

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-7139
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GLEN MCADORY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(CR 2:92 86 D)

September 10, 1993

Before DAVIS, JONES and DUHÉ, Circuit Judges.

DAVIS, Circuit Judge:¹

In this direct criminal appeal, McAdory challenges his conviction on drug distribution and related firearms charges. We affirm.

I.

The first three counts of a six-count indictment charged that Glen McAdory, a convicted felon, committed drug and firearm

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

offenses on September 27, 1991. The second three counts charged similar offenses occurring on February 11, 1992. The first three counts charged McAdory with possession with intent to distribute more than five grams of cocaine base, with use of a specific semi-automatic pistol in relation to that cocaine possession, and with possession of the pistol by a convicted felon. The second three counts charged him with possession with intent to distribute more than five grams of cocaine base, with use of a different semi-automatic pistol in relation to the second cocaine possession, and with possession of the second pistol by a convicted felon.

A jury found McAdory guilty on all counts. The district court sentenced him to serve a total of 392 months imprisonment and a total of five years of supervised release. The 392 months consist of four concurrent 92-month terms on the counts of cocaine possession and possession of a firearm by a convicted felon, one 60-month term on the first count of using a pistol in relation to a drug trafficking offense, and one 240-month term on the second count of using a pistol in relation to a drug trafficking offense. The 60-month and 240-month terms were ordered to run consecutively to the 92-month terms and to each other. This appeal challenges the 240-month sentence and the sufficiency of the evidence of the intent element of the second cocaine count.

II.

At McAdory's trial, Lambert, Mississippi, police officer Leon Williams testified that, on September 27, 1991, he gave a \$20 bill to a confidential informant to purchase drugs from McAdory.

Observing the transaction from some distance away, Williams saw the informant approach McAdory's car and exchange something with McAdory, though Williams could not identify the items exchanged from his vantage point. The informant returned from McAdory to Williams and gave Williams a rock of cocaine.

Williams waited a short while and then, with support, approached McAdory and McAdory's car. Williams found inside the driver's door, near the hinges, a bottle containing 5.46 grams of crack cocaine. Inside another door, he found a pistol. McAdory had on his person the \$20 bill that Williams had given to the informant to make the purchase.

Williams testified that McAdory invoked his right to remain silent but did say, "Well, y'all got me." McAdory denied making that comment. He also denied that he possessed or sold cocaine or possessed the pistol.

Five months later, official business took state narcotics agent Roy Sandefer and state probation officer Sammy Flowers to Glen's Place, a small club owned by McAdory in Marks, Mississippi, which is near Lambert. When the officers entered the club, they found McAdory lying on a mattress on a pool table, with his head on a pillow. They saw a mirror and a crack cocaine pipe next to him. The mirror had a razor blade and cocaine residue on it.

They ordered McAdory and two others to stand against the wall. While the two others obeyed, McAdory reached beneath the pillow. The officers drew their weapons and ordered McAdory to remove his

hand from beneath the pillow. He did, and they found a pistol there.

A search of the premises yielded a box of corn starch, which can be used for lawful purposes and for cutting cocaine; a bottle of Dr. Tichenor's, which has innocent uses but which also can be used to heat crack cocaine for inhaling; several crack cocaine pipes; and wires and wire mesh used for smoking cocaine. They also found on the premises a match box containing cocaine residue. A search of McAdory himself yielded a rock of crack cocaine weighing 11.43 grams.

Sandefer testified that, after arrest, McAdory said that he sold cocaine to supplement his income and that he had traded cocaine for the pistol. A police officer corroborated Sandefer's account of McAdory's statement that he sold cocaine to supplement his income.

McAdory denied making the statement. He testified that he chewed on the corn starch and that he used the Dr. Tichenor's for a sore throat. He denied knowledge of the gun and denied having reached for it. He denied that he had ever sold cocaine or possessed it with the intent to distribute it.

III.

A.

McAdory first argues that he should not have received a 20-year sentence on Count 5, which charged the use of a firearm in relation to the February 1992 cocaine count. His argument hinges on what he considers an ambiguity in 18 U.S.C. § 924(c)(1).

That section provides that the penalty for a conviction for the use or carriage of a firearm in relation to a drug trafficking offense shall be five years imprisonment to run consecutively to the prison term for the drug conviction. 18 U.S.C. § 924(c)(1). McAdory received the mandatory five-year consecutive sentence for the conviction of the September 1991 offense as charged in Count 2.

Section 924(c)(1) further provides, "In the case of [the defendant's] second or subsequent conviction" for the use or carriage of a firearm in relation to a drug trafficking offense, the mandatory sentence is a 20-year consecutive term. 18 U.S.C. § 924(c)(1). McAdory argues that the 20-year sentence for a "second or subsequent" firearm conviction does not apply when the first conviction and the "second or subsequent" conviction both flow from one indictment.

The Supreme Court, affirming a judgment of this court, expressly rejected that argument. **Deal v. United States**, ___ U.S. ___, 113 S. Ct. 1993, 1996, 124 L. Ed. 2d. 44 (1993) (**aff'g United States v. Deal**, 954 F.2d 262 (5th Cir. 1992)). McAdory confesses the deficiency of his position, urging this court to adopt Justice Stevens's dissent in **Deal**. As both this court and the Supreme Court have recently decided the issue adversely to McAdory's position, the argument is meritless.

B.

McAdory argues next that the evidence was insufficient to prove that he intended to distribute the cocaine that he possessed at his club, as charged in Count 4. When the sufficiency of the

evidence is challenged, this court reviews the evidence in the light most favorable to the verdict and makes all reasonable inferences and credibility choices in favor of the verdict. **Glasser v. United States**, 315 U.S. 60, 80, 62 S. Ct. 457, 86 L. Ed. 680 (1942). The conviction must be affirmed if any rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt. **United States v. Smith**, 930 F.2d 1081, 1085 (5th Cir. 1991).

Intent to distribute may be proven by circumstantial evidence. **United States v. Prieto-Tejas**, 779 F.2d 1098, 1101 (5th Cir. 1986). Intent to distribute may be inferred from a large quantity of drugs possessed. **United States v. Gonzalez-Lira**, 936 F.2d 184, 192 (5th Cir. 1991).

No witness was asked whether the cocaine seized from McAdory at the club was a quantity typically distributed or a quantity in excess of that which a personal user would have at any one time. A forensic drug analyst, however, testified that the 11.43-gram rock was "large." R. 2, 131-32. "This is a large amount. The amount that we usually see mostly is one-tenth of a gram. This is 11 grams."

When the AUSA introduced it into evidence as a "large rock," the defense raised no objection. Sandefer also referred to the rock as "large." **Id.** at 85.

The "large rock" of 11.43 grams was more than twice the weight of the 5.46 grams seized from McAdory's car in September, when

Williams observed a cocaine sale. Additionally, two officers testified that McAdory stated that he sold cocaine.

The jury heard evidence that the rock was large, that it was twice the weight of the cocaine seized in September, and that McAdory himself said that he sold cocaine. A rational juror could have concluded that McAdory intended to distribute the quantity seized at the club.

AFFIRMED.