

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8751

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES TRAVIS THOMPSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CR-38)

(August 3, 1994)

Before REYNALDO G. GARZA, SMITH, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

James Thompson appeals his conviction of conspiracy and possession of marihuana with intent to distribute. Finding no error, we affirm.

I.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

On December 1, 1992, a confidential informant who had previously provided information to Sgt. Ralph Sramek of the Texas Department of Public Safety ("DPS") Narcotics Service told Sramek that an individual named Leo Alaniz was in San Antonio to conduct a narcotics transaction. The informant also told Sramek where Alaniz would be staying and that Alaniz would be accompanied by James Coy, James Thompson, and Rogelio Ramirez. The informant stated that these men intended to transport marihuana to the Austin area from San Antonio and would be using two vehicles, a black and gray Ford pickup and a bronze Honda two-door. The informant provided the respective license numbers.

Sramek confirmed the information by determining that Leo Alaniz was registered at the specified hotel. Furthermore, he located the Ford pickup and verified from the license tag that the truck was registered to Alaniz. In addition, Sramek verified that the Honda was registered to James Thompson.

Sramek observed the Honda arriving at the hotel where Alaniz was staying. Two men, later identified as Thompson and Coy, entered Alaniz's room and later exited at about 11:00 p.m. Sramek saw Leo Alaniz through the open doorway and smelled the distinctive odor of marihuana.¹

Thompson and Coy departed the hotel in the Honda, driving erratically and over the posted speed limit. Sramek followed the vehicle to a residence, where Thompson pulled the vehicle into the

¹ The informant had told Sramek that drug traffickers commonly sample the marihuana to check its quality.

backyard. Immediately after the Honda arrived, a Chevrolet pickup pulled into the driveway. After about ten minutes, both vehicles exited the driveway. This time, however, the Honda was driven in a careful manner. As the vehicle proceeded northbound out of San Antonio, Sramek learned that Alaniz and Ramirez had left the hotel and were traveling north toward Austin.

Sramek requested that DPS officers stop the Honda. DPS troopers Oscar Lopez and Ben Zamora located the vehicle and pulled it over. When Zamora requested Thompson's driver's license, he observed a large amount of cash. Zamora began to check the vehicle's dark window tinting that Zamora suspected was in violation of Texas law. He smelled the strong odor of marihuana coming from inside the vehicle and observed a marihuana-smoking pipe in plain view on the front seat. A search of the vehicle revealed about sixty pounds of marihuana and \$5,547 in cash. Thompson was arrested and advised of his rights.

While Thompson was at the arrest site, the Ford pickup belonging to Alaniz passed the vehicle. As the truck passed, it began making erratic movements. Sramek instructed the DPS troopers to stop the Ford truck.

After being advised of his rights, Thompson stated that the marihuana was loaded into his vehicle at the residence in San Antonio when he pulled into the backyard. He stated that Coy loaded the marihuana into the vehicle and that Thompson did not participate in the negotiations.

The next morning a search warrant was executed at the residence. The officers discovered discarded wrappings, a scale, a firearm, and a large quantity of marihuana. The marihuana bundles were similar to the ones found in Thompson's vehicle.

Thompson was indicted for conspiracy to possess marihuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D), and 846, and possession of marihuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D) and 18 U.S.C. § 2. Thompson filed a motion to suppress, which the district court denied after an evidentiary hearing. Thompson was convicted of both counts after a jury trial.

II.

A.

Thompson first challenges the validity of the vehicle stop and contends that the district court erred in failing to suppress the evidence. When a motion to suppress is based upon live testimony at a suppression hearing, "the trial court's purely factual findings must be accepted unless clearly erroneous, or influenced by an incorrect view of the law." United States v. Randall, 887 F.2d 1262, 1265 (5th Cir. 1989) (quoting United States v. Maldonado, 735 F.2d 809, 814 (5th Cir. 1984)). Moreover, the trial court's implicit credibility findings are entitled to the same deference as its express factual findings. Montelongo v. Meese, 803 F.2d 1341, 1347 n.6 (5th Cir. 1986), cert. denied, 481 U.S. 1048 (1987).

Under Terry v. Ohio, 392 U.S. 1 (1968), a temporary investigatory stop is proper if it is based upon reasonable suspicion that criminal activity may be afoot. After an automobile has been properly stopped pursuant to Terry, the police may search the vehicle without a warrant if probable cause exists to believe that contraband or evidence of criminal activity is located inside. California v. Carney, 471 U.S. 386, 391 (1985).

Given the information available to Sramek, he had a reasonable suspicion to believe that the Honda contained contraband. He had information from a known, reliable informant. See United States v. Lopez-Gonzalez, 916 F.2d 1011, 1014 (5th Cir. 1990). The informant identified the individuals involved, described the vehicles, and pinpointed the location of the transaction. Sramek confirmed the information and determined that marihuana was present in the hotel room. His further surveillance indicated that Thompson had loaded his vehicle with contraband. Based upon this information, Sramek had a reasonable suspicion that the Honda was carrying marihuana, and he was justified in ordering it stopped.

