FILED
United States Court of Appeals
Tenth Circuit

August 28, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NICO ANTWAIN JONES,

Defendant - Appellant.

No. 22-1031
(D.C. No. 1:21-CR-00018-RM-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **MURPHY**, and **EID**, Circuit Judges.

Nico Antwain Jones appeals the district court's denial of his motion to suppress evidence. He argues the district court clearly erred by finding Special Agents with the Bureau of Alcohol, Tobacco, Firearms, and Explosives had probable cause to arrest him and, therefore, the fruits of the subsequent search were admissible. He also argues the district court clearly erred by finding he validly waived his *Miranda* rights and, therefore, his confession was also admissible. We

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

have jurisdiction under 28 U.S.C. § 1291, and for the reasons stated below, we affirm.

I.

In August 2020, Special Agents with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (the "ATF") began investing Nico Antwain Jones on suspicion that he was involved with multiple reported shootings in Colorado Springs, Colorado. The agents were aware Jones had previously been convicted of a felony, and they had information that led them to believe he currently possessed a firearm. After observing him outside an apartment complex and seeing him handle what the agents believed to be a gun, they arrested him for being a felon in possession of a firearm.

After arresting Jones, the agents obtained a search warrant and searched his vehicles. They found, among other things, a gun and approximately thirty-four grams of cocaine. They also interrogated Jones, who, after waiving his *Miranda* rights, admitted to possessing the gun and drugs. Jones was then charged with possession of a firearm as a felon in violation of 18 U.S.C. § 922(g); possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a) and (b)(1)(C); and possession of a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A)(i).

He filed a motion to suppress the evidence found in the vehicles, arguing the agents had no probable cause to arrest him and, therefore, all the evidence found as a result of the arrest was obtained in violation of his Fourth Amendment rights. He

also moved to suppress his confession on Fifth Amendment grounds. He argued his *Miranda* waiver was not valid because he had been incapacitated due to tiredness and having consumed drugs earlier that day. The district court held a hearing on the motion to suppress during which it watched a video of the interrogation and heard testimony from two ATF agents.

Special Agent Ryan Molinari testified first. He told the court that sometime around August 4, 2020, another agent, Special Agent Robert Dunning, told him he suspected Jones of being involved in some reported shootings in Colorado Springs. He said despite the fact that Jones was a felon, and therefore prohibited from possessing a firearm, Agent Dunning had seen recent Facebook videos showing Jones holding a gun. Agent Molinari was then assigned to surveil Jones.

He drove to an apartment complex associated with Jones to begin surveillance. He sat in his car in the parking lot for several hours before Jones pulled in driving a BMW. Jones got out of the BMW and began to work on another car approximately thirty feet away from Agent Molinari. At some point, Agent Molinari saw Jones reach into the BMW, take out an object, and tuck it in his waistband. Agent Molinari did not see the object before Jones tucked it into his waistband, but later he clearly saw part of it sticking out of Jones' pants because Jones was not wearing a shirt. Agent Molinari testified that he believed the object was a gun based on (1) his six-years' experience with the ATF; (2) his ten years' experience in the military; (3) Jones' manner and demeanor; (4) the fact that they were investigating Jones for possessing a gun; and (5) the fact that the object looked like a gun. During the

surveillance, Agent Molinari took pictures of Jones on his iPhone. He testified that he did not get a clear picture of the gun, but one picture showed something dark in Jones' waistband.

Agent Molinari then called for backup because he knew Jones was a felon, he believed Jones had a gun, and he felt it would be safer to have another agent nearby. Special Agent Robert Gillespie arrived. While he parked within sight of Jones, he was a little farther away than Agent Molinari. Agent Gillespie testified during the hearing that he also saw Jones and the gun. At some point, Agent Dunning drove past the parking lot. He did not testify at the hearing, but both Agents Molinari and Gillespie testified he told them he saw a gun. It was unclear how far away Agent Dunning would have been when he drove past.

Agent Gillespie also testified about Jones' interrogation. The interrogation began around 11:30 p.m. When asked to spell his name, Jones initially spelled his middle name "A-*I*-N-T-W-" but quickly corrected himself to "A-*N*-T-W-A-I-N." R. Vol. I at 128; *see also* Doc 62 8_4_2020 11_18_33 PM at 1:07–15 ("Interrogation Video"). Jones told the agents that the day before he had been awake until 3:00 a.m., gone home, slept until 11:00 a.m. or noon, then woke up and smoked some marijuana. He later took two Percocet pills. The video showed Jones asking and answering questions, following the conversation, and telling coherent stories. He volunteered information about other crimes and went into some detail about them. Agent Gillespie testified he had conducted thousands of interrogations, including some where the suspect was too intoxicated to proceed. In his opinion, "there was no

indication that [stopping the interrogation due to intoxication] was necessary with Mr. Jones[] that day." R. Vol. I at 123.

