

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

MAY 18 1990

ROBERT L. HOECKER
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
NORMAN DALE BAUGH,
Defendant-Appellant.

No. 89-2074
D. C. No. 88-407
(D. New Mexico)

ORDER AND JUDGMENT*

Before **HOLLOWAY**, Chief Judge, **McWILLIAMS**, Circuit Judge, and
KANE,** District Judge.

**The Honorable John L. Kane, Jr., District Judge of the United States District Court for the District of Colorado, sitting by designation.

Defendant-Appellant Norman Baugh (Baugh) challenges his conviction for carrying and using a firearm during and in relation to a drug trafficking crime, a violation of 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2. He argues first that the other offense of which he was convicted, possession of methamphetamine with intent to distribute (a violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) and 18 U.S.C. § 2) is not a drug trafficking crime under 18 U.S.C. § 924(c)(1). He argues further that the

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This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

possession of the firearm in this case was not sufficiently related to the drug possession with intent to distribute charge to support the firearms conviction. We affirm.

I.

In August 1988, Baugh's ex-landlord called police complaining of a terrible smell in the house Baugh's girlfriend had rented (and in which Baugh also resided). An Albuquerque police officer identified the smell as being associated with methamphetamine, and examined syringes and other items which the landlord had discovered. The landlord then pointed out Baugh driving by in his pickup truck. II R. 53, 60. The officer stopped the pickup and noticed the same smell of methamphetamine. Under the passenger seat of the truck was a loaded shotgun (in an apparently damaged case). II R. 56, 66. The officer said that if Baugh had reached over, he could have grabbed the shotgun. II R. 60. A locked box in the bed of the truck was later found to contain methamphetamine, syringes, scales, more loaded weapons, and \$3,840 in cash. II R. 113. There was testimony by a detective in the Albuquerque Police Department narcotics division that the methamphetamine would be worth approximately \$320,000 if "stepped on" five times and sold in grams. II R. 108, 116.

Baugh waived a jury trial. The district court found Baugh guilty of possession of methamphetamine with intent to distribute, a violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C), and of using or carrying a firearm during and in relation to a drug trafficking crime, a violation of 18 U.S.C. § 924(c)(1). Baugh was sentenced to fifty-one months of imprisonment for the possession with intent to distribute conviction, and received a

five-year sentence for the firearms conviction, to be served consecutively to the other sentence. A timely notice of appeal was filed.

II.

Baugh argues first that possession of methamphetamine with intent to distribute is not a drug trafficking offense within the meaning of 18 U.S.C. § 924(c)(1). We disagree.

Section 924(c)(1) provided in part at the pertinent time:

Whoever, during and in relation to any crime of violence or drug trafficking crime, including a crime of violence or drug trafficking crime, which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such a crime of violence or drug trafficking crime, be sentenced to imprisonment for five years

18 U.S.C. § 924(c)(1)(Supp. V 1987).

At the time this offense was committed, a "drug trafficking crime" was defined as a federal violation "involving the distribution, manufacture, or importation of any controlled substance" 18 U.S.C. § 924(c)(2). Baugh concedes that three circuits have held that possession with intent to distribute is a drug trafficking crime under that definition. United States v. Robinson, 857 F.2d 1006, 1110 (5th Cir. 1988); United States v. Matra, 841 F.2d 837 (8th Cir. 1988); United States v. James, 834 F.2d 92 (4th Cir. 1987). However, he argues that the amendment of that statute following those decisions (in November, 1988) makes it clear that the old wording was ambiguous.¹ Thus, he argues

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Section 924(c)(2) now defines a drug trafficking crime as "any felony punishable under the Controlled Substances Act: (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act."
Fn. cont'd to next page

that the rule of lenity requires us to hold that possession with intent to distribute is not a drug trafficking offense under § 924(c)(1). Bell v. United States, 349 U.S. 81 (1955); United States v. Valentine, 706 F.2d 282 (10th Cir. 1983).

