

APR 28 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GARY RUSHWAM,

Defendant - Appellant.

No. 07-10245

D.C. No. CR-05-00432-KJD/RJJ

MEMORANDUM *

Appeal from the United States District Court
for the District of Nevada
Kent J. Dawson, District Judge, Presiding

Submitted April 15, 2008 **
San Francisco, California

Before: FERGUSON, TROTT, and THOMAS, Circuit Judges.

Gary Rushwam appeals his jury conviction and sentence of 188 months for being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

924(a)(2). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the conviction and sentence.

We review de novo whether a defendant's Fourth, Fifth, or Sixth Amendment rights were violated. United States v. Van Poyck, 77 F.3d 285, 290 (9th Cir. 1996) (Fourth Amendment); United States v. Hernandez, 476 F.3d 791, 796 (9th Cir. 2007) (Fifth Amendment); United States v. Ortega, 203 F.3d 675, 679 (9th Cir. 2000) (Sixth Amendment).

We reject Rushwam's argument that the district court's admission of recorded telephone calls that Rushwam made from jail constituted a Fourth, Fifth, or Sixth Amendment violation. Rushwam had no reasonable expectation of privacy in the outbound calls he made from jail, Van Poyck, 77 F.3d at 291, and the recorded conversations were not the result of a government-initiated interrogation. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980); Ortega, 203 F.3d at 680.

We review de novo a district court's rulings on a motion to suppress and the validity of a search warrant. United States v. Crews, 502 F.3d 1130, 1135 (9th Cir. 2007). "A magistrate judge's finding of probable cause is entitled to great deference and this court will not find a search warrant invalid if the magistrate

judge had a ‘substantial basis’ for concluding that the supporting affidavit established probable cause.” Id.

We reject also Rushwam’s argument that the search warrant was not supported by probable cause, and that the firearms were not in plain view. The totality of the circumstances supports a determination that probable cause for the search warrant existed. Illinois v. Gates, 462 U.S. 213, 230-31 (1983).

Furthermore, the firearms were lawfully seized pursuant to the plain-view doctrine because: 1) Officer Hernandez was lawfully present in the room where the firearms were located pursuant to the search warrant; 2) the incriminating nature of the firearms was immediately apparent because Officer Hernandez knew that Rushwam was a convicted felon; and 3) Officer Hernandez had a lawful right to seize the firearms as evidence of a crime because he knew that Rushwam was a convicted felon. See United States v. Wong, 334 F.3d 831, 838 (9th Cir. 2003).

We review de novo whether a jury instruction accurately describes the elements of the charged offense. United States v. Heredia, 483 F.3d 913, 921 (9th Cir. 2007) (en banc). We review for abuse of discretion whether the required factual foundation for the requested instruction exists. Id.

Rushwam’s argument that the district court’s possession instruction did not provide the jury with an explanation of constructive possession fails also. The

district court's instruction was taken almost verbatim from the Ninth Circuit Model Jury Instruction. See NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS § 3.18 (2007). "This instruction is all-inclusive. There is no need to attempt to distinguish further between actual and constructive possession and sole and joint possession." Id. at cmt. This instruction sufficiently covers constructive possession.

Finally, we review de novo "a district court's conclusion that a prior conviction may be used as a sentencing enhancement." United States v. Gallaher, 275 F.3d 784, 789 (9th Cir. 2001).

The plain language of 18 U.S.C. § 924(e)(1) requires that the defendant have "three previous convictions." Because an Alford plea may properly be considered a conviction for the purposes of imposing a sentence enhancement, we reject Rushwam's argument that the district court improperly used two prior Alford pleas to calculate his sentence enhancement. See United States v. Guerrero-Velasquez, 434 F.3d 1193, 1194, 1197 (9th Cir. 2006).

AFFIRMED.