IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50635

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ISAIAH BROWN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A 94 CR 78)

August 9, 1995

Before REYNALDO G. GARZA, KING, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

Isaiah Brown appeals his conviction for possession of a firearm on the grounds of insufficient evidence. Having reviewed the arguments, we affirm the judgment of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 26, 1994, Travis County Sherriff's Deputy Santiago Salazar noticed a bronze-colored Ford Thunderbird, driven by Brown,

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

blocking traffic and making a "bouncing" movement. Salazar turned on his patrol car lights and motioned to Brown to pull over. Brown turned left onto a side street and pulled into a driveway at the end of the street. Salazar turned on his spotlight and saw Brown lean over towards the passenger seat. Salazar then asked Brown to "get out of the car" and to "show [his] hands." After hesitating for approximately thirty seconds, Brown put his hands outside the driver's window and opened his door from the outside, as instructed by Salazar.

As Brown exited the vehicle, Salazar noticed that the pockets of Brown's pants were turned inside-out "like little ears," and some dice and change fell to the ground. Salazar handcuffed Brown, placed him in the rear of the patrol car, and asked Brown why he had been reaching towards the passenger seat floorboard. Brown appeared to have been drinking and replied, "I'm not hiding anything. Go ahead and look." Salazar entered the car, leaned over towards the passenger seat, and discovered a loaded .38 caliber revolver wedged between the console and the front passenger seat. The butt or grip of the firearm was positioned upward, such that one could reach over from the driver's seat and grab it quickly. Salazar also discovered two buck knives under the front passenger seat, a half-empty bottle of whiskey on the back seat, and a box of ammunition on the floorboard behind the driver's seat. Several rounds missing from the box matched the ammunition found inside of the gun, although two rounds inside of the gun were different from the ammunition in the box. Brown told Salazar that

the Thunderbird did not belong to him, and a registration check turned up no record as to ownership. Salazar testified, however, that he had seen Brown driving the same car several times prior to the March 26 stop.

A grand jury subsequently indicted Brown on one count of knowingly possessing a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). Section 922(g)(1) reads:

> (g) It shall be unlawful for any person --
> (1) who has been convicted in any court of, [sic] a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition . . . .

18 U.S.C. § 922(g)(1). Section 924(a)(2) states that anyone who knowingly violates § 922(g) "shall be fined as provided in this title, imprisoned not more than 10 years, or both." 18 U.S.C. § 924(a)(2).

After the indictment was returned, federal agents went to Brown's house to arrest him. The bronze Thunderbird was parked in Brown's driveway. Three adults -- Brown, his mother, and his brother -- lived in the house. A jury found Brown guilty and he received a sentence of seventy-seven months imprisonment, the bottom of the applicable guidelines range. Brown now appeals his conviction, contending that there was insufficient evidence to establish that he "knowingly" possessed a firearm.

II. STANDARD OF REVIEW

The standard for assessing the sufficiency of the evidence to support a conviction is well-settled:

> "[W]hether, after viewing the evidence in the light most favorable to the prosecution, ***any*** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Alexander v. McCotter, 775 F.2d 595, 597-98 (5th Cir. 1985) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). In making this determination, a court should not substitute its view of the evidence for that of the fact-finder; instead, a court should consider all of the evidence in the light most favorable to the prosecution. See id. at 598.

III. ANALYSIS AND DISCUSSION

To support a conviction for the unlawful possession of a firearm by a felon under § 922(g)(1), the government must prove: 1) that Brown had a previous felony conviction; 2) that Brown knowingly possessed a firearm; and 3) that the firearm had travelled in or affected interstate commerce. See United States v. Wright, 24 F.3d 732, 734 (5th Cir. 1994). Brown challenges the sufficiency of the evidence on the second element, arguing that the government failed to prove that he knowingly possessed a firearm.

Possession of contraband, including a firearm, may be either actual or constructive. See United States v. McKnight, 953 F.2d 898, 901 (5th Cir. 1992). 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." Id. Moreover, constructive possession "need not be exclusive, it may be joint with others, and it may be proven with circumstantial evidence." Id. The court applies "a common sense, fact-specific approach" to determine whether constructive

possession exists, Wright, 24 F.3d at 735, and we have stated that "we examine the merits of each constructive possession case independently; previous cases serve as illustration only." McKnight, 953 F.2d at 902 (internal quotations omitted).

Brown contends that the testimonial evidence indicating that he was the driver of the car and that he was seen leaning over towards the passenger seat is insufficient to support a finding of constructive possession and his ultimate conviction. Brown argues that he made no statements regarding the gun, and he asserts that there was no evidence that he owned the car or the gun. He also points out that the ammunition was found in the back seat, not on his person.

