

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50108
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARVIN LEAL,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CR-179)

(February 7, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appellant Leal, sentenced to 138 months imprisonment on consecutive counts of possession with intent to distribute cocaine base and carrying a firearm in relation to drug trafficking, appeals on two grounds. He contests the denial of his motion to suppress and sufficiency of the evidence. Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Leal argues that the seizure from his car and search of the green bag, gun and the black film canisters containing cocaine base violated the Fourth Amendment. Leal fails to mention, however, the district court's denial of his motion to suppress or the district court's adoption of the uncontested facts found in the magistrate judge's report. Because Leal failed to contest the magistrate judge's recommended findings of fact, he is barred from attacking these adopted findings "except upon grounds of plain error or manifest injustice." Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. Unit B 1982) (en banc). The court's legal conclusions are reviewed de novo. United States v. Elwood, 993 F.2d 1146, 1151 (5th Cir. 1993).

The district court, by adopting the magistrate judge's report, found the following:

While on patrol at about 6:00 p.m. on February 11, [O]fficer Christian and his partner [O]fficer Linda Taylor received a call for a shooting in the 700 block of Sterling. As they responded to the call, a vehicle backed out in front of them and began travelling in the same direction. Officer Christian recognized the driver as Leal and the vehicle as Leal's. Leal, who was also driving to the site of the shooting, arrived before the police officers. He and his passengers exited their vehicle and left the motor running.

Officer Christian walked past Leal's vehicle and, through an open window, observed the barrel of a semi-automatic weapon protruding from a [green] bag on the front seat. Approximately 5 inches (or 1/3 of the length) of the barrel could be seen. Fearing Leal could also have a weapon on his person, [O]fficer Christian then called ahead to [O]fficer Taylor to put Leal, who was heading toward an EMS unit, in handcuffs. Officer Christian reached through the window into the vehicle and retrieved the bag. For security reasons, he did not examine the bag at that time; instead, he zipped the bag closed and placed [it] in the trunk of the patrol vehicle.

Shortly thereafter, more police officers arrived at the scene. After Leal was placed in a patrol car,

[O]fficer Christian went to his trunk and opened the bag. Inside, he found the weapon, money, a baggie of crack cocaine, a baggie of marijuana, ammunition, two film canisters, and two rolls of undeveloped film. Officer Christian opened the film canisters and found more crack cocaine. Because of the drugs, the decision was made to impound Leal's vehicle.

R. 1, 49-50 (footnotes omitted).

Leal argues that the plain-view exception to the Fourth Amendment's warrant requirement is inapplicable to the seizure of the green bag in this case because the mere sight of a weapon, without more, does not make the weapon's nature as contraband or evidence of a crime immediately apparent. "The plain view exception applies when an officer lawfully in a location by virtue of a warrant or some exception to the warrant requirement seizes an item having an incriminating character that `is immediately apparent.'" United States v. Hill, 19 F.3d 984, 989 (5th Cir.) (citation omitted), cert. denied, 115 S. Ct. 320 (1994). Contrary to Leal's argument, the inadvertent-discovery requirement to the plain view exception is no longer required. See Horton v. California, 496 U.S. 128, 138-41, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990).

In its legal analysis, the court noted that Texas law in effect in February 1993 prohibited the carrying of a handgun on or about one's person. R. 1, 52; see TEX. PENAL CODE ANN. § 46.02 (West 1989) (detailing the offense and its defenses); see also Contreras v. State, 853 S.W.2d 694, 696-97 (Tex. Ct. App. 1993) (concluding evidence sufficient to convict defendant of violation of § 46.02 based on the firearms's location next to defendant in his vehicle). Therefore, the criminal nature of the firearm, seen in plain view by Officer Christian, was immediately apparent. See Hill, 19 F.3d

at 989 (defining requirement at issue as "probable cause to believe that the item viewed is either contraband or will be useful in establishing that a crime has been committed").

For the first time in his reply brief, Leal argues that only the gun, and not the green bag, should have been seized by Christian. "This Court will not consider a new claim raised for the first time in an appellate reply brief." United States v. Prince, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, 493 U.S. 932 (1989).

