IN THE UNITED STATES COURT
OF APPEAL FOR THE TENTH CIRCUIT

United States of America v. Porter

Case No. 22-1134

Attachment A
Opinion

FILED
United States Court of Appeals
Tenth Circuit

May 2, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

AARON LEE PORTER,

Defendant - Appellant.

No. 22-1134

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:20-CR-00283-RBJ-1)

Kathleen Shen, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, Office of the Federal Public Defender, with her on the briefs), Denver, Colorado, for Defendant - Appellant.

Kyle Brenton, Assistant United States Attorney (Cole Finegan, United States Attorney, with him on the brief), Denver, Colorado, for Plaintiff - Appellee.

Before **EID**, **EBEL**, and **KELLY**, Circuit Judges.

KELLY, Circuit Judge.

Defendant-Appellant Aaron Lee Porter entered a conditional plea of guilty to one count of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), and was sentenced to 43 months' imprisonment and three years' supervised release. He

reserved the right to appeal the denial of his motion to suppress a firearm found inside of his backpack. On appeal, he argues that the Denver police conducted a warrantless search of his backpack and that the district court erred in finding that (1) he had abandoned the backpack, and (2) the firearm would have been discovered pursuant to an inventory search. Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm.

Background

Mr. Porter was identified as a suspect in a July 22, 2020, shooting and a warrant was issued for his arrest. A wanted bulletin contained a physical description, a short account of his criminal history, and information that he was suspected of membership in the Crips gang. Mr. Porter was wanted for attempted murder and believed to be armed and dangerous and in possession of a handgun. Later that day, detective Jay Lopez found Mr. Porter at the warehouse where he worked. From his vehicle, Detective Lopez saw Mr. Porter walk into the building carrying a dark colored backpack.

Detective Lopez then entered the building. Once inside, he confirmed with office manager Scott Williamson that Mr. Porter worked there. Mr. Williamson then called Mr. Porter into his office and Mr. Porter was arrested. Detective Lopez asked Mr. Porter "if there were any personal belongings there at the job site that he wanted to bring with him." 4 R. 14. Mr. Porter stated that "he didn't have any personal

belongings." Id. Detective Lopez then "asked him what about the backpack I watched you walk in with, and he responded he didn't have a backpack." Id.[1]

Detective Lopez then went back into the warehouse and informed Mr. Williamson that Mr. Porter had entered the building carrying a backpack and asked where Mr. Porter kept his belongings. Mr. Williamson escorted Detective Lopez back to Mr. Porter's workstation and after briefly searching the area, saw Mr. Porter's backpack at a nearby workstation about 15 or 20 feet away. Mr. Williamson asked another employee if the backpack belonged to Mr. Porter. Reluctantly, the employee confirmed that it did. After confirming that the bag belonged to no one else, Mr. Williamson urged Detective Lopez to take it with him.

Detective Lopez picked up the backpack and shook it. Although fairly empty, he felt something compact and heavy — it felt like a gun. He then opened it looking for identification which revealed a handgun's grip. At that point, Detective Lopez zipped up the backpack. Officers then applied for a search warrant and pursuant to that warrant discovered a Smith & Wesson .40 caliber handgun.

The district court denied Mr. Porter's motion to suppress, finding that Mr. Porter had abandoned the backpack, and thereby renounced any expectation of privacy in it for purposes of the Fourth Amendment, and alternatively, that the gun would inevitably have been discovered pursuant to a valid inventory search.

[1] Although a factual discrepancy was recognized at the suppression hearing, Mr. Porter does not dispute this conversation occurred on appeal. 4 R. 24–25; Aplt. Br. at 8.

Discussion

In reviewing the denial of a motion to suppress, we uphold the district court's factual findings unless clearly erroneous and view the evidence in the light most favorable to the prevailing party, here the government. See United States v. Tafuna, 5 F.4th 1197, 1200 (10th Cir. 2021). Fourth Amendment reasonableness is reviewed de novo. United States v. Johnson, 43 F.4th 1100, 1107 (10th Cir. 2022).