After hearing from the two witnesses, the district court "f[ound] and conclud[ed] that the agents saw a firearm in the possession of Mr. Jones." *Id.* at 145. It credited the amount of time Agent Molinari had watched Jones, his ATF and military experience, and the fact that he had called for backup after seeing the gun. The district court found Agent Gillespie was farther away from Jones than Agent Molinari, but it believed his testimony that he also saw the gun. The district court then said, "I have had the opportunity to assess their credibility[,] and I believe them. There's nothing to the contrary that suggests that there was no firearm . . . the weight of the evidence goes in one direction and one direction only." *Id.* at 147.

Then, the district court considered the interrogation video and Agent Gillespie's testimony about the interrogation and found "there was no incapacitation." *Id.* at 150. It also found "the *Miranda* advisement was given[,] it was knowingly, voluntarily, and intelligently . . . waived[,] . . . and [] he was absolutely capable of waiving." *Id.* It based this conclusion on seeing that Jones did not slur his speech, he did not pause, he did not seem unable to comprehend what the agents were saying, he was not confused about what words meant, he responded to questions quickly, and he negotiated with the agents.

After finding there was probable cause to arrest Jones and that Jones had voluntarily, knowingly, and intelligently waived his *Miranda* rights, the district court denied the motion to suppress. Jones pled guilty to one count of violating 21 U.S.C.

§ 841(a)(1) and (b)(1)(C), possession with intent to distribute cocaine, and one count of 18 U.S.C. § 924(c)(1)(A)(i), possession of a firearm in furtherance of a drug trafficking crime. He reserved his right to appeal the denial of the motion to suppress.

II.

When reviewing the denial of a motion to suppress, "we review the district court's factual findings for clear error and consider the evidence in the light most favorable to the Government." *United States v. Edwards*, 813 F.3d 953, 959 (10th Cir. 2015) (quoting *United States v. Haymond*, 672 F.3d 948, 958 (10th Cir. 2012)). We "accept the factual findings of the district court[] and its determination of witness credibility[] unless they are clearly erroneous." *United States v. Chavez*, 534 F.3d 1338, 1343 (10th Cir. 2008) (internal alteration omitted). "A finding of fact is clearly erroneous if it is without factual support in the record or if, after reviewing all of the evidence, we are left with the definite and firm conviction that a mistake has been made." *Hamric v. Wilderness Expeditions, Inc.*, 6 F.4th 1108, 1119 (10th Cir. 2021). We review the district court's ultimate legal determination based on those facts de novo. *See United States v. Burson*, 531 F.3d 1254, 1256 (10th Cir. 2008); *United States v. Zamudio-Carrillo*, 499 F.3d 1206, 1209 (10th Cir. 2007).

a.

Jones first argues the district court erred in finding the agents had probable cause to arrest him and therefore also erred in denying his motion to suppress evidence that was found as a result of his arrest.

The Fourth Amendment does not prohibit warrantless arrests based on probable cause. *Zamudio-Carrillo*, 499 F.3d at 1209. An officer has probable cause to make a warrantless arrest when the officer has "learned of facts and circumstances through reasonably trustworthy information that would lead a reasonable person to believe that an offense has been or is being committed by the person arrested." *United States v. Morris*, 247 F.3d 1080, 1088 (10th Cir. 2001) (quoting *United States v. Vazquez–Pulido*, 155 F.3d 1213, 1216 (10th Cir. 1998)). The agents knew Jones had been convicted of a felony, and they knew he was now prohibited from possessing a firearm. The question for us is whether the district court's finding that the agents saw Jones in possession of a firearm is clearly erroneous.

