

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41343
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOHN STALLWORTH,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(CR-93-20034-01)

(July 25, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

John Stallworth appeals his convictions of possession and conspiracy to possess with intent to distribute crack cocaine and carrying a firearm in relation to a drug-trafficking crime, in violation of, respectively, 21 U.S.C. §§ 841 and 846 and 18 U.S.C. § 924(c). Finding no error, we dismiss the appeal as frivolous.

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

On May 14, 1992, law enforcement agents received information that narcotics activities were occurring at Stallworth's residence. The officers went there and were invited inside by Stallworth. The officers entered the kitchen area and observed white powder residue on a plate with a razor blade in it. Recognizing that such items were commonly used to "cook" crack cocaine, the officers asked for, and obtained, Stallworth's consent to search.

Officers discovered two coin containers containing crack cocaine in Stallworth's bedroom. They also discovered "numerous" firearms in the bedroom and in a gun cabinet in the den area. Two thousand dollars of marked currency were discovered in Stallworth's pants. The money had been given to a confidential informant earlier in the evening so that he could buy crack from Stallworth.

A woman who was staying at the house when it was searched testified at trial that she got crack from Stallworth in exchange for cooking, cleaning, and sex. She also testified that she sold crack that Stallworth had given her and that she had seen Stallworth trade crack for firearms on several occasions.

On September 23, 1992, a confidential informant was sent to buy narcotics from Stallworth with marked currency. The informant returned with four pieces of crack cocaine. Stallworth's home was searched, and \$80 of the marked currency was discovered in Stallworth's pants pocket. Firearms located in Stallworth's bedroom also were collected.

During auditory monitoring of the informant's conversation with Stallworth, officers heard Stallworth giving the informant directions to a house where Stallworth told the informant he could buy a quantity of cocaine. The officers proceeded to the house, where they made a controlled purchase of cocaine. A search warrant was obtained, and officers recovered the marked currency they had used in the purchase. They also recovered crack cocaine. One of the men arrested at the Westlake location testified that Stallworth had fronted him the crack he was selling.

Stallworth's home was searched again on October 21, 1992, after surveillance officers noticed an unusual amount of traffic at the house. Burned "Brillo" pads commonly used in smoking crack cocaine, a coin case with cocaine residue, and a shotgun were discovered in Stallworth's bedroom. Another officer testified that weapons were seized "throughout the residence." As officers were conducting their search, two persons arrived at the residence; one person said he was there to pay someone, and the other had \$60 in his hand.

On December 14, 1992, officers conducted another search of Stallworth's residence. While attending to preliminary matters, the officers discovered a female attempting to flush crack cocaine down the toilet. A large amount of currency was found in Stallworth's bedroom, and a shotgun was found in the trunk of his car.

Stallworth was arrested on May 2, 1993. In an attempt to execute the search warrant, officers "tipped-off" Stallworth of an

impending search and warned him to get out of his home immediately. Shortly after the tip-off, officers observed a man carrying a brown bag exit the kitchen door of Stallworth's home. After the man was apprehended, he led officers to the bag, which contained several loaded handguns and cocaine. The man testified at trial that Stallworth had told him to hide the items. He also testified that he had accompanied Stallworth to Houston to buy crack cocaine and that they divided it into twenty-dollar rocks.

II.

A.

Stallworth's counsel avers that he decided not to brief Stallworth's narcotics convictions on appeal. Counsel avers that, in view of this decision, "some discussion of the issues is necessary." He then explains how he advised Stallworth regarding the law on the convictions, giving numerous reasons why Stallworth's narcotics convictions could not have been challenged on appeal. Counsel requests that this court review the narcotics convictions for patent errors.

The government asserts that it is "at a loss" to respond to Stallworth's first issue. The government further asserts that Stallworth has waived any argument regarding the narcotics convictions by failing to brief the issue on appeal.

The government's assertions are well-founded. Stallworth makes no legal argument challenging his narcotics convictions. "Failure to prosecute an issue on appeal constitutes waiver of the

issue." United States v. Green, 964 F.2d 365, 371 (5th Cir. 1992), cert. denied, 113 S. Ct. 984 (1993).

B.

Stallworth argues that the evidence was insufficient to sustain his firearms offenses, because the government failed to establish a connection between the firearms and the drug offenses. His argument is not that weapons were not available but rather that the firearms were not used in connection with the drug-trafficking activity.

Although Stallworth moved for a judge of acquittal at the close of the government's evidence, he failed to do so at the close of all the evidence. Nor do the pleadings in the record or on the docket reflect that any post-trial motions for acquittal were filed. Therefore, Stallworth's sufficiency-of-the evidence claim is reviewable only to determine whether there was a manifest miscarriage of justice. See United States v. Laury, 49 F.3d 145, 151 (5th Cir. 1995). Such exists only if the record is devoid of evidence pointing to guilt, or because the evidence on a key element of the offense is so tenuous that a conviction would be shocking.

Section 924(c)(1) requires the government to prove that Stallworth "(1) used or carried a firearm during an 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. It is not necessary, however, that the weapon be employed or brandished. Id. It is enough that the firearm was present at the drug-trafficking scene, that it could have been used to protect or facilitate the operation, and that the presence of the firearm was in some way connected with the drug trafficking. Id.

With respect to the May 14 offense, Stallworth argues that it was uncontroverted at trial that he was sitting in his den beside a locked gun cabinet when the search was executed. Thus, he argues, "any facts from which an inference that the guns could have been used in connection with a crime relates to the potential of a crime that might be committed, not a crime that was in fact committed." Id.

This argument misunderstands the nature of a § 924(c) conviction. It is not necessary that a firearm be used, but only that it could have been used. See Munoz-Fabela, 896 F.2d at 911. Further, insofar as Stallworth argues that the firearms could not have been used because they were locked up, the trial testimony also established that numerous weapons were found in Stallworth's bedroom.

With regard to the September 23 offense, Stallworth argues that there was no indication that the narcotics found in his home were "associated" with him; therefore, the government failed to prove that the firearms were used in connection with drug-trafficking activity. This argument is absurd. Stallworth was discovered to have \$80 of marked currency in his possession minutes after a

confidential informant had returned from purchasing crack at Stallworth's home. In addition, officers heard Stallworth giving the informant directions to the Westlake house where more cocaine could be purchased.

With regard to the October 21 offense, Stallworth argues that he was not present at the time the firearms were found and that there was never "any testimony regarding the weapons at the time of the offense." With regard to the May 1993, offense, Stallworth argues that there was no evidence that the firearms disposed of in fear of the police raid belonged to him.

The trial testimony established that during the October 21 search, a shotgun was discovered in Stallworth's bedroom. Another officer testified that weapons were seized "throughout the residence." Further, as long as there is sufficient evidence linking a defendant to a firearm used in connection with a drug-trafficking offense, it is not necessary that the defendant be present when the firearm is discovered. See, e.g., United States v. Beverly, 921 F.2d 559, 562-63 (5th Cir.), cert. denied, 501 U.S. 1237 (1991). Regarding the May 1993, offense, it was established at trial that Stallworth directed that the firearms be hidden.

After a total of five searches, forty-six firearms were seized from Stallworth's home. Affirmance of the firearms convictions would not result in a miscarriage of justice. See Laurry, 49 F.3d at 151.

There is no merit to any issue raised. In fact, this appeal is frivolous. Accordingly, it is hereby DISMISSED pursuant to 5TH

CIR. R. 42.2.