When Zamora stopped the vehicle, he observed a large amount of cash, smelled the odor of marihuana, and noticed a marihuana pipe in plain view. These observations, in conjunction with Sramek's information, gave Zamora probable cause to search the car.

Thompson alleges that the district court relied upon false testimony from Sramek in reaching its conclusion that the stop and subsequent search did not violate the Fourth Amendment. But the allegations)) questioning the time the defendants entered the

hotel room, the identity of the individuals, and Sramek's ability to smell the marihuana and observe the individuals)) amount to nothing more than credibility choices that the district court resolved in the government's favor. Therefore, the district court did not err in refusing to suppress the evidence.

B.

Thompson also challenges the sufficiency of the evidence supporting his conviction. The standard for reviewing a conviction allegedly based upon insufficient evidence is whether a reasonable jury could find that the evidence establishes the guilt of the defendant beyond a reasonable doubt.

To establish possession of marihuana with intent to distribute, the government must prove beyond a reasonable doubt (1) knowing (2) possession of marihuana (3) with intent to distribute it. United States v. Gonzalez-Lira, 936 F.2d 184, 192 (5th Cir. 1991). The knowledge element in a possession case can be inferred from control of the vehicle where the contraband is not concealed in a hidden compartment. United States v. Garza, 990 F.2d 171, 174 (5th Cir.), cert. denied, 114 S. Ct. 332 (1993). Possession can be imputed to a passenger or driver of a vehicle containing contraband, and intent to distribute can be inferred from the quantity of drugs. United States v. Garcia, 917 F.2d 1370, 1377 (5th Cir. 1990). To establish a conspiracy under 21 U.S.C. § 846, the government must prove beyond a reasonable doubt (1) an agreement between two or more persons to violate the narcotics laws, (2) that

each alleged conspirator knew of the conspiracy and intended to join it, and (3) that each alleged conspirator did participate voluntarily in the conspiracy. United States v. Leed, 981 F.2d 202, 204-05 (5th Cir.), cert. denied, 113 S. Ct. 2971 (1993). An explicit agreement is not required; a tacit mutual agreement will suffice. United States v. Prieto-Tejas, 779 F.2d 1098, 1103 (5th Cir. 1986).

We conclude that the evidence supports the jury's verdict on both counts. Thompson traveled to the hotel room to meet with Alaniz, Coy, and Ramirez. He stayed only a short time and left carrying over \$5,000 in cash. The room smelled like marihuana. Thompson then went to the residence where, as he later admitted, the marihuana was loaded into his vehicle. When his vehicle was stopped, it smelled like marihuana and contained a marihuana pipe. Marihuana was discovered in the vehicle. Alaniz and Ramirez left the hotel room shortly thereafter and proceeding north on the same route as Thompson. Upon seeing Thompson's car stopped by police, the Ford truck made "erratic movements." This evidence was ample to support the jury's conclusion that Thompson knowingly possessed marihuana with the intent to distribute it and that he conspired with the other individuals.

C.

Thompson also alleges prosecutorial misconduct in failing to produce Brady materials and "manipulat[ing] the information presented to the Court as to time, knowledge, details, and unstated

basis for the Confidential Informant's suspicions." Without evidence of specific Brady material, the court cannot review the merits of Thompson's contention. See United States v. Dula, 989 F.2d 772, 775 (5th Cir.), cert. denied, 114 S. Ct. 172 (1993).

D.

Thompson also complains that the district court erred in refusing to honor his request to change one of his peremptory juror strikes after the list of strikes had been given to the court and the jury was in the process of being seated. Alleged errors involving jury selection are reviewed for abuse of discretion. United States v. Black, 685 F.2d 132, 134 (5th Cir.), cert. denied, 459 U.S. 1021 (1982).

After defense counsel had submitted his signed list of peremptory challenges to the clerk and as the clerk was calling the names of jurors to take their seats in the jury box, counsel noticed that he had intended to strike prospective juror Melvin Barron and to allow prospective juror John Redus to serve. Prior to the swearing-in of the jury, defense counsel asked the court to allow him to correct his mistake, but the court denied his request. Barron served as foreman of the jury.

This issue is a novel one in this circuit. In fact, our research has revealed no cases in any circuit where a defendant's counsel sought to correct his own signed mistake as to which juror to strike. Since Thompson has failed to allege that the seated

juror was not impartial, the error constituted waiver of the intended use of that peremptory strike.

E.

Finally, Thompson argues that the district court abused its discretion in admitting evidence seized during the search of the residence. We review complaints concerning the admissibility of evidence for abuse of discretion. United States v. Jimenez Lopez, 873 F.2d 769 (5th Cir. 1989).

Thompson contends that the handgun and scale seized inside the residence should have been excluded as irrelevant because he never entered the house. Nevertheless, Thompson did drive into the backyard of the house and stayed there while the marihuana was loaded onto his vehicle. Moreover, one of Thompson's co-conspirators resided at this house. Therefore, the evidence seized from inside the house was relevant to the conspiracy.

AFFIRMED.