Ordinarily the Fourth Amendment requires officers obtain a warrant before searching or seizing private property. Camara v. Mun. Ct., 387 U.S. 523, 528–29 (1967). The Fourth Amendment's protections do not apply, however, where a defendant has abandoned property prior to a warrantless search. United States v. Hernandez, 7 F.3d 944, 947 (10th Cir. 1993). Whether abandonment has occurred is an objective inquiry based in "words spoken, acts done, and other objective facts." United States v. Jones, 707 F.2d 1169, 1172 (10th Cir. 1983) (quoting United States v. Kendall, 655 F.2d 199, 202 (9th Cir. 1981)). Overall, the court considers whether, in the eyes of a reasonable officer, the defendant manifested an intent to disavow ownership of the property. See Jones, 707 F.2d at 1172–73; United States v. Nowak, 825 F.3d 946, 948–49 (8th Cir. 2016) (per curiam); United States v. Basinski, 226 F.3d 829, 836 (7th Cir. 2000). We defer to the district court's findings absent clear error. Jones, 707 F.2d at 1172.[2]

[2] We recognize our cases have not always articulated the standard of review of abandonment findings in a unitary manner. See Jones, 707 F.2d at 1172 (clearly erroneous); United States v. Trimble, 986 F.2d 394, 399 (10th Cir. 1993) (same); United States v. Hernandez, 7 F.3d 944, 947 (10th Cir. 1993) (same); but cf. United

Mr. Porter faults the reasoning underlying the district court's abandonment determination for being unduly confined. He maintains that abandonment requires a clear, unambiguous, and unequivocal disclaimer of ownership. In doing so, Mr. Porter urges us to look at the entire context of his conversation with Detective Lopez. In his view, his response to Detective Lopez's question about whether he had a backpack is qualified by Detective Lopez's initial question "if there were any personal belongings there at the job site that he wanted to bring with him." 4 R. 14 (emphasis added). Read in context, Mr. Porter posits, his responses indicating he "didn't have any personal belongings" and "didn't have a backpack," cannot be understood to mean he does not have any backpack at all but rather none that he wanted to take with him to the station. Aplt. Br. at 10. The district court considered this argument at the suppression hearing and was unpersuaded. 4 R. 89–91, 93–94, 117–18. Rather, the facts suggested that Mr. Porter subjectively intended to disclaim any ownership of the backpack. Likewise, the court found that a reasonable officer would believe Mr. Porter had abandoned the bag. Id. 117.

States v. Austin, 66 F.3d 1115, 1118 (10th Cir. 1995); United States v. Garzon, 119 F.3d 1446, 1449 (10th Cir. 1997) (interpreting the abandonment finding as "subsum[ing] both a subjective and an objective component," the former being a factual finding reviewed for clear error and the latter, a question of law reviewed de novo); United States v. Juszczyk, 844 F.3d 1213, 1214 (10th Cir. 2017) (applying the standard as articulated in Garzon); United States v. Fernandez, 24 F.4th 1321, 1330 (10th Cir. 2022) (same). To the extent there is an apparent inconsistency, our earliest pronouncement controls. See Haynes v. Williams, 88 F.3d 898, 900 n.4 (10th Cir. 1996); see also Garzon, 119 F.3d at 1453 (Porfilio, J., dissenting).

The district court considered Mr. Porter's theory that he meant that he did not have any belongings he wanted to take with him to the station. But that was belied by Mr. Porter's next statement that he didn't have a backpack. Even if Mr. Porter's interpretation is plausible, choosing one of two plausible interpretations of the evidence cannot be clearly erroneous. Anderson v. Bessemer City, N.C., 470 U.S. 564, 574 (1985).

Mr. Porter nonetheless attempts to distinguish this case from our other abandonment cases, claiming that in those cases, the defendant's denial of ownership was clear and unequivocal. But it is hard to imagine a statement plainer than "I don't have a backpack." The statement is clearer still when viewed in conjunction with the fact that Detective Lopez saw Mr. Porter walk into the job site with a backpack. That ambiguity might be read into a statement does not mean it should. And certainly, plausible ambiguity does not yield clear error.

Mr. Porter also imparts significance to the fact that Detective Lopez did not ask if the bag "belonged" to Mr. Porter. But this is a distinction without a difference. An objectively reasonable officer would view Mr. Porter's statements as unequivocal. Indeed, these facts squarely align with those in United States v. Fernandez, 24 F.4th 1321 (10th Cir. 2022). There, the defendant "said that he did not have any luggage" and this court found it "reasonable for [the agent] to infer that there was no luggage on the bus being claimed by Mr. Fernandez." Id. at 1331 (emphasis in original).

Because Mr. Porter abandoned the backpack and thus surrendered an expectation of privacy therein, the subsequent search was reasonable. In light of our

holding, we need not address alternative theories relied upon by the district court or the government.

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

May 02, 2023

Kathleen Shen
Office of the Federal Public Defender
Districts of Colorado and Wyoming
633 Seventeenth Street, Suite 1000
Denver, CO 80202

RE: 22-1134, United States v. Porter
Dist/Ag docket: 1:20-CR-00283-RBJ-1

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Kyle W. Brenton

CMW/sds