

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1743
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CARLOS ENRIQUE GUTIERREZ-AMEZQUITA,
a/k/a Roberto Lugo, Jr.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-28-A)

(April 19, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Carlos Enrique Guitierrez-Amezquita (Guitierrez) was convicted by a jury of illegal re-entry into the United States after deportation, in violation of 8 U.S.C. § 1326. He appeals his conviction, contending that the evidence was

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

insufficient to support it. As our review of the record demonstrates that it is not devoid of evidence pointing to his identity or his guilt, we affirm.

I

FACTS AND PROCEEDINGS

Trial testimony demonstrated the following chronology of events. "Carlos Enrique Gutierrez" applied for a Texas driver's license on June 12, 1986. He listed his date of birth as November 26, 1961, and his place of birth as Guatemala. He indicated that he had previously been issued a Texas identification card, number 08536273, and that a Texas driver's license, number 09038022, had been issued in that name as well. The government introduced evidence that the Texas Department of Public Safety had in fact issued a card, number 08536273, in that name, birth date November 26, 1961, bearing Gutierrez's photograph.

In April 1988, Gutierrez applied for legalization under the Immigration Reform and Control Act of 1986. The application indicated that he was born in Guatemala on November 26, 1961, and was a citizen of that country. He was granted temporary residence on December 3, 1988.

On January 30, 1989, Gutierrez - under the name "Carlos Enrique Gutierrez" - was convicted of delivery of cocaine and was sentenced to five years of imprisonment in the Texas Department of Corrections (TDC). While imprisoned in TDC, Gutierrez admitted - during an interview with a special agent of the Immigration and Naturalization Service (INS) - that he illegally entered the U.S.

without inspection on February of 1981 at Del Rio, Texas. Gutierrez was then deported to Guatemala on June 9, 1989. He has not subsequently requested the permission of the Attorney General to re-enter the U.S.

On December 6, 1990, Jessica Aminta Gutierrez was born in Fort Worth, Texas, to Jessica Lainfiesta and one Carlos Gutierrez. The birth certificate reflects that "Carlos Gutierrez" was born November 26, 1961, in Guatemala.

On September 24, 1991, an individual applied for a passport under the name of Robert Lugo, Jr. "Lugo" requested an immediate issuance because he was scheduled to depart the U.S. for Guatemala within 72 hours. Lugo claimed that he was born February 2, 1963, in Brownsville, Texas. During an interview with Sylvia Eisele, the Fraud Program Coordinator for the U.S. Department of State, Lugo perspired profusely. The identification documents Lugo presented appeared to be newly issued and were of a type that is easy to obtain. Consequently, no passport was issued.

Lugo again applied for a passport in November 1992, providing additional information in the form of a Texas driver's license and a letter from Hemphill Insurance Company. The letter had been altered to reflect that Lugo had purchased insurance on his 1977 van in 1977, a date ten years earlier than the date on which the insurance was actually purchased. If the letter were correct, Lugo would have purchased insurance on his van when he was fourteen years old. Lugo also presented a birth certificate which he represented to be that of his father, Roberto Lugo Aguirre. But

the date of birth on that certificate did not match the dates on Lugo's prior applications. Again, no passport was issued.

"Lugo" was arrested on February 18, 1993, at his residence, located at 1013 East Hammond, Fort Worth, Texas. Present was a female child named Jessica Aminta Gutierrez. Also present was an envelope postmarked February 8, 1993, from the Fort Worth Water department addressed to Carlos E. Gutierrez at 1013 East Hammond. Water department records indicated that Carlos Enrique Gutierrez applied for water service at 1013 East Hammond on February 20, 1992. The application listed Jessica E. Castillo as Gutierrez's spouse, and 09038022 as his driver's license number. The referenced license number matches the license issued to "Carlos Enrique Gutierrez" which bears appellant Gutierrez's photograph.

After receiving 17 requests for copies of that birth certificate, beginning about 1982, the state registrar of the Bureau of Vital Statistics for the State of Texas stopped honoring requests for copies of the birth certificate of Robert Lugo, Jr., born February 2, 1963, in Brownsville, Texas. The Social Security Administration issued an original and six duplicates of card number XXX-XX-XXXX in the name of Roberto Lugo, Jr.

The fingerprints contained in (1) the penitentiary records from the TDC on Carlos Gutierrez, (2) the warrant of deportation for Carlos Enrique Gutierrez, (3) a fingerprint card taken of "Roberto Lugo, Jr." during his 1992 passport application, and (4) a fingerprint card taken of appellant Gutierrez when he was arrested on February 18, 1993, were all taken from the same individual.

A jury convicted Gutierrez of illegal re-entry after deportation. The court sentenced Gutierrez to 120 months of imprisonment and a two-year term of supervised release. Gutierrez timely appealed.

II

ANALYSIS

Gutierrez contends that he is in fact Roberto Lugo, Jr. and that he was born in Brownsville, Texas. He asserts that he used the name "Carlos Enrique Gutierrez" as an alias when he was arrested and processed through TDC. He argues that the evidence was insufficient to convict him of illegal re-entry after deportation.

To establish illegal re-entry after deportation, the government must prove that the defendant (1) was an alien at the time of the alleged offense; (2) had previously been arrested and deported from the United States; (3) was subsequently found to be present unlawfully in the United States; and (4) had not received consent of the Attorney General of the United States to apply for re-admission to this country since his previous deportation. United States v. Cardenas-Alvarez, 987 F.2d 1129, 1131 (5th Cir. 1993).

Gutierrez did not move for acquittal at the close of the government's evidence; neither did he file such a motion at the close of all the evidence. "In this circumstance, appellate review is limited to determining whether there was a manifest miscarriage of justice, that is, whether the record is `devoid of evidence

pointing to guilt.'" United States v. Daniel, 957 F.2d 162, 164 (5th Cir. 1992) (citation omitted).

Under the Daniel standard, the government's evidence is more than sufficient to establish that the appellant is Carlos Enrique Gutierrez-Amezquita. The government showed that Carlos Enrique Gutierrez-Amezquita was born in Guatemala and was an alien. The government further proved that Carlos Enrique Gutierrez-Amezquita had been arrested previously for delivery of cocaine and deported to Guatemala, and that he was, therefore, unlawfully present in the United States. Last, the government demonstrated that Carlos Enrique Gutierrez-Amezquita had not received the consent of the Attorney General of the United States to apply for re-admission since his previous deportation. Accordingly, the record is not devoid of evidence pointing to his identity or to his guilt. Under such circumstances, we will not reverse a jury conviction for insufficiency of evidence.

AFFIRMED.