

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50133
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALTON JEROME MOORE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-93-CR-89-1)

(October 21, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

Alton Jerome Moore appeals his conviction and sentence for possession with the intent to distribute cocaine base. We **AFFIRM**.

I.

Moore was arrested after Temple, Texas, police officers searched his apartment, pursuant to a warrant, and discovered 26 "rocks" of "crack" cocaine. A jury found him guilty of possession with the intent to distribute cocaine base, in violation of 21

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.

U.S.C. § 841(a)(1). Moore was sentenced, *inter alia*, to 360 months imprisonment.² The district court also imposed a \$2,000 fine.

II.

Moore's primary challenges are to the district court's failure to conduct an evidentiary hearing on his motion to suppress evidence seized from his apartment, and the sufficiency of the evidence.

A.

Prior to trial, Moore moved to suppress the evidence seized from his apartment, asserting that the warrant affidavit contained information acquired from unreliable confidential informants, that the information was stale, and that the information was as consistent with innocent activity as it was with criminal behavior. Without conducting an evidentiary hearing, the district court denied the motion, holding that the search and seizure were valid under the "good faith exception" of *United States v. Leon*, 468 U.S. 897 (1984). Moore contends that his motion raised factual issues regarding the applicability of the good-faith exception, requiring resolution in an evidentiary hearing.³

"Evidentiary hearings are not granted as a matter of course, but are held only when the defendant alleges sufficient facts which, if proven, would justify relief." *United States v.*

² Moore's sentence was enhanced because he had two prior felony drug convictions.

³ The good faith exception does not apply when a warrant is based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable". *Leon*, 468 U.S. at 923.

Harrelson, 705 F.2d 733, 737 (5th Cir. 1983). "General or conclusory assertions, founded upon mere suspicion or conjecture, will not suffice." **Id.** We review the decision regarding the necessity of an evidentiary hearing only for abuse of discretion. **Id.**

An affidavit supporting a warrant has "a presumption of validity". **Franks v. Delaware**, 438 U.S. 154, 171 (1978). Accordingly,

[t]o mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Id. Moore did not allege in his motion or supporting brief that the affiant's statements were deliberately false or made with reckless disregard for the truth. Therefore, the district court did not abuse its discretion by failing to conduct an evidentiary hearing.

B.

Moore contends that the evidence is insufficient to sustain his conviction. Because he failed to move for a judgment of acquittal pursuant to Fed. R. Crim. P. 29, "we are limited to the determination of whether there was a manifest miscarriage of

justice. Such a miscarriage would exist only if the record is devoid of evidence pointing to guilt, or ... because the evidence on a key element of the offense was so tenuous that a conviction would be shocking." **United States v. Galvan**, 949 F.2d 777, 782-83 (5th Cir. 1991) (internal quotation marks and citations omitted).

A conviction for possession of cocaine base with the intent to distribute requires proof of "(1) knowing, (2) possession, (3) with intent to distribute". *E.g.*, **United States v. Munoz**, 957 F.2d 171, 174 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 332 (1992). "Possession may be actual or constructive". **United States v. Cardenas**, 9 F.3d 1139, 1158 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2150 (1994). "In general, a person has constructive possession if he knowingly has ownership, dominion, or control over the contraband itself or over the premises in which the contraband is located". **United States v. McKnight**, 953 F.2d 898, 901 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2975 (1992). "However, more evidence than mere physical proximity of the defendant to the controlled substance is required". *Id.*

The possession of "a larger quantity of cocaine [base] than an ordinary user would possess for personal consumption" can support a finding of intent to distribute. **United States v. Pineda-Ortuno**, 952 F.2d 98, 102 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1990 (1992). Intent to distribute also "may be inferred from the presence of distribution paraphernalia, large quantities of cash, or the value and quality of the substance". **Cardenas**, 9 F.3d at 1158 (internal quotation marks and citation omitted).

We find no manifest miscarriage of justice, because there was ample evidence of Moore's guilt, including, *inter alia*, the following. A pill bottle containing 26 \$20 rocks of crack cocaine, an amount consistent with distribution, was found on the floor near Moore's foot during the execution of the warrant. Three single-edged razor blades, containing a powdery residue, were found in a kitchen cabinet along with some empty prescription pill bottles with Moore's name on the labels. There was evidence that such blades are commonly used by crack cocaine dealers to cut crack into rocks for distribution.⁴ Approximately \$1,200 in cash (the majority of which consisted of \$20 bills) was discovered in the search: \$660 in a man's jacket in the master bedroom closet, and \$535 in a purse located on a dresser in the master bedroom. There was testimony that \$20 bills are the denomination commonly used to purchase crack cocaine. Among the bills discovered in the jacket was a \$20 bill bearing the same serial number as a \$20 bill that the police had given to an informant who had entered Moore's apartment earlier in the evening and purchased a rock of crack cocaine for \$20.⁵

⁴ Of course, it was the jury's prerogative to discredit the testimony of Moore's wife, Alice Simpson, that she used the razor blades for "arching [her] eyebrows" and "feminine things". [2 R 163]

⁵ In a supplemental brief, Moore contends that the district court erred in failing to conduct an evidentiary hearing to determine whether the police violated the Constitution and Texas law by kicking open his apartment door without an announcement or the existence of exigent circumstances, and that the district court abused its discretion in imposing a fine. Because Moore failed to raise either of these issues in the district court, we review them only for plain error. See *United States v. Rodriguez*, 15 F.3d 408,

III.

For the foregoing reasons, the judgment is

AFFIRMED.

414-17 (5th Cir. 1994). With respect to his first supplemental contention, Moore fails to satisfy the first step in plain error analysis -- that there be an error. Because Moore's motion to suppress did not include this challenge to the search of his apartment, as required by Fed. R. Cr. P. 12(b)(3), there was no factual dispute that required resolution in an evidentiary hearing.

Regarding the fine, even assuming both an error, and that it was "plain", we would not exercise our discretion to correct it, because Moore's substantial rights are not affected. The PSR stated that, despite an injury to his back, Moore was employed at the time of his arrest, and that he had "the capability to work and should be able to pay a minimal fine". See *id.* at 416-17 & n.10 (defendant's substantial rights not affected by imposition of \$1,000 fine payable over 92 months where defendant was in good health and had earned \$350-450 per week as a truck driver for nearly 14 years).