

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,
v.
[REDACTED],
Defendant.

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ECF

3:18-CR-[REDACTED]

OBJECTIONS TO THE PRESENTENCE REPORT

Defendant [REDACTED], through his counsel, Assistant Federal Public Defender Michael Kawi, makes the following objections to the Presentence Report:

I. Background

On January [REDACTED] law enforcement executed a search warrant on a house located at [REDACTED]. Four men were observed in various locations at or near the residence and detained. See PSR ¶ 11. Mr. [REDACTED] was encountered in a room inside the house, referred to in reports either as “bedroom #2” or “the recording studio.” Law enforcement searched the house and found various controlled substances, the bulk of which was cannabis. See id. In the bedroom where [REDACTED] was encountered law enforcement observed a Springfield Armory XD firearm on a couch near where Mr. [REDACTED] was seated. See PSR ¶ 12. A search of Mr. [REDACTED] yielded a small amount of cannabis and keys to the outer bars in front of the front door of the residence. See PSR ¶ 11. Law enforcement located a Taurus Model PT-911PRO firearm inside of a backpack in the living room. See id. In another bedroom law enforcement located a Smith and Wesson 9mm handgun. Law enforcement seized \$813 dollars from the house, \$450 directly from defendant [REDACTED], \$670 directly from defendant [REDACTED], and none from Mr. [REDACTED].

In the instant case Mr. [REDACTED] plead guilty to the crime of illegally receiving a firearm while

under indictment. The firearm listed in the indictment is the Springfield Armory XD firearm discussed above.

II. First Objection

The defense objects to paragraphs 25 and 26 of the Pre-Sentence Report, on the grounds that it improperly enhances Mr. ██████ guideline range by holding him responsible for firearms that were never in his actual or constructive possession.

The PSR raises Mr. ██████ offense level by 2 levels by asserting that the offense involved between 3 and 7 firearms. See PSR ¶ 25. The PSR also raises Mr. ██████ offense level by an additional 2 levels because one of the three firearms was stolen. To do this the PSR holds Mr. ██████ responsible not just for the Springfield Armory firearm that was found near him and forms the basis for the charge, but also the additional two firearms recovered from the house.

However, there is no evidence that Mr. ██████ actually or constructively possessed either the Smith and Wesson or the Taurus firearms. The 5th Circuit defines constructive possession as “ownership, dominion, or control over the contraband itself *or* dominion or control over the premises in which the contraband is concealed.” United States v. Mergerson, 4 F.3d 337, 349 (5th Cir. 1993) (quoting United States v. Smith, 930 F.2d 1081, 1085 (5th Cir. 1991) (emphasis in original)). The 5th Circuit has clarified that even where a residence is jointly occupied constructive possession is established “only when there was some evidence supporting at least a plausible inference that the defendant had knowledge of and access to the weapon or contraband.” See id. (holding that a weapon not found in plain view was not constructively possessed without other evidence that the defendant knew of the weapon).

In the instant case neither of the additional two firearms were found in plain view. The Taurus

was concealed inside of a backpack, and the backpack was not in the room where Mr. **Gibbons** was encountered; similarly the Smith and Wesson was located inside of a bedroom, not the bedroom/recording studio where Mr. **Gibbons** was located. There is no other evidence that Mr. **Gibbons** possessed, controlled, or knew of these additional firearms.

The recent case of United States v. Sealy is strikingly similar in its facts and therefore instructive as to the issues in the instant case. 661 Fed. Appx. 278 (5th Cir. 2016). In Sealy, after an informant purchased cannabis and observed firearms at a residence law enforcement executed a search warrant. See id. at 279. All persons in the residence were detained, including Sealy, and during the search law enforcement recovered the following items: (1) a Bersa .380–caliber semi-automatic pistol and 2.16 ounces of marijuana on a glass table within Sealy's reach; (2) a Ruger .44–caliber revolver and 26.23 ounces of marijuana in a shoebox in the southeast bedroom; (3) a Hi-Point .380–caliber pistol and 6.35 ounces of marijuana in the kitchen; (4) a Norinco SKS semiautomatic rifle with two high-capacity magazines in a hallway closet; and (5) \$1,668.00 on a co-defendant's person and in the southeast bedroom. Id. at 279-280.

Sealy pled guilty to being a felon in possession of a firearm, and admitted that he knowingly possessed the Bersa pistol that had been observed within his reach during the search. Id. In addition to the Bersa, the PSR held Sealy responsible for the additional two firearms and assessed him four additional levels for possessing the firearm in connection with another felony offense, specifically possession of marijuana with intent to distribute. Id. Sealy objected but his objections were overruled by the District Court. Id.

