UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-41278
Summary Calendar

United States of America,

Plaintiff-Appellee,

versus

Willie Ray Harmon,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas
(1:93-CR-143)

November 22, 1995

Before KING, SMITH and BENAVIDES, Circuit Judges.

Per Curiam:*

A jury found defendant-appellant Willie Ray Harmon ("Harmon") guilty on a charge of being a convicted felon in possession of a firearm. The district court sentenced Harmon to 293 months imprisonment. Harmon appeals, arguing that the district court

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

erred in applying the sentencing guidelines, in failing to suppress the firearm evidence, and in granting the Government a continuance during the sentencing proceeding. We affirm the judgment of the district court.

BACKGROUND

On November 26, 1992, Officer Doug Kibodeaux of the Orange City Police Department responded to a call from the Arthur Robinson Housing Complex in Orange, Texas regarding a man with a gun firing shots into an apartment. The suspect was described as a light-skinned black male wearing a brown jacket.

Kibodeaux arrived at the complex approximately two minutes later and observed a man who matched the suspect's description walking on the street toward the complex gates. Kibodeaux performed a pat down search of the individual, later identified as Harmon, and found a Smith and Wesson revolver tucked into the front waistband of his pants. Upon discovering that Harmon was a convicted felon, he was charged with being a felon in possession of a firearm. 18 U.S.C. § 922(g)(1). The United States filed a notice of sentence enhancement under 18 U.S.C. § 924(e)(1).

Harmon was convicted and the case was set for a sentencing hearing. The Presentence Investigation Report ("PSR") calculated Harmon's base offense level at 33 according to the armed career criminal sentencing guideline. See United States Sentencing Commission, Guidelines Manual § 4B1.4 (1994) (hereinafter "U.S.S.G"). Harmon objected to certain parts of the PSR. After a hearing on November 22, 1994, at which the complainant in the

shooting testified, the district court sentenced Harmon to 293 months imprisonment.

DISCUSSION

A. The Prior Convictions

Harmon initially contends that the district court erred in sentencing him under 18 U.S.C. § 924(e)(1) because his prior convictions do not support enhancement under the statute. A person convicted of being a felon in possession of a firearm who has three previous convictions for violent felonies or serious drug offenses must receive an enhanced sentence. See 18 U.S.C. § 924(e)(1).

Harmon asserts that his 1980 burglary conviction is not a "crime of violence" under the sentencing guidelines.[1] Harmon incorrectly relies on United States v. Jackson, 22 F.3d 583, 585 (5th Cir. 1994), in which this Court concluded that burglary of a building was not a "crime of violence" under the career-offender provisions of the sentencing guidelines because section 4B1.2(1) defines only burglary of a dwelling as a "crime of violence." Harmon, however, was sentenced under section 4B1.4, which is applicable when a defendant is subject to enhancement under 18 U.S.C. § 924(e). Section 924(e)(2) defines a "violent felony" as any crime punishable by imprisonment for a term exceeding one year, including burglary, and makes no distinction between burglary of a dwelling and burglary of a building. 18 U.S.C. § 924(e)(2)(B)(ii).

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[1] Harmon did not raise this challenge in the district court. Therefore, we may correct this forfeited error only if Harmon establishes that the district court committed plain error. See United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), cert. denied, __ U.S.__, 115 S. Ct. 1266, 131 L. Ed.2d 145 (1995).

Burglary of a building is a crime of violence for purposes of section 924(e). See United States v. Speer, 30 F.3d 605, 613 (5th Cir. 1994), cert. denied, __ U.S. __, 115 S. Ct. 768, 130 L. Ed.2d 664 (1995).

Harmon argues that his two 1983 convictions for delivery of Talwin cannot be used to enhance his sentence because (1) the offenses were part of a common scheme and thus should not count as two separate convictions and (2) the convictions do not constitute "serious drug offenses" under section 924(e)(2)(A)(ii).[2] Harmon contends that because the offenses occurred less than one month apart and he was ordered to serve the sentences concurrently, they should be considered part of a common scheme and count as only one offense.

In Speer, this Court refused to find a continuous course of criminal conduct where the alleged offenses occurred "months, days and even years apart." 30 F.3d at 613; see also United States v. Washington, 898 F.2d 439, 440-42 (5th Cir.), cert. denied, 498 U.S. 842 (1990) (refusing to hold that convictions were based on a course of criminal conduct where the offenses were committed at the same location, against the same victim, and within a few hours of each other because the defendant completed and escaped the first robbery with an intervening period devoid of criminal activity

[2] We initially question whether Custis v. United States, __ U.S. __, 114 S. Ct. 1732, 1739, 128 L. Ed.2d 517 (1994), which prevents defendants from collaterally attacking prior convictions used in sentence enhancement, precludes our consideration of Harmon's challenge. We conclude, however, that because Harmon is not attacking the convictions' validity, but only what effect should be given them under the enhancement statute, we will review his contentions.

before the second robbery). Harmon's convictions were based on incidents that occurred more than one month apart; merely because he sold drugs to the same agency each time does not make these transactions part of a common scheme.[3]

We similarly reject Harmon's argument that the convictions are not "serious drug offenses" because Texas law was amended on September 1, 1994 to make the delivery of less than twenty-eight grams of Talwin a "state jail felony" with a punishment range of 180 days to two years. See Tex. Health & Safety Code Ann. § 481.114(b) (West Supp. 1995); Tex. Penal Code Ann. § 12.35(a) (West 1994). Under section 924(e)(2)(A)(ii), a serious drug offense is an offense under state law for which a maximum term of imprisonment of ten years or more is prescribed. Harmon does not deny that at the time of his conviction, the applicable law imposed a term of imprisonment of two to ten years, thus meeting the requirement for a "serious drug offense."[4] Harmon's drug convictions therefore support enhancement under section 924(e)(1).

