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895 F.2d 1419

Unpublished Disposition

NOTICE: Ninth Circuit Rule 36-3 provides that dispositions other than opinions or orders designated for publication are not precedential and should not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

UNITED STATES of America, Plaintiff–Appellee,

v.

Craig ROGERS, Defendant–Appellant.

Nos. 89–10013, 89–10069.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 6, 1989.

Decided Feb. 12, 1990.

Before TANG, CYNTHIA HOLCOMB HALL and BRUNETTI, Circuit Judges.

1 MEMORANDUM*

2 Craig Rogers ("Rogers") appeals his conviction, following a jury trial, for one
count each of possession with the intent to distribute Lysergic Acid Diethylamide
("LSD"), 21 U.S.C. Sec. 841(a)(1); possession of hashish, 21 U.S.C. Sec. 844;
possession of marijuana, 21 U.S.C. Sec. 844; and possession of psilocyn, 21 U.S.C.
Sec. 844. Rogers contends that the district court erred in denying his motions to
suppress evidence and to preclude application of mandatory sentencing.

3 The district court had jurisdiction pursuant to 18 U.S.C. Sec. 3231. We have
jurisdiction under 28 U.S.C. Sec. 1291. We affirm.

4 * At about noon on October 21, 1987, six or seven Drug Enforcement Officers
executed a court-authorized search warrant at Rogers' residence and seized
numerous controlled substances, including LSD, hashish, marijuana and psilocyn.
They also seized various drug distribution paraphernalia including blotter paper,
glassware, a funnel, a blacklight, and a drug sale ledger. Rogers was indicted by a
grand jury on April 6, 1988.

Rogers' motions to suppress evidence and to preclude application of mandatory
sentencing were heard on October 24, 1988, and both were denied. There was
conflicting testimony at this hearing. Denial of the motion to suppress appears to be
based on the testimony of agent David Donald who testified that he knocked on the
unlocked front door and announced "police officer, search warrant". The door came
ajar approximately one foot when he knocked. He waited about five seconds and
knocked a second time, very loudly. No response was heard to either knock. After
another five-second delay, he pushed the open door with enough force that the
impact from the doorknob made a hole in the wall behind it. Upon entering the
house he found Rogers in the back bedroom with the door closed and loud music

5 being played on the stereo. Rogers was found in possession of over 10 grams of a
6 substance containing between .91% and .28% pure LSD.

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6 On October 28, 1988, after a four day trial, the jury convicted Rogers of possession of LSD with intent to distribute, possession of hashish, possession of marijuana, and possession of psilocyn. The jury found that the weight of the LSD was less than one gram and that the weight of the mixture or substance containing the LSD was 12.47 grams. On December 19, 1988, Rogers was sentenced to ten years of imprisonment for the possession with intent to distribute LSD violation, and one year of imprisonment for each of the other three possession violations, all sentences to run concurrently.

II

7 Rogers contends that the district court erred in finding that the drug enforcement agents properly complied with the knock-and-announce provisions of 18 U.S.C. Sec. 3109 before entering his home and that sentencing under the enhanced penalty provisions of 21 U.S.C. Sec. 841(b)(1)(A)(v) was improper. We disagree.

8 * Rogers argues that the search warrant was improperly executed and therefore the evidence obtained in the search should be suppressed. He contends that the officers did not comply with the knock and announce provision of 18 U.S.C. Sec. 3109¹ by failing to knock, or, in the alternative, that even if they did knock, a 10-second wait was not reasonable.

9 In denying Rogers' motion to suppress, the district court made no written findings of fact.² Where there are no written findings of fact, the appellate court will uphold the result if there is a reasonable view of the evidence to support it, viewing the evidence in the light most likely to support the district court's decision. *United States v. Gomez*, 846 F.2d 557, 560 (9th Cir.1988). The district judge apparently believed agent Donald's version of the facts, and there is no evidence to indicate his conclusion was unreasonable.

10 There is no set rule governing the amount of time an officer must wait before failure to answer becomes a constructive denial of entry; each case is fact-specific. See, e.g., *United States v. Rodriguez*, 663 F.Supp. 585 (D.D.C.1987) (three- to five-second wait after announcement before forcing entry into defendant's home with battering ram insufficient, especially where occupants were probably asleep at 6:30 AM and officers offered no reason for fearing that evidence was likely to be destroyed); *United States v. Wysong*, 528 F.2d 345, 348 (9th Cir.1976) (officer's entry of hotel room with pass key after announcement and ten-second wait coupled with officer's concern that defendant might destroy the drugs was reasonable).

11 Although ten seconds is somewhat short, given the facts of this case it is not unreasonable. The knock took place in the middle of the day, when the occupants would undoubtedly be awake and able to answer verbally or come to the door relatively quickly. The fact that the door was unlocked and came open when agent Donald knocked would also lead him to believe that somebody was home and should have been able to respond.

B

Rogers next contends that he was improperly sentenced under the penalty provision of 21 U.S.C. Sec. 841(b)(1)(A)(v).³ The indictment charged him with possessing over 10 grams of LSD but at trial it was determined that he actually possessed over 10 grams of a substance or mixture containing LSD. His argument is that the indictment controls the range of sentencing. *United States v. Crockett*, 812

12 F.2d 626 (10th Cir.1987). Since the government failed to prove Rogers possessed
« up over 10 grams of pure LSD, as alleged in the indictment, and failed to charge him
with possessing over 10 grams of a substance or mixture containing LSD, as proven
at trial, it cannot now subject him to the mandatory 10-year minimum sentence.

