

JAN 25 2010

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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NOT FOR PUBLICATION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.

RUSSELL MODDISON,

Defendant - Appellant.

No. 09-30179

D.C. No. 1:08-CR-00118-JDS-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted December 8, 2009
Portland, Oregon

Before: FARRIS, D.W. NELSON and BERZON, Circuit Judges.

Moddison was charged by Indictment with being a felon in possession of a firearm. After a one day jury trial, he was found guilty.

A tip from a confidential informant indicated that Moddison possessed a silver Jennings 9-millimeter hand gun. Investigation led to a high speed chase and

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

subsequent arrest of Moddison. His motion for disclosure of the confidential source was denied.

We understand Moddison's argument that allowing the government to elicit statements regarding the substance of the confidential source's tip violated his right to confront the witness. The confidential source did not testify but a deputy U.S. Marshal testified as to the confidential source's role in the investigation and subsequent apprehension of Moddison.

The government conceded that the hearsay testimony was admitted in error. The question for review is whether the violation of the confrontation clause was harmless beyond a reasonable doubt. It was. *See United States v. Nielsen*, 371 F.3d 574, 581-82 (9th Cir. 2004).

It is not disputed that the firearm could only have belonged to Moddison or his passenger. Moddison was the only person near the bush where the gun was discovered. He was apprehended 10 to 15 feet from the discovery point, and his escape route led him to that point. Matching ammunition for the weapon was found in the firearm and in a backpack full of men's clothing inside of a man's tube sock.

Moddison's conviction resulted from the abundant evidence of who possessed the gun, not the hearsay statement. The tip initiated the investigation, but it was not the basis for the conviction.

AFFIRMED.