UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60643
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH CRAWFORD MIXON,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Mississippi
(CR 2:93 184 1)

October 4, 1995

Before KING, SMITH and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Appellant Joseph Crawford Mixon was convicted on three counts of drug and weapons violations stemming from a marijuana manufacturing operation. Mixon appeals his convictions contending: (1) failure to suppress evidence, (2) insufficient evidence to sustain his convictions, and (3) ineffective assistance of counsel. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTUAL AND PROCEDURAL BACKGROUND

On June 17, 1993, Mississippi Highway Patrol Officer James Synder was working as an aerial drug spotter while flying with a marijuana eradication crew. As the crew flew over Tate County, Mississippi, Synder spotted hundreds of perfectly-dug holes over an area of several acres. On closer inspection, Synder observed small dark green plants growing in the center of some of the holes. Nearby, he spotted bags of fertilizer, a wheelbarrow, and hand tools. He also noticed a tractor trail leading from these plants to a nearby house. Following the trail back toward the house, Synder saw several hundred freshly-watered and neatly-rowed plants that appeared to be marijuana growing in planting trays within one hundred feet of the house. A green watering bucket was also close-by. A lightpole was erected near these plants with wiring leading back to the house. There was also a trail from these plants to the residence. A tractor was parked by the side of the house. Synder also saw a greenhouse near the front yard.

Following these observations, Synder radioed Lieutenant Randy Corban of the Mississippi Bureau of Narcotics for ground support. Corban met Synder near the property. The agents walked onto the property where they observed four trays of two-foot tall marijuana plants, the green watering bucket, and tracks and paths leading back to the residence. Corban also spotted a sign bearing the name of Joseph Mixon and a telephone number posted on wooden pole.

Corban called Mixon at the listed telephone number and informed him that marijuana had been spotted on his property and that the officers needed to conduct a search. Mixon agreed to meet

Corban at the property at seven-thirty that evening. After speaking with Mixon, Corban contacted the Tate County Tax Assessor's Office to confirm who owned the property. The tax assessor advised Corban that the property was owned by Joseph and Sally Mixon. Unbeknownst to Officer Corban, the Joseph Mixon listed as the property owner was the father of appellant Joseph Crawford Mixon. Based upon his observations, Corban swore an affidavit and obtained a search warrant for the Mixon house from a state-court judge. Corban then returned to the property and met Mixon.

After inspecting the search warrant, Mixon led Corban and other agents into the house. Corban advised Mixon of his rights and asked if there were any weapons in the house. Mixon admitted there was a loaded gun in the bedroom. While Mixon waited in the den, Corban found a loaded .380 caliber semi-automatic pistol in a piece of luggage in the bedroom. As the search continued, Corban discovered a plastic trash can in the bedroom closet containing approximately 53 plastic bags of packaged marijuana. Inside a compartment in the headboard of the bed were jars of marijuana, marijuana seeds, a .38 caliber revolver with ammunition, and a personal videotape.

As other officers continued the search, two additional firearms were uncovered at the foot of the bed. More packaged marijuana was discovered in two coolers in the attic. Loose marijuana and marijuana seeds were discovered in the attic as well. The attic floor was stained in a manner consistent with marijuana having been dried on the floor. Agents also seized a container of

Miracle Grow, a growth enhancer, from Mixon's kitchen.

In addition to the bags of marijuana seized from the residence, officers also confiscated 187 marijuana plants from the planting trays south of the house and another 121 plants from the cultivated holes that initially caught the attention of the aerial spotters. While the officers believed all of the marijuana plants were on the Mixon property, it was later discovered that both plots of plants were actually on property owned by another person, Jared Huffman.

Mixon was charged in a three-count indictment of manufacturing a controlled substance, possession with intent to distribute marijuana, and using firearms in relation to a drug trafficking crime. See 21 U.S.C. §§ 841(a)(1), (b)(1)(B), (b)(1)(D); 18 U.S.C. § 924(c)(1). At a pretrial hearing, Mixon sought to suppress the evidence seized pursuant to the warrant on the grounds that the marijuana plants seen from the air were not in fact on the Mixon property and that Corban obtained the warrant through intentionally false or reckless statements. While the government stipulated that the cultivated marijuana was later determined to be on the property of another, the district court concluded that the mistake was insufficient grounds to suppress the evidence since the officers made a reasonable inquiry into whom the property belonged. Therefore, the officers were not making an intentionally false statement or acting with reckless disregard for the truth. The case proceeded to jury trial where Mixon was convicted on all three counts. This appeal ensued.

SUPPRESSION OF EVIDENCE

On appeal, Mixon contends that the district court erred by denying his motion to suppress the evidence found in the house. Specifically, he argues that: (1) the search warrant was obtained through false information violative of state[1] and federal law; (2) the warrant was overly broad because there was no nexus between the cultivated marijuana located on Huffman's property and the house to be searched; and (3) the information identifying Mixon as the property owner was itself gathered as a result of an earlier warrantless search of the property. None of these grounds reveal error in the district court's decision to deny the motion to suppress.