13 The government responds that it need not allege in the indictment the quantity of
contraband required to trigger the enhanced penalty provisions, since the amount
of LSD involved is not an element of the offense and the penalty provisions are
wholly separate from the definition of unlawful acts included in 21 U.S.C. Sec. 841
(a). *United States v. Normandeau*, 800 F.2d 953, 956 (9th Cir.1986). In the
alternative, the government argues that even if notice of the enhancement is
required, the indictment in the instant case did give Rogers sufficient notice of the
possibility of an enhanced sentence if convicted.

14 In *Normandeau* we declined to address the issue of whether the indictment must
state the quantity of contraband to trigger the enhancement penalty:

15 It may be that the indictment must allege that more than 1,000 pounds of
marijuana was involved before the government may seek enhanced sentences. We
need not decide this issue today because the indictment in this case clearly alleged
that more than 1,000 pounds was involved.

16 800 F.2d at 956 and n. 2. For similar reasons, we need not address that issue in
the instant case.

17 We find that Rogers did in fact receive adequate notice of the charges against him
and the potential for a 10-year to life sentence. The allegation in the indictment that
he possessed "over 10 grams of LSD" made him aware of the application of Sec. 841
(b)(1)(A)(v) just as well as stating "over 10 grams of a substance or mixture
containing a detectable amount of LSD" would have. "The key question in these
inquiries is whether an error or omission in an indictment worked to the prejudice
of the accused. If it did not, a conviction will not be reversed merely because a
minor or technical deficiency in the indictment is later discovered." (citation
omitted) *Id.* at 958.

C

18 Rogers argues that the sentencing enhancement violates due process as applied
to him because he is not a large volume dealer. While it is true that congressional
intent in amending 21 U.S.C. Sec. 841 in 1986 was to focus on "major traffickers,"⁴
Rogers fits squarely within this category as defined by Congress, namely,
individuals who possess large quantities of mixtures containing detectable amounts
of contraband that have been "cut" with other ingredients and thereby multiplied
for sale to others. *United States v. Holmes*, 838 F.2d 1175, 1178 (11th Cir.), cert.
denied, 108 S.Ct. 2829 (1988). The statute is clearly rationally related⁵ to the
congressional goal of protecting public health and welfare by implementing stiff
and certain penalties for those who violate federal drug laws. *Id.* at 1177, 1178; *U.S.*
v. Klein, 860 F.2d 1489, 1500-01 (9th Cir.1988).

19 Rogers also argues that the sentencing enhancement violates his due process
rights because the LSD he possessed was placed in a particular medium for storage,
and was thus not readily marketable. This argument lacks merit. There is nothing in
the record to show that it was not marketable. In fact, there was testimony by an
expert witness that the LSD seized had been diluted specifically so that it could be
distributed.

D

20 Rogers claims that his ten-year sentence is disproportionate to the severity of his
 « up crime, relying on *Solem v. Helm*, 463 U.S. 277 (1983). A sentence which is within
 the limits set by a valid statute may not be overturned on appeal as cruel and
 unusual. *United States v. Washington*, 578 F.2d 256, 258 (9th Cir.1978); *United*
States v. Zavala-Serra, 853 F.2d 1512, 1518 (9th Cir.1988). Rogers' sentence here
 was clearly within the limits set by 21 U.S.C. Sec. 841(b)(1)(A)⁶ .

21 The defendant's conviction is AFFIRMED in all respects.

* This disposition is not appropriate for publication and may not be cited to or by the
 courts of this circuit except as provided by 9th Cir.R. 36-3

¹ 18 U.S.C. Section 3109 provides that "[t]he officer may break open any outer or inner
 door or window of a house, or any part of a house, or anything therein, to execute a
 search warrant, if, after notice of his authority and purpose, he is refused admittance ..."

² Fed.Rule of Crim.Pro. 12(e) requires only that "[w]here factual issues are involved in
 determining a motion, the court shall state its essential findings on the record." There is
 no requirement of a written finding

³ 21 U.S.C. Sec. 841, as amended in 1986, provides as follows:

(b) Penalties

Except as otherwise provided in sections 845, 845a, or 845b of this title, any person who
 violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) involving--

(v) 10 grams of more of a mixture or substance containing a detectable amount of
 lysergic acid diethylamide (LSD):

such person shall be sentenced to a term of imprisonment which may not be less than 10
 years or more than life ...

⁴ H.R.Rep. No. 99-845, Part I, 99th Congress, Second Session, page 11 (1986)

⁵ Where a statute does not discriminate against a suspect class, Congress' judgment will be
 sustained in the absence of persuasive evidence that Congress had no reasonable basis
 for drawing the lines that it did. *Nebbia v. New York*, 291 U.S. 502, 537 (1934)

⁶ In fact, the district judge gave Rogers the lowest possible sentence allowed under the
 statute. Three circuits have stated that where the indictment alleges sufficient quantity
 to trigger the penalty enhancement and this is proved at trial, the district court must
 sentence under Sec. 841(b)(1)(B). *United States v. Hernandez-Beltran*, 867 F.2d 224,
 228 (5th Cir.) cert. denied 109 S.Ct. 2439 (1989); *United States v. Agyen*, 842 F.2d 203,
 205 (8th Cir.), cert. denied, 108 S.Ct. 2021 (1988); *United States v. Brandon*, 847 F.2d
 625, 630-31 (10th Cir.), cert. denied, 109 S.Ct. 510 (1988)