

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60364
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GEORGE POWELL HANN,

Defendant-Appellant.

Appeals from the United States District Court
For the Southern District of Mississippi

(2:94-CR-1 PR)

(October 12, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Appellant George Hann (Hann) was charged with (1) conspiracy to possess cocaine base (crack) with intent to distribute, (2) possession of crack with intent to distribute, and (3) possessing firearms as a convicted felon. Pursuant to an agreement, he

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

pleaded guilty on only the firearms count, Count 2, reserving the right to appeal the denial of his motion to suppress the evidence. Fed. R. Crim. P. 11(a)(2). The court sentenced Hann to serve 21 months and to three years of supervised release. Service of the sentence was stayed pending appeal.

The district court conducted an evidentiary hearing on Hann's motion to suppress the two firearms described in Count 2, at which he, the two arresting officers, and his parole officer testified. The following is a summary of relevant testimony.

On September 10, 1991, Chief Hugh Mixon of the New Augusta, Mississippi Police Department and Agent John Carter of the Metro Drug Task Force went to Apartment 21, Pinewood Apartments, in New Augusta. The officers went to the apartment, Hann's residence, to arrest him pursuant to a warrant on a charge of selling drugs.

The officers testified that Carter arrested and handcuffed Hann in his living room, as Chief Mixon performed a protective sweep of two bedrooms behind the living room. In the left bedroom, also referred to as the TV room, they saw in plain view the firearms described in Count 2, a .22 Glenfield rifle and a High Standard 12 gauge shotgun. Mixon testified that the sweep took no longer than two or three minutes.

Mixon testified that prior to the arrest, he had received information that Hann was selling cocaine from his apartment and that he, Mixon, had personally observed people entering and leaving the apartment regularly. Mixon did not watch the apartment on the day of the arrest because he "was tied up with getting ready to

serve the warrant." Mixon testified that Barbara Payton stayed in the apartment regularly. (Hann testified that she lived there with him.) Mixon testified that neither he nor Carter searched the storage room adjacent to the apartment.

Agent Carter testified that he had received information that Hann was selling drugs from his apartment, and would exchange drugs for guns. Thereafter, Carter participated in a purchase of drugs from Hann by an undercover agent, for which Hann was indicted. Carter knew that Hann was on felony probation and he had been informed that Hann carried guns and that there usually were guns in the apartment. Carter further testified that he feared for his safety when he entered the apartment and that the sweep search was "to see if there was anything that presented a danger."

Hann testified that the two firearms had been in the storage room adjacent to his apartment, not in the back room, and that they were not his. He also testified that the officers searched the premises for 30 minutes and that one Harold Franklin had been in the right bedroom during that time. Franklin was not arrested.

In denying Hann's motion to suppress the district court stated: "I'm not prepared to say an officer, as a reasonable precaution, should not go into adjoining rooms and see if there's someone there, particularly when they have information that drug dealing is going on and that guns are present." The court stated further that "if [the officers] have a right to be where they are, anything that's open and obvious can be seized and is admissible as evidence."

OPINION

Hann contends that the district court erred by denying his motion to suppress the evidence. He notes that the district court failed to make an explicit finding whether the guns were recovered from the bedroom or, as he testified, from his storage room. Implicit in the district court's reasons for the ruling, however, is a finding that the guns were found in the bedroom. Hann's principal argument is that the evidence should have been suppressed because the government witnesses were unable to establish that they had a reasonable belief based on specific and articulable facts that [his] apartment harbored an individual posing a danger to the arresting officers. Maryland v. Buie, 494 U.S. 325, 337, 110 S. Ct. 1093, 1097, 108 L. Ed. 2d 276 (1990).

"In reviewing a district court's ruling on a motion to suppress, the reviewing court must consider the evidence in the light most favorable to the prevailing party, accepting factual findings unless clearly erroneous and reviewing questions of law de novo." United States v. Shannon, 21 F.3d 77, 81 (5th Cir.), petition for cert. filed, (U.S. Aug. 1, 1994)(No. 94-5443). "Clear error is especially rigorous when applied to credibility determinations because the trier of fact has seen and judged the witnesses." United States v. Casteneda, 951 F.2d 44, 48 (5th Cir. 1992). In the district court, the Government had the burden of proving, by a preponderance of the evidence, that the search or protective sweep was justified by exigent circumstances. See Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29

L. Ed. 2d 564 (1971); Buie, 494 U.S. at 335 n.3 ("[a] protective sweep is without question a `search'"); United States v. Hurtado, 905 F.2d 74, 76 (5th Cir. 1990)(en banc).

"A `protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." Buie, 494 U.S. at 327. The Court stated two standards for determining the legality of such a sweep. First, "as an incident to the arrest the officers [can], as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." Id. at 334. To justify a more extensive sweep, however, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id.

The Court remanded Buie to the state appellate court for a determination whether "the searching officer possesse[d such] a reasonable belief." Id. at 337. The state court then held that the protective sweep of the basement of Buie's residence, from which he had emerged prior to his arrest, was legal. Buie v. State, 580 A.2d 167 (Md. Ct. App. 1990), cert. denied, 498 U.S. 1106 (1991). The court held, first, that "in determining the existence of reasonable suspicion in a case such as this, the objective standard must be used." 580 A.2d at 170. This is

supported by the Supreme Court's Buie opinion and other Supreme Court cases. See id. at 169-70. The court held that at the time the officer entered Buie's basement, it was reasonable for him to suspect that one Allen, who had been identified with Buie as one of the two robbers, "might well be in the basement." Id. at 171. As the dissent points out, however, the officers did not bring with them the arrest warrant which had been issued for Allen. Id. at 174. The officer testified that he "just went down there in case there was someone else in the basement." Id. at 173. After the state court affirmed Buie's conviction, the Supreme Court denied certiorari, 498 U.S. 1106 (1991).

The district court appears to have held that the protective sweep of Hann's bedrooms may well have not required either probable cause or reasonable suspicion, because these rooms were "spaces immediately adjoining the place of arrest from which an attack could [have been] immediately launched." Buie, 494 U.S. at 334. The bedrooms were separated from the living room by only a hallway, and their doors were open.

The district court also seems to have held that reasonable suspicion justified the sweep. This holding is valid because the officers testified to specific facts which led them to believe that it was necessary for their safety. They knew that Hann was a previously convicted felon who trafficked in drugs from his apartment. Chief Mixon had seen numerous individuals going to the apartment; and Agent Carter had information that Hann traded drugs for guns, which he kept there. Mixon testified that he swept

through the bedrooms in three minutes or less, as Carter was placing Hann under arrest. See Buie, 494 U.S. at 335-36. Both officers testified that the sweep was to insure their safety. See United States v. Mendoza-Burciaga, 981 F.2d 192, 196-97 (5th Cir. 1992), cert. denied, 114 S. Ct. 356 (1993).

As the district court held, "if [officers] have a right to be where they are, anything that's open and obvious can be seized and is admissible as evidence." Horton v. California, 496 U.S. 128, 133-37, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). Both officers testified that the firearms were in plain view in Hann's left bedroom.

AFFIRMED.