The 5th Circuit held that the facts did not establish actual or constructive possession of the additional firearms, and that the District Court improperly overruled the defendant's objections to

their inclusion as relevant conduct. Id. at 281. In doing so, the Court noted that to prove possession of additional firearms the government must demonstrate that the defendant “exercised direct physical control over them” and that “[t]o prove constructive possession, the Government must show that [the defendant] exercised ownership, dominion, or control over the firearms or the premises in which they were discovered.” Id. (quoting United States v. Hagman, 740 F.3d 1044, 1048 (5th Cir. 2014)). Even though there was no evidence of joint occupation in the Sealy case, the Court notes that “[e]ven jointly occupying a space...is insufficient to show constructive possession.” Id. (citing United States v. Fields, 72 F.3d 1200, 1212 (5th Cir. 1996)).

In reaching its conclusion the Court reasons that “[n]othing in the PSR suggests that [the defendant] ever carried or handled these three firearms; nothing suggests that [the defendant] even knew that these firearms, two of which were hidden from view, existed.” Id.

The facts of the instant case are nearly identical. Just as in Sealy, the firearms being used to enhance Mr. Gibbons guideline range were not found in plain view, and they were not near Mr. Gibbons. Just as in Sealy there is no evidence that Mr. Gibbons knew of the firearms or had possessed them in any way. Mr. Gibbons possession of a key that opened an outer door is not alone evidence that he occupied the residence, but even if it were the 5th Circuit reaffirmed in Sealy that even joint occupancy of a space is not enough to establish constructive possession on the items found within that space.

Application of the 5th Circuit’s analysis in Sealy makes it clear that the PSR incorrectly uses the two additional firearms to enhance Mr. Gibbons guideline range. This lowers the number of firearms from 3 to 1, and also eliminates the stolen firearm from consideration. The result is the elimination of 4 improperly attributed levels.

III. Second Objection

The defense objects to paragraph 27 of the Pre-Sentence Report on the grounds that it improperly enhances Mr. ██████ guideline range by holding him responsible for possessing the firearm in the indictment in connection with another felony offense, without sufficient evidence that Mr. ██████ was engaged in another felony offense. Specifically the PSR accuses Mr. ██████ of using the firearm in connection with the distribution of narcotics. See PSR ¶ 27.

It is well established law in the 5th Circuit that when a defendant is only in possession of a misdemeanor amount of marijuana the enhancement does not apply. See United States v. Houston, 364 F.3d 243, 249 (5th Cir. 2004). In cases where a defendant is found near felonious amounts of controlled substances the 5th circuit has held that “[m]ere presence, standing alone, is insufficient to prove [the defendant] [is] a drug trafficker.” See Sealy 661 Fed. Appx. at 282.

The similarities between the instant case and Sealy continue with this issue. The defendant in Sealy was found near a misdemeanor amount of marijuana. See id. at 279. The house in which he was found contained larger amounts of controlled substances and individuals had purchased illegal substances from the house prior to the defendant’s arrest. See id. Police recovered a large amount of cash but none from Sealy. See id.

Under these circumstances the 5th Circuit reversed the district court and found that the evidence was insufficient to support the enhancement. Id. at 282. In so holding the Court specifically notes the factors that the defendant was not holding the gun when police entered the home, that the defendant was not the one observed engaging in drug sales prior to the search of the home, that the defendant was only near a misdemeanor amount of marijuana when “vastly larger amounts were discovered elsewhere,” and notes that no cash was discovered on the defendant’s person. Id.

Each of these circumstances and factors is identical to the instant case: Mr. [REDACTED] was found in possession of a misdemeanor amount of marijuana; no cash was recovered from him while hundreds of dollars were recovered from co-defendants; he was not holding the firearm when police entered, and he was not observed engaging in drug transactions at any point. Unlike in the Sealy case, here the drugs in the living room were literally labeled with the nicknames of the Co-defendant's, indicating even more so than in Sealy that the drugs were explicitly under the control of others and not under Mr. [REDACTED] actual or constructive control.

Because the evidence is insufficient to establish that Mr. [REDACTED] possessed the firearm in connection with any other felony offense the Court should sustain the objection and remove these 4 assigned levels from Mr. [REDACTED] current guideline calculation.

CONCLUSION

Because there is no evidence that Mr. [REDACTED] possessed the additional firearms attributed to him, and because there is not sufficient evidence to establish that he possessed the Springfield Armory firearm in connection with another felony offense, the defense's objections should be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2019, I electronically filed the foregoing document using the Court's CM/ECF system, thereby providing service on all parties of record.

/s/ Michael W. Kawi

MICHAEL W. KAWI