This Court recently faced the issue in United States v. McKinnell, 888 F.2d 669 (10th Cir. 1989). There the defendant had a gun on the passenger's seat next to him, underneath a bag containing cocaine and drug paraphernalia, and also had cocaine on his person. The defendant was convicted of possession of cocaine with intent to distribute. He was also convicted of using a firearm "during and in relation to" a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). We ruled there that possession of cocaine with intent to distribute was indeed a drug trafficking offense: "Conviction of possession of cocaine with intent to distribute requires proof of specific intent to distribute. We find that it is an offense 'involving' the distribution of a controlled substance." McKinnell, 888 F.2d at 674.

We agree with the government that McKinnell is controlling in this case. There is no rational reason to differentiate cocaine from methamphetamine. In every other respect the two cases are indistinguishable. In fact, Baugh has not offered any reasons why McKinnell should not control.

We therefore hold that possession of methamphetamine with intent to distribute is a drug trafficking offense under the old version of 18 U.S.C. § 924(c).

(Fn. continued):
Act (21 U.S.C. §§ 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)."

III.

Baugh further argues that there was insufficient evidence for a finding that the firearms were "use[d] or carrie[d]" "during and in relation to" the possession with intent to distribute offense. 18 U.S.C. § 924(c)(1). He says the presence of the shotgun under the passenger seat of his truck, and the methamphetamine found in the tool box in the rear of the truck, do not establish the "during and in relation to" element of the offense.

When examining sufficiency of the evidence, we look at whether "[t]he evidence - both direct and circumstantial, together with the reasonable inferences to be drawn therefrom - is sufficient if, when taken in the light most favorable to the government," a reasonable factfinder could find the defendant guilty beyond a reasonable doubt. United States v. Brandon, 847 F.2d 625, 630 (10th Cir.) (quoting United States v. Hooks, 780 F.2d 1526, 1531 (10th Cir. 1986), cert. denied, ___ U.S. ___, 109 S. Ct. 510 (1988); United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir.), cert. denied, 404 U.S. 993 (1971).

Here the district court reasonably found "that the defendant was carrying, contrary to the statute, a firearm or firearms during and in relation to a drug trafficking crime. That the drug trafficking crime being [sic] possession of methamphetamine with intent to distribute." II R. 163. The gun was within easy reach of Baugh, and there were drugs as well as cash and more guns in the bed of the pickup. "[T]he 'uses' element of section 924(c)(1) is met when the defendant has 'ready access' to the firearm and the firearm 'was an integral part of his criminal undertaking and its availability increased the likelihood that the criminal

undertaking would succeed.'" McKinnell, 888 F.2d at 675 (quoting Matra, 841 F.2d at 843).

Baugh cites United States v. Cardenas, 864 F.2d 1528 (10th Cir.), cert. denied, ___ U.S. ___, 109 S. Ct. 3197 (1989), for the proposition that while "possession and transportation of a weapon in a truck can constitute the 'carrying' element of a 924(c) violation, this in and of itself does not establish the 'in relation to' element." Brief of Appellant at 8-9. In Cardenas, authorities discovered a gun behind a potato chip bag, in an open compartment near the driver, "within an effortless reach of Cardenas." Cardenas, 864 F.2d at 1530. Moreover, Cardenas had conceded that he knew the gun was there. We said, quoting United States v. Medina-Ramos, 834 F.2d 874, 876 (10th Cir. 1987), and United States v. Massey, 687 F.2d 1348, 1354 (10th Cir. 1982), that "a person in constructive possession of an item knowingly holds the power to exercise dominion and control over it." Cardenas, 864 F.2d at 1533 (emphasis in the original).

It is true that in this case the gun was not quite so close to the defendant as in Cardenas or McKinnell. However, there was testimony that the gun was easily accessible. II R. 60, 66. Had Baugh had the inclination, he could have easily reached down to get it. II R. 60, 66.

We hold that there was sufficient evidence to support Baugh's conviction for violating section 924(c)(1).

Entered for the Court

William J. Holloway, Jr.
Chief Judge