehicle in which the shotgun was discovered. Because Hill

contested possession of the gun, it was proper to present to the jury the issue of sole or joint possession.

**D. The district court properly charged the jury regarding the government's burden of proof in order to find the defendant guilty or not guilty.**

Hill argues on appeal that the district court's jury instruction regarding reasonable doubt was deficient because "there was no converse instruction to the effect that if [the jury did] not find any or all of [the] elements [of the crime] to be true by proof beyond a reasonable doubt, then they must find the Defendant not guilty." Hill made this specific objection at trial, and the district court overruled it.

Hill's argument is frivolous. The district court specifically instructed the jury that "the government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant." The district court did not err.

**E. Hill was not entitled to a three-level reduction for mitigating role in the offense pursuant to § 3B1.2 of the Sentencing Guidelines.**

Finally, Hill contends that the district court should have afforded him a three-level reduction to his base offense level pursuant to § 3B1.2 of the Sentencing Guidelines due to his alleged mitigating role in the offense. Specifically, Hill argues that he played a minimal role because he was not the sole



occupant of the car, because no fingerprints linked him to the weapon, and because several defense witnesses testified that the weapon belonged to the other, non-apprehended occupant. Thus, Hill contends, he is "less culpable than the other participant." Hill raised this objection at sentencing, and the district court overruled it. We similarly see no merit in his argument.

### **1. Standard of Review**

A defendant bears the burden of proving his mitigating role by a preponderance of the evidence. United States v. Zuniga, 18 F.3d 1254, 1261 (5th Cir.), cert. denied, 115 S. Ct. 214 (1994). The district court's refusal to grant a reduction under § 3B1.2 of the Sentencing Guidelines is entitled to great deference. United States v. Devine, 934 F.2d 1325, 1340 (5th Cir. 1991), cert. denied, 504 U.S. 1104 (1992).

An adjustment under § 3B1.2 will be used infrequently. United States v. Maseratti, 1 F.3d 330, 341 (5th Cir. 1993), cert. denied, 115 S. Ct. 282 (1994). Section 3B1.2 applies "to a defendant who plays a [role] in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group." § 3B1.2 comment. (n.1).

### **2. Discussion**

Hill has not met his burden of proving that he was less culpable than the other occupant who was never apprehended. Hill owned and was the driver of the vehicle in which the shotgun was found. We see no error in the district court's ruling.

#### IV. CONCLUSION

For the reasons discussed above, we AFFIRM.