Jones argues Agent Molinari's statement that he believed Jones had a gun because they "were looking for one" renders his belief speculative. Aplt. Op. Br. at 12. He likens his case to *Beck v. Ohio*, 379 U.S. 89 (1964), and *United States v. Coker*, 599 F.2d 950 (10th Cir. 1979). Both *Beck* and *Coker* make clear that probable cause cannot exist in absence of hard facts connecting the defendant to the crime. *See* 379 U.S. 89, 92 (1964); 599 F.2d 950, 951 (10th Cir. 1979). However, both cases make equally clear that we defer to the district court's factual findings and credibility determinations unless they are clearly erroneous. *See Beck*, 379 U.S. at 92; *Coker*, 599 F.2d at 951. Here, the district court found, as a matter of fact, that the agents did see Jones carrying a gun. Agents Molinari and Gillespie testified they saw Jones with a gun and that Agent Dunning had also seen the gun. Agent Molinari had ATF and military training and experience and knew what a gun looked like. The

agents had a clear view of Jones for over an hour. Nothing in the record calls the agents' veracity into question. The mere fact that the agents were investigating Jones for illegal possession of a gun, and therefore had some reason to expect to see him with a gun, does not render their observation that the object he was carrying was a gun speculative. Nor does this fact render the district court's conclusion that the agents saw a gun clearly erroneous.

The district court did not clearly err in finding the agents saw Jones with a gun and therefore had probable cause to arrest him. Because Jones does not otherwise contest the validity, scope, or execution of the warrants obtained based on his arrest, the district court did not err by denying his motion to suppress evidence obtained through those warrants.

b.

Jones next argues the district court erred in finding he was not so incapacitated as to vitiate his waiver of his *Miranda* rights and thereafter denying his motion to suppress his confession.

"The Fifth Amendment affords citizens the right to remain silent, to have an attorney present, and to be informed of these rights when the individual is both (1) in custody and (2) subject to interrogation by police." *United States v. Woody*, 45 F.4th 1166, 1176 (10th Cir. 2022). The suspect may waive those rights if he so chooses, and the police may then interrogate him without an attorney present. "In order to be effective, a waiver must be made 'voluntarily, knowingly, and intelligently.'" *Smith v. Mullin*, 379 F.3d 919, 932 (10th Cir. 2004) (quoting *Miranda v. Arizona*, 384 U.S.

436, 444 (1966)). A waiver is "knowing" and "intelligent" if it was "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* (citing *United States v. Morris*, 287 F.3d 985, 989 (10th Cir. 2002)). In making this determination, "we employ a totality of the circumstances approach." *Burson*, 531 F.3d at 1256–57. Under this approach, the court may consider, among other things, the suspect's mental state and whether he was intoxicated. *See id.* at 1257.

As evidence that he did not knowingly and intelligently waive his *Miranda* rights, Jones cites his lack of sleep and his drug use earlier that day. He argues he was "substantially impaired at the time he allegedly waived *Miranda*, being high on opioids and marijuana and not having slept to the point where he could not spell his own name," and, therefore, he was "incapable of making a knowing, voluntary, and intelligent *Miranda* waiver." Aplt. Op. Br. at 13.

However, the fact that a suspect used drugs earlier in the day will not, by itself, render a waiver unknowing or unintelligent. Nor will tiredness. In *United States v. Curtis*, for example, we found the suspect validly waived his *Miranda* rights even though "he was under the influence of marijuana, crack cocaine[,] and alcohol he had consumed earlier that day," slurred his speech somewhat, "la[id] down and close[d] his eyes," and "look[ed] a little punchy." 344 F.3d 1057, 1065 (10th Cir. 2003). In that case, the district court noted the suspect "appear[ed] to think long and hard about [the waiver] before kind of resignedly initialing that portion [of the waiver]," "recollect[ed] details" about the days' events, and "his memory appear[ed]

to be good." *Id.* at 1065–66. Finally, the officer who interrogated the suspect testified that he appeared lucid and answered questions. *Id.* "After hearing this testimony and viewing the videotape of the confession itself the district court concluded that the evidence did not indicate an impairment such that the confession was not voluntary and that Defendant was not operating under his own free will." *Id.* (alterations, internal quotation marks, and footnotes omitted). We therefore concluded the waiver was valid.

We reach the same result here. The district court reviewed video of the interrogation and heard testimony from Agent Gillespie. Agent Gillespie testified Jones did not appear so intoxicated that he felt a need to stop the interrogation. The district court clearly believed Agent Gillespie's testimony, and there is nothing to suggest he lied. The video shows Jones alert, answering questions, and negotiating with the agents. He remembers details of events from earlier in the day and details of other crimes. The totality of the circumstances does not clearly show Jones was too incapacitated to waive his *Miranda* rights knowingly, intelligently, and voluntarily. Therefore, the district court did not clearly err in finding Jones was not incapacitated and therefore the *Miranda* waiver was valid. It did not err by denying Jones' motion to suppress his confession.

III.

For the reasons stated above, we AFFIRM the district court's denial of Jones' motion to suppress.

Entered for the Court

Allison H. Eid
Circuit Judge