IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
February 11, 2020

Lyle W. Cayce
Clerk

No. 18-50627

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

ALEXIS AGUILAR-ALONZO,

Defendant – Appellant.

Appeal from the United States District Court
for the Western District of Texas

Before SMITH, WIENER, and ELROD, Circuit Judges.

PER CURIAM:

The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), rehearing en banc is DENIED.

In the poll, 4 judges voted in favor of rehearing en banc, and 12 voted against. Judges Jones, Smith, Ho, and Oldham voted in favor. Chief Judge Owen and Judges Stewart, Dennis, Elrod, Southwick, Haynes, Graves, Higginson, Costa, Willett, Duncan, and Engelhardt voted against.

ENTERED FOR THE COURT:

/s/ Jennifer Walker Elrod

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Jennifer Walker Elrod

United States Circuit Judge

JERRY E. SMITH, Circuit Judge, dissenting from the denial of rehearing en banc:

The well-intentioned judges in the majority badly misapply the standard of review. The result is a remand that should be an affirmance. The Department of Justice, with plenty of opportunity to object, did not. And most regrettably, only one-quarter of the active judges find this matter enbancworthy. I respectfully dissent.

For reasons that are legitimate, it is much more difficult to engage the en banc court where the losing party does not seek rehearing. That takes some wind out of the sails of the judges who question the result; even judges who spot significant error in the panel's reasoning or result are less likely to take it on themselves to rescue the case where the aggrieved party makes no effort. And those judges must exercise commendable care to make sure they're not viewed as advocates for one side or the other.

In this case, judges should favor en banc submission as advocates not for an enhanced sentence but for the rule of law—for proper application of the standard of review and consistency in that application. Although this stubborn majority, in its second, substitute opinion, finally admits to the correct standard of review, it pulverizes that standard by substituting its own *de novo* review of the facts for the finding of the district court.

Even a *de novo* review should result in affirmance. The question is whether Aguilar-Alonzo explicitly told his young girlfriend that if she really loved him, she should help transport the contraband; or, similarly, that if she did not, he would break up with her. Although there's no direct evidence that he said something like that, there's also no direct evidence that he did not.

With that in mind, the majority declines to consider any circumstantial evidence. If it had done so, the result would be obvious: There is no

circumstantial evidence that even remotely suggests that Aguilar-Alonzo did not use friendship or affection to obtain his girlfriend's help. On the other hand, there is much circumstantial evidence from which the district judge easily decided that the defendant did so: (1) They were in a year-long romantic relationship; (2) she was pregnant by him; (3) he lived in a trailer right behind the house where she and her parents resided; (4) she was nineteen years old; and (5) she told the probation officer that she'd "agreed to [the defendant's] request [to help with the crime] out of fear he would break up with her."

In light of this evidence, the majority is wrong to pretend that there's not, in the majority's words, "some evidence" that Aguilar-Alonzo said or did enough to warrant the enhancement. The majority never even uses the word "circumstantial" or explains how, in light of that evidence, Judge Counts's finding is not "plausible," which is customarily defined as "permissible," "conceivably true," "possibly correct," or "reasonable."

This court routinely uses circumstantial, or indirect, evidence where direct evidence is wanting. Recent examples abound. Take *United States v. Drake*, No. 19-50277, 2020 U.S. App. LEXIS 459 (5th Cir. Jan. 20, 2020) (per curiam) (unpublished). It is, conveniently, a sentencing guideline enhancement case. The panel upheld the enhancement "based on [the district judge's] finding that the firearms were found in close proximity to drugs and drug paraphernalia." *Id.* at *1. The defendant urged that the distance was 70 feet and therefore not in close proximity. The unanimous panel noted that the district court "did not discuss the distance between the drug paraphernalia and black-tar heroin, though defense counsel had just argued that the distance was too great . . . ." *Id.* at *5. Despite the government's failure to present proof to counter the 70-foot claim, the panel credited the judge's finding: "We conclude the district court implicitly inferred from these facts that Drake's firearms

were in close proximity . . . . The . . . finding was plausible and therefore not clearly erroneous." *Id.*

This is the way it should work: There was (as the *Aguilar-Alonzo* majority would put it) "no evidence" of close proximity; as the *Drake* panel explained, the district judge made no finding as to the distance. But he used all the circumstantial evidence to discard the defendant's 70-foot theory, and the panel gave due deference to that decision as "plausible."

The author of the *Aguilar-Alonzo* opinion was on a recent panel that employed similar reasoning in a civil case, *Jones v. Portfolio Recovery Associates, L.L.C.*, No. 18-50703, 2019 U.S. App. LEXIS 36943 (5th Cir. Dec. 12, 2019) (per curiam) (unpublished). An element of the cause of action was that the debt was a consumer debt. The district judge granted judgment as a matter of law "because [the plaintiff] did not offer any evidence regarding [the bank account in question]." *Id.* at *6. The panel reversed, agreeing with the plaintiff "that the jury could reasonably infer that the [debt] at issue was the QVC credit card, which was used exclusively for personal purchases, and, therefore, a consumer debt." *Id.* at *7. As the panel explained, "a[n] inference is permissible as long as it is reasonable in light of the evidence presented." *Id.* at *10. "From [the circumstantial] evidence, a reasonable jury could infer that, if the Comenity debt was associated with a distinct merchant, the Synchrony Bank debt likely was as well." *Id.* at *11. The absence of the "necessary" direct evidence "is not enough to overturn the jury's verdict. We permit—in fact implore—juries to process contradictory information and make inferences to reach a verdict . . . . It was not the *clearest* path to victory for Jones, but it was a *reasonable* path, which is all we require." *Id.*[1]

[1] Take a plain, generic hypothetical that examines how judges and juries find raw historical facts. Assume a trial in which the question is whether the traffic light was red

If, on the other hand, the panel in *Jones* had employed the same reasoning that the majority used in *Aguilar-Alonzo*, it would have said that *Jones* was a "no evidence" case because there was no direct evidence that the debt was a consumer debt. The reasoning of the two panels is irreconcilable.

So what is the hapless district judge or Fifth Circuit panel supposed to do in light of the published opinion in *Aguilar-Alonzo*? The panel majority has turned the standard of review upside down. By declining to explain what makes Judge Counts's decision neither "permissible," "conceivably true," nor "possibly correct," the majority tosses circumstantial evidence to the wind and imposes an unrealistic burden on the proponent of a sentencing enhancement. In any given case, it becomes a toss of the coin whether this court will affirm or reverse based on the whim of a randomly-assigned panel majority.

The vote of the active judges not to re-examine this untenable result is disappointing, though understandable for the reasons I have explained. I respectfully dissent from the denial of rehearing en banc.

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when the tort defendant drove through the intersection. Suppose that a bystander testified that a car in the next lane stopped at the same light but the defendant didn't. Assume further that there was no testimony whether the light was red or green, just the uncontested evidence that the other car stopped. The panel majority in *Aguilar-Alonzo* would say that there's "no evidence" that the light was red and that any contrary finding is not "plausible" or "conceivably true." Sure, it's possible that the other car stalled or was avoiding a squirrel, or its driver was texting. But is it "implausible" that the other car stopped because the light was red, even in the absence of direct testimony?

In its merits brief, the government helpfully applied this reasoning to the facts in *Aguilar-Alonzo*: "Just as seeding one flinch circumstantially evidences an assailant's raised fist, [Aguilar-Alonzo's girlfriend's] expression of concern about the relationship circumstantially pointed to [Aguilar-Alonzo's] use of her affection to involve her in his crime." We use trial judges and juries to decide such facts, not circuit judges to overturn them.