Mixon's chief argument is that Corban obtained the search warrant through deliberately false statements or with reckless disregard for the truth. See Franks v. Delaware, 438 U.S. 154, 171-72 (1978). A defendant seeking to suppress evidence on these grounds bears the burden of proof. United States v. Wake, 948 F.2d 1422, 1429 (5th Cir. 1991), cert. denied, 504 U.S. 975 (1992). The district court found that the officers did not use intentionally false statements or act with reckless disregard for the truth in

[1] For the first time on appeal, Mixon contends that Corban's use of false information to obtain the search warrant also violates Mississippi state law. Because Mixon did not raise the state law claim before the district court, he may only prevail if he can demonstrate plain error. United States v. Calverley, 37 F.3d 160, 162 (5th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 1266 (1995). Mixon, however, cannot show plain error because it is well-settled that it is federal law that controls the admissibility of this evidence, not state law. See United States v. Eastland, 989 F.2d 760, 765-66 (5th Cir.), cert. denied, 114 S. Ct. 246, 443 (1993).

obtaining the warrant. We review findings of fact on a motion to suppress only for clear error, with the record being viewed in the light most favorable to the government. United States v. Mendez, 27 F.3d 126, 129 (5th Cir. 1994).

At the hearing on the motion to suppress, the government conceded that the marijuana discovered near the house was about ten feet south of Mixon's property line. However, Corban testified that at the time he secured the warrant, his investigation had led him to believe the property belonged to Mixon. Specifically, Corban testified that while there was a fence on Mixon's property, it was partially down and incomplete. Furthermore, he testified that there were two mailboxes at the end of the driveway leading to the property; one bore the name "J. Mixon." Corban recounted the marijuana he had seen growing just one hundred feet south of the house and that a path led from these plants back toward the house. He also recalled the posted sign bearing Mixon's name and telephone number. Likewise, he told of his contact with the tax assessor who said the property was owned by Joseph and Sally Mixon. Finally, Corban testified about his phone call to Mixon and that Mixon did not deny ownership of the property.

Based upon this evidence, the district court did not err in failing to suppress the evidence for intentionally false statements or reckless disregard for the truth. The evidence supports the district court's conclusion that Corban made a good faith investigation to determine the appropriate owner of the property. Consequently, Mixon failed to meet his burden of proof on this issue.

Similarly, Mixon's additional challenges to the warrant are meritless. Based upon Corban's affidavit of probable cause, the state-court judge could properly authorize a search warrant for the house. The affidavit contained information about the presence of marijuana in close proximity to the house to be searched, the evidence of marijuana cultivation on the property, and Corban's good faith investigation revealing, albeit erroneously, that Mixon was the owner of the property. This provides the basis for the issuance of the search warrant of the residence. Consequently, the district court did not err by denying the motion to suppress because the state-court judge had a substantial basis for concluding that probable cause existed. See Illinois v. Gates, 462 U.S. 213, 238-39 (1983).

Finally, Mixon's complaint that the information used in obtaining the search warrant was based upon an earlier warrantless search is unavailing. While it is true that the officers entered the property to confirm the aerial spotting of the marijuana, they did not approach the house or curtilage. The property they entered was described as a grassy and wooded area. This property constitutes an open field. See United States v. McKeever, 5 F.3d 863, 867-68 (5th Cir. 1993). Observations made from an open field do not implicate the Fourth Amendment, even when police conduct may violate state trespass laws to obtain access to the field. Id. at 868; United States v. Eastland, 989 F.2d 760, 765 (5th Cir.), cert. denied, 114 S. Ct. 246, 443 (1993). Consequently, Corban could rely on his observations in obtaining the warrant.

SUFFICIENCY OF EVIDENCE

Mixon next challenges the sufficiency of the evidence to support his convictions. On a challenge to the sufficiency of the evidence, we view the evidence and all inferences in the light most favorable to the verdict. United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd, 462 U.S. 356 (1983). Viewing the evidence in this light, the relevant question is whether any reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Bell, 678 F.2d at 549.

A defendant may be convicted of a violation of 21 U.S.C. § 841(a)(1) if it is shown that the person knowingly or intentionally manufactured a controlled substance. To prove possession with intent to distribute, the government must prove knowing possession of the contraband with intent to distribute. United States v. Cardenas, 9 F.3d 1139, 1158 (5th Cir. 1993), cert. denied, 114 S. Ct. 2150 (1994). Possession may be actual or constructive and may be joint among several defendants. Id. Constructive possession is "the knowing exercise of, or the knowing power or right to exercise dominion and control over the proscribed substance." Id. (quoting United States v. Molinar-Apodaca, 889 F.2d 1417, 1423 (5th Cir. 1989)). Additionally, a jury may infer intent to distribute from possession of a large amount of contraband. United States v. Lopez, 979 F.2d 1024, 1031 (5th Cir. 1992), cert. denied, 113 S. Ct. 2349 (1993).