Leal argues that the subsequent search of the closed green bag and the film canisters do not fall within the scope of the plain view exception. As explained in the magistrate judge's report, adopted by the district court, Christian searched the bag to inventory its contents pursuant to San Antonio, Texas, Police Department regulations. "Inventory searches are excepted from the warrant requirement because they serve . . . `caretaking' purposes, and because they are not designed to uncover evidence of criminal activity." United States v. Andrews, 22 F.3d 1328, 1334 (5th Cir.) (citation omitted), cert. denied, 115 S. Ct. 346 (1994). Further, once Christian discovered the cocaine base in the clear plastic bag found in the green bag, he had probable cause to open the film canisters also found in the green bag. See United States v. Ryles, 988 F.2d 13, 14 n.2 (5th Cir.) (noting that once an officer smells the odor of marijuana in a vehicle, the officer has probable cause to search the entire vehicle), cert. denied, 114 S. Ct. 168 (1993).

The district court did not err in denying Leal's motion to suppress.

Leal also argues that the evidence was insufficient to

convict him of either count of conviction. Although Leal's counsel moved for a directed verdict¹ after the Government rested, he failed to renew his motion after the close of all the evidence. Therefore, this Court's review is narrowed by counsel's failure to preserve the district court's ruling on Leal's motion. United States v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988). ([This Court is] limited to the determination of "whether there was a manifest miscarriage of justice.")

There are three elements to possession with the intent to distribute cocaine base: (1) knowing (2) possession of cocaine base (3) with the intent to distribute. See United States v. Olivier-Becerril, 861 F.2d 424, 426 (5th Cir. 1988). The white substance found in the clear plastic bag and the film canister tested positive for cocaine base. Further, evidence was adduced that the amount, over 27 grams, was much greater than an amount for personal use. United States v. Gonzalez-Lira, 936 F.2d 184, 192 (5th Cir. 1991) (inferring intent to distribute from large amount of controlled substance).

The gist of Leal's arguments focus on the first two elements. He argues that the evidence reasonably and plausibly showed that the green bag was the property of Clifton Reese, the front seat passenger in Leal's vehicle, who exited the vehicle at the same time Leal did. Therefore, the evidence did not show that Leal possessed the cocaine base within the bag, and the jury's verdict is unreasonable by the rejection of the only plausible explanation for the crack's presence in the car.

¹ Motions for directed verdict have been abolished and have been replaced with motions for judgment of acquittal. See Fed. R. Crim. P. 29(a).

Although Leal and other defense witnesses testified that the green bag belonged to and was used solely by Clifton Reese, Leal admitted the gun was his. The jury was free to discredit the defense testimony and infer that Leal was using the bag, the bag which contained the cocaine base, Leal's 9 mm firearm, and his sister's camera. See United States v. Speer, 30 F.3d 605, 611 (5th Cir.), cert. denied, 63 U.S.L.W. 3421 (U.S. Nov. 28, 1994).

Leal argues that the evidence fails to show that he knew the bag contained cocaine base, the knowing element of the offense. Leal stated that he had only been at his apartment for ten or fifteen minutes when word came about his brother's being shot that day. Christian testified that the cocaine base felt moist and warm, as if it had been recently cooked. Leal's sister, Comell Haygood, testified that Clifton Reese took pictures with her camera at Leal's apartment that day when Leal was not present, that Reese owned the green bag, and that she neither knew what was in the bag nor saw Reese take anything out of the bag but camera film. She knew Reese's reputation as a drug dealer. Haygood's friend, Victoria Weaver, testified that it was not unusual to see Reese at Leal's place. Haygood and Weaver denied seeing the cooking of cocaine base at Leal's apartment.

The photos reveal that Leal's gun and a roll of money were at one time outside of the bag at Leal's apartment, and that Leal's table contained a white powdery substance, scissors, cutting marks, and a package of plastic baggies. Other photos showed individuals at Leal's apartment holding clear plastic baggies of unknown contents. Although Leal is not seen in any of the photos, the testimonial and other evidence support the inference that Leal

was present at his apartment when the cocaine base was recently prepared and placed in the green bag along with the camera and film before Leal and the others left for the scene of the shooting. The evidence also supports the inference that Leal placed his loaded 9 mm gun in the bag, knowing the bag contained cocaine.

Because the record is not devoid of evidence pointing to Leal's guilt, the evidence is sufficient to support Leal's conviction on the drug charge. See Ruiz, 860 F.2d at 617.

Leal does not provide independent argument on the sufficiency of the evidence on the conviction for using and carrying a firearm during and in relation to a drug-trafficking offense. Therefore, it is presumed that Leal's sufficiency argument as to this count is predicated upon the insufficiency of the evidence on the drug trafficking count. In light of the sufficiency analysis on the drug trafficking count, Leal's conviction should be affirmed on this count too.

For these reasons, the conviction is AFFIRMED.