Finally, Harmon contends that his 1987 robbery conviction was

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[3] Harmon relies on United States v. Houser, 929 F.2d 1369 (9th Cir. 1990), in urging that the offenses be considered part of a common scheme. In Houser, the convictions resulted from one investigation, Houser sold drugs to a single government agent, and the Government admitted that Houser was charged with two separate offenses only because the sales occurred in different counties. Id. at 1374. The circumstances in the instant cause do not involve this type of evidence that the offenses were part of a common scheme.

[4] We also note that the PSR did not disclose whether the amount of Talwin was less than twenty-eight grams and, thus, it is unclear whether the reduced range of imprisonment is applicable. Harmon offered no evidence that he was convicted for less than twenty-eight grams; indeed, he only specifies that the PSR does not "make clear the total weight of Talwin sold."

erroneous because there is no evidence that he threatened or placed another in fear of bodily injury or death. See Tex. Penal Code Ann. § 29.02(a)(2) (West 1994). The district court refused to allow Harmon to collaterally attack the robbery conviction. In Custis v. United States, __ U.S.__, 114 S. Ct. 1732, 1739 (1994), the Supreme Court held that section 924(e) "does not permit [a defendant] to use the federal sentencing forum to gain review of his state convictions." Except in cases where convictions are obtained in violation of the right to counsel, a defendant may not attack collaterally the prior convictions used for sentence enhancement. The district court did not err in considering the four prior convictions under the enhancement statute.

B. Suppression of Evidence

Harmon contends that the district court erred in denying his motion to suppress the firearm evidence seized during the pat down search. He argues that the stop and search violates the Fourth Amendment and Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968). On appeal from a denial of a motion to suppress, this Court reviews factual findings for clear error and conclusions of law de novo. United States v. Tellez, 11 F.3d 530, 532 (5th Cir. 1993), cert. denied, __ U.S. __, 114 S. Ct. 1630, 128 L. Ed.2d 354 (1994). We review the evidence in the light most favorable to the Government as the prevailing party, and uphold the district court's ruling if any reasonable view of the evidence supports it. Id.

Harmon asserts that in the absence of a more complete description of the person reported to be firing shots, Officer

Kibodeaux lacked a reasonable suspicion to stop him and that Kibodeaux's testimony that Harmon was the only person he encountered matching the description was "just not plausible." Officers are permitted to briefly detain a person when they have a reasonable suspicion that criminal activity may be occurring. Terry, 392 U.S. at 22, 88 S. Ct. at 1880. In making such a stop, an officer may conduct a reasonable search for weapons if there is reason to believe that the individual is armed and dangerous. Id. at 24, 88 S. Ct. at 1881. Reasonable suspicion must be supported by particular and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant an intrusion. United States v. Michelletti, 13 F.3d 838, 840 (5th Cir.) (en banc), cert. denied, __ U.S. __, 115 S. Ct. 102, 130 L. Ed.2d 50 (1994).

Reviewing the evidence adduced at trial, we conclude that the district court did not err in denying the motion. Officer Kibodeaux responded to a call describing the shooter as a light-skinned black male wearing a brown jacket who was walking away from the complex. Upon reaching the complex, Kibodeaux observed a man matching the description who started walking back toward the gates of the complex as Kibodeaux approached. Kibodeaux testified that he assumed that Harmon had seen him and had turned and begun walking the other way. Because Kibodeaux was responding to a report that shots were fired, he was justified in performing the pat down search of Harmon based on a reasonable suspicion that Harmon, who matched the description of the shooter, might be armed and dangerous. See United States v. Sanders, 994 F.2d 200, 201-02,

207 (5th Cir.), cert. denied, __ U.S. __, 114 S. Ct. 608, 126 L. Ed.2d 572 (1993) (holding that the officer's actions were reasonable because the suspect matched the description in the call-in complaint and began walking away when he noticed the police car approaching).

C. Grant of a Continuance

Harmon asserts that the district court erred in granting the Government a one-day continuance on the date of sentencing in order to procure live testimony about Harmon's role in the shooting at the complex. During the sentencing hearing, Harmon objected to information in the PSR concerning a follow-up investigation about the shooting. The court concluded that the information was relevant and that testimony from the complainant was necessary because Harmon denied any involvement in the shooting. The court granted the Government a continuance to procure the complainant's testimony.

Harmon does not challenge the district court's consideration of the testimony. He merely argues that because the Government had a month to prepare, the district court should not have granted the continuance. The grant or denial of a continuance is reviewed only for an abuse of discretion. See United States v. Correa-Ventura, 6 F.3d 1070, 1074 (5th Cir. 1993). The district court did not abuse its discretion in granting a continuance so that the court could resolve Harmon's involvement in the shooting, a factor important to the court's sentencing determination. See U.S.S.G. § 6A1.3(a).

AFFIRMED.