In support of his position, Brown relies on United States v. Evans, 950 F.2d 187 (5th Cir. 1991). In Evans, a gun was found in a sock on the floorboard behind the driver's seat of Evans's car. See id. at 189. The government used the statement of a woman who was present during the search of Evans's apartment to demonstrate that Evans owned a gun. See id. at 189, 191-92. There was no other evidence concerning the gun other than an "equivocal" statement by a drug enforcement agent that Evans leaned over towards the floorboard. See id. at 192. Moreover, the car had been driven by at least two or three other people before Evans got into it, and no gun had been seen during more than five days of government surveillance of Evans. See id. We concluded that there was little "non-hearsay" evidence to indicate that Evans knowingly possessed the gun. See id. at 192-93.

The instant case, however, is distinguishable from Evans. Unlike in Evans, Salazar's testimony ***unequivocally*** conveyed that Brown had leaned towards the front passenger seat after he was pulled over. Salazar had no difficulty in finding the gun when he traced Brown's movement during the search of the car. Further, a box of ammunition matching several rounds of ammunition in the gun was found, according to Salazar's testimony, "in plain sight behind the driver's seat of the car." Moreover, Brown hesitated before pulling over and he delayed in exiting the car despite being asked repeatedly to do so. All of these factors suggest knowledge of contraband and/or an attempt to hide it, and the cumulative effect of this circumstantial evidence is far greater than the mere equivocal testimony of the government agent in Evans.[1]

In addition, we have found "knowing" possession in factually-analogous cases. In United States v. Prudhome, 13 F.3d 147, 148 (5th Cir. 1994), a police officer stopped the defendant's car because it lacked a license plate. A search of Prudhome's person revealed a waist pouch containing three bullets, objects believed to be rock cocaine, and a razor blade. See id. An automatic pistol was found under the driver's seat of the car, and the ammunition found on Prudhome matched the ammunition in the pistol. See id. at 149. Even though Prudhome maintained that he did not own the car, and despite the existence of a passenger in the

[1] A finding of constructive possession is also supported by the evidence that Salazar had seen Brown driving the Thunderbird several times prior to the March 26 stop, and that the same vehicle was parked at Brown's residence on the day that he was arrested.

vehicle with him, we concluded that the evidence was sufficient to support the conviction for possession of a firearm. See id. As we stated, "[a] reasonable jury was entitled to discredit defense testimony and infer knowing possession from the facts that Prudhome was driving, the gun was located directly under his seat, and he had three rounds of matching ammunition in his waist pouch." Id.

Similarly, in Brown's case, knowing possession could be inferred from the facts that Brown was driving a car that he had been seen in before, a gun was located under the passenger seat where Brown had been leaning, and a box of matching ammunition was found under the driver's seat. Furthermore, Brown hesitated before exiting the vehicle, and the car was parked in his driveway at his residence.

In United States v. Orozco, 715 F.2d 158, 159 (5th Cir. 1983), we upheld a conviction for unlawful possession of a firearm by a convicted felon when a search of a BMW driven by the defendant uncovered two guns in the trunk. The vehicle did not belong to the defendant (it was stolen), the guns were inside of the trunk (and were therefore not visible to the driver), and the defendant was accompanied by a passenger (his cousin). See id. Nevertheless, we characterized the defendant's insufficiency of the evidence argument as "bogus," id. at 161, and we concluded that "[t]estimony at trial indisputably established Orozco's dominion and control over the stolen BMW, which was being kept at his house, up to the time of the stop and arrest." Id.

Of course, in Brown's case, the automobile in question was also discovered at his house, and, as mentioned, there were numerous other factors to support a jury's finding of "knowing" constructive possession. Simply put, viewed in the light most favorable to the verdict, the cumulative impact of all of the circumstantial evidence is sufficient for a rational trier of fact to conclude that Brown had "knowing" constructive possession over the firearm found in the automobile.[2]

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

---

[2] The Fourth Circuit's opinion in United States v. Blue, 957 F.2d 106 (4th Cir. 1992), does not compel a different result. In Blue, the government relied on two pieces of evidence to support its case; first, a police officer's testimony that Blue's shoulder "dipped" as the officer approached Blue's vehicle, and second, the officer's discovery of a revolver under the passenger seat where Blue was sitting. See id. at 108. The court found that this evidence was insufficient to prove constructive possession, but it emphasized "that the facts of this case fall outside, ***but just barely***, the realm of the quantum of evidence necessary to support a finding of constructive possession." Id. (emphasis added). In Brown's case, however, much more circumstantial evidence was presented. In short, even if Blue were controlling authority in this circuit, its factual context is readily distinguishable.