A brief review of the evidence reveals ample evidence to support both the marijuana manufacturing and possession with intent

to distribute convictions. At trial, Officer Synder testified to the initial aerial spotting of the suspicious holes, the presence of dark green plants consistent with marijuana, the fertilizer, handtools, and wheelbarrow. He explained that a tractor trail led from these plants to the Mixon house and that a tractor was parked beside the house. In close proximity to the house were more than a hundred additional freshly-watered plants. Another trail led from these plants back toward the house. A lightpole was erected near the plants with wiring also leading back to the house.

Officer Corban confirmed that 187 two-foot tall marijuana plants in planting trays were discovered growing within one hundred feet of the Mixon house. He also corroborated that a trail led from these plants back toward the house, as well as, the existence of the lightpole wired to the house. Additionally, he testified that another 121 plants were found at the planting holes; a bag of fertilizer had been placed next to each of the holes.

Corban also testified to the discoveries made inside the house. This included sixty bags of packaged marijuana discovered inside the garbage can in the bedroom closet and the coolers in the attic. He testified to the loose marijuana and seeds found in the attic, as well as the stain on the attic floor indicative of drying marijuana. He also told of the discovery of marijuana in the secret compartment of the waterbed headboard along with other of Mixon's personal property. Based upon his observations, Corban concluded that a large-scale marijuana operation was being conducted at the Mixon house and surrounding property. Finally, Corban testified that Mixon indicated that he was the sole occupant

of the house and that there was no evidence that the house was occupied by anybody other than Mixon.

Mixon himself testified on cross-examination that while others had access to the property, he considered himself to be the caretaker. He said that he was at the property one to two days every week to ten days. He had access to all of the property and that he kept it "bushhogged" with the tractor located near the house.

Given this evidence, a rational trier of fact could conclude beyond a reasonable doubt that Mixon knowingly manufactured marijuana and possessed it with intent to distribute. The jury could infer that Mixon controlled the premises on which the marijuana was found and exercised control over the marijuana in the house and on the grounds where marijuana was grown, processed, and packaged. Likewise, Mixon's control over such a large quantity of marijuana indicates an intention to distribute.

The evidence is also sufficient to sustain Mixon's conviction for the use of firearms in connection with a drug trafficking crime. See 18 U.S.C. § 924(c)(1). To sustain such a conviction, the government must establish that a firearm facilitated, or could have facilitated, the drug trafficking offense. United States v. Pace, 10 F.3d 1106, 1117 (5th Cir. 1993), cert. denied, 114 S. Ct. 2180 (1994). The presence of loaded firearms at a defendant's house where drugs, money, and ammunition are also found may be sufficient to establish the use of a firearm as an integral part of the drug trafficking offense. Id. at 1118.

The evidence at trial reflects that Mixon himself directed Corban to his .380 caliber semi-automatic pistol. This loaded weapon was discovered in the bedroom near the trash can filled with packaged marijuana. Another .38 caliber revolver was discovered in the compartment of the waterbed's headboard along with packaged marijuana, marijuana seeds, and ammunition. Two additional handguns were uncovered in the foot of Mixon's waterbed. Mixon admitted at trial that all four weapons were his. Corban also testified that it is common for drug traffickers to keep firearms to protect themselves, the drugs, and their money from other drug dealers and law enforcement agents. A rational trier of fact could conclude from this evidence that the firearms were used to protect the marijuana operation.

INEFFECTIVE ASSISTANCE OF COUNSEL

Mixon's final contention is that his trial counsel was ineffective. The essence of his complaint is that trial counsel should have called several additional witnesses whose affidavits he attached to a motion for bail pending appeal.[2] To prevail on his ineffective-assistance-of-counsel claim, Mixon must meet the heavy two-pronged burden announced in Strickland v. Washington, 466 U.S. 668 (1984). Mixon must show that counsel's performance was both deficient and that the deficient performance prejudiced the

[2] The general rule in this circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court, since no opportunity existed to develop the record on the merits of the allegations. United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988). In this case, we conclude that the record is sufficiently developed and address the merits of Mixon's claim.

defense. Strickland, 466 U.S. at 687. To prove prejudice, one must show that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome would have been different. Id. at 694. Mixon cannot meet this burden.

Mixon's sole basis for this claim is that trial counsel failed to call additional witnesses to bolster his defense that others had access to the property. In conjunction with his bail motion, Mixon swore that he informed trial counsel that several other people had equal or better access to the house than he had. According to Mixon, he offered these names to trial counsel but counsel refused to call the witnesses. To support his claim, Mixon attached affidavits of eleven individuals who swore that they enjoyed access to the house and property and had used firearms there.

Failure to call these witnesses demonstrates neither deficient performance nor prejudice. At trial, Mixon himself testified that at least dozen other people had access to the house and property. Likewise, two additional witnesses testified at trial that they had enjoyed the use of the property and used firearms there. Any additional testimony to this effect would merely be cumulative. Counsel's decision not to tender cumulative testimony rises to neither constitutional nor professional error. Ross v. Estelle, 694 F.2d 1008, 1011 (5th Cir. 1983). Given the weight of the evidence against Mixon and the cumulative nature of Mixon's proffered information, appellant has failed to meet the Strickland standard.

CONCLUSION

The judgment of conviction is AFFIRMED.