**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 92-1673
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FERNANDO MENA,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
CR4 92 123 Y

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June 2, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Fernando Mena appeals his conviction of, and sentence for, possession of heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Finding no error, we affirm.

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Mena argues that the prosecutor improperly commented on his post-arrest silence. First, he contends that the prosecutor's attempt to impeach his exculpatory story on cross-examination was an improper comment on his post-arrest, pre-Miranda silence. Second, he argues that the prosecutor's comment on his silence until trial during the prosecutor's rebuttal closing argument was an improper comment on his post-arrest, post-Miranda silence.

A.

As an initial matter, the government argues that if error is found from its cross-examination of Mena,[1] the plain error standard should apply, as Mena's objection at trial, which was based upon the Fifth-Amendment privilege against self-incrimination as interpreted in Doyle v. Ohio, 426 U.S. 610, 617 (1976), is not the issue Mena raises on appeal. The government contends that Mena is now arguing a nonconstitutional issue, i.e., that the prejudicial effect of the admission of the impeached statement as evidence outweighed its probative value.

The government is correct. At the initial objection and the bench conference immediately following it, Mena's attorney argued

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[1] Mena's objection at cross-examination is as follows:

> Q: [Prosecutor] And when Inspector Griffin and Inspector Shaffer pulled the narcotics out of your shoe, did you think at that time to tell Inspector Griffin that Sergio had given you these shoes?
>
> [Mena's attorney]: Objection, Your Honor. It impinges on his Fifth Amendment privilege of self-incrimination, a violation of Doyle v. Ohio.

The bench conference that followed the objection focused on constitutional analysis. Mena did not raise another basis for his objection.

his objection solely on constitutional grounds, specifically mentioning the Fifth-Amendment privilege of self-incrimination and Doyle. Mena's attorney did not assert any nonconstitutional basis for his objection. On appeal, Mena now asserts error based upon pre-Doyle cases that were not decided on constitutional grounds. See United States v. Hale, 422 U.S. 171, 173 (1975); United States v. Impson, 531 F.2d 274, 275 (5th Cir. 1976), appeal after remand, 562 F.2d 970 (5th Cir. 1977, cert. denied, 434 U.S. 1050 (1978).

Using a balancing approach, evidentiary laws, and supervisory powers, the Supreme Court has determined that evidence of a defendant's post-arrest silence is inadmissible as impeachment of his exculpatory story. Hale, 422 U.S. at 176-81. Interpreting Hale, we have determined that evidence of a defendant's post-arrest, pre-Miranda silence lacked probative value to outweigh its prejudicial effect. Impson, 531 F.2d at 278-79. A year later, the Supreme Court in Doyle recognized that the Constitution protects post-arrest, post-Miranda silence. United States v. Carter, 953 F.2d 1449, 1464 (5th Cir.), cert. denied, 112 S. Ct. 2980 (1992). Consequently, Mena's asserted error on appeal on nonconstitutional grounds is not the issue raised by his objection at trial based upon constitutional grounds.

Therefore, we will not review the issue unless it rises to the level of plain error. United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). "`Plain error' is error which, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the

fairness, integrity or public reputation of judicial proceedings." United States v. Lopez, 923 F.2d 47, 50 (5th Cir.) (citation omitted), cert. denied, 111 S. Ct. 2032 (1991). It is a mistake so fundamental that it constitutes a "miscarriage of justice." Id. Errors of constitutional dimension will be noticed more freely under the "plain error" doctrine than will less serious errors. United States v. Munoz-Romo, 947 F.2d 170, 179 (5th Cir. 1991), vacated on other grounds, 113 S. Ct. 30 (1992), on remand, 1993 WL 112730, No. 89-2345 (5th Cir. Apr. 14, 1993).

The government argues that the prosecutor's cross-examination of Mena as to his silence was not plain error because Mena was not under arrest for Miranda purposes, since Mena was in the unique situation of a customs entry port. Therefore, Hale and Impson do not even apply.

A suspect is "`in custody' for Miranda purposes when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." United States v. Bengivenga, 845 F.2d 593, 596 (5th Cir.) (en banc), cert. denied, 488 U.S. 924 (1988). Applying Bengivenga, we have determined that a routine airport stop and questioning by customs officials of a traveler, including a secondary inspection, do not rise to the level of "in custody" under the reasonable person test. United States v. Park, 947 F.2d 130, 138 (5th Cir. 1991), vacated in part and remanded for

resentencing on other grounds, 951 F.2d 634 (5th Cir. 1992); United States v. Berisha, 925 F.2d 791, 797 (5th Cir. 1991).

Customs Inspector Charles Griffin initially detained Mena and took him to secondary inspection after noticing that Mena looked nervous, was waiting in the baggage area when he had no baggage to claim, and was walking stiffly in his tennis shoes. Griffin noticed that Mena's baggage declaration card misstated information as to his residence. A search of Mean's baggage revealed no contraband but also revealed no toiletry items, which Griffin thought was unusual. A computer check on Mena for prior criminal history proved negative.

Still not satisfied, Griffin obtained permission to conduct a personal search on Mean. Inspector Troy Shaffer accompanied Griffin and Mena as a witness. The two inspectors took Mena to a small, private, personal-search room and closed the door, whereupon Griffin conducted a pat-down check of Mena and then asked him to remove his shoes. After sensing a strong smell of glue in one of the shoes, Griffin gave the shoe to Shaffer, who slit open the cushion, exposing brown rocks of heroin.

Shaffer immediately told Griffin, who handcuffed Mena. Mena was not given his Miranda warnings until later, because Griffin and Shaffer did not immediately question him.

We may assume arguendo that, applying the reasonable person test to the above situation, once Mena passed from secondary inspection to a private personal search room where he was patted down and his tennis shoes were slit open, his freedom of movement

was restrained to the extent that he was "in custody" for Miranda purposes and that consequently, his silence following the discovery of heroin in his shoes was post-arrest and pre-Miranda. Even if it was, however, Mena has not shown plain error.

By the time of Mena's cross-examination, his story as to why he was in the United States differed markedly from what he allegedly had told Griffin. Griffin testified that Mena had told him that Mena lived in the United States but that he had been in Mexico for fifteen days on a family visit. At trial, Mena explained that he was coming to the United States for a job and to renew his residency permit and that he had received the shoes from Sergio Roman, the man who gave him the job.

Mena stated that he met Roman when he stopped to help him with his car. A month later, Mena met Roman as Mena was going to buy an airline ticket to the United States to renew his residency permit. Roman asked Mena whether he had a job in the United States and offered to give Mena a job and a place to live with others who worked for Roman.

Roman also offered Mena a pair of tennis shoes, which Roman said did not fit his son; Mena accepted the shoes. Mena stated that the shoes felt like any other tennis shoes he wore and did not bother him when walking. He stated that he did not know the shoes contained heroin and that he was surprised when Griffin and Shaffer found the heroin in the shoes.

By the time the prosecutor cross-examined Mena as to his silence when the inspectors found heroin in his shoes, the jury had

already heard Mena's unlikely story as to how he had obtained the shoes and the inconsistencies between Griffin's testimony and Mena's as to why Mena was in the United States. Additionally, the jury had the opportunity to feel the rocks of heroin found in the tennis shoes. Even without Mena's silence upon discovery of the heroin, the jury had ample evidence to determine Mena's credibility and to disbelieve his explanation. A "miscarriage of justice" did not result from the impeachment of Mena regarding his silence at the time heroin was discovered in his shoes. Therefore, the district court did not commit plain error when it allowed the impeachment.

B.

Mena argues that the prosecutor's comment on his silence until trial during the prosecutor's rebuttal closing argument[2] was an improper comment on his post-arrest, post-Miranda silence, which is protected by Doyle. In Doyle, 426 U.S. at 619, the Court clarified that the Due Process Clause embraces the right not to have one's post-arrest, pre-Miranda-warning silence used for impeachment at trial.

[2] The pertinent part of the prosecutor's rebuttal argument and Mena's objection are as follows:

> [Prosecutor] Why didn't we fingerprint the shoes? Maybe it was just because the defendant kept his story secret until he came to trial that there was some other person involved --
>
> [Mena's attorney]: Objection, your Honor . . . . The objection is referring to the defendant's post-arrest silence.
>
> The Court: Overruled.

The government argues that the prosecutor's comment was a fair response to Mena's closing argument questioning whether the government had proved its case.[3] "A conviction should not be set aside if the prosecutor's conduct . . . did not in fact contribute to the guilty verdict and was, therefore, legally harmless." United States v. Lowenberg, 853 F.2d 295, 302 (5th Cir. 1988) (internal quotations and citation omitted), cert. denied, 489 U.S. 1032 (1989).

Mena claims that the prosecutor's comment was not a fair reply to his closing argument, because the government originally had introduced the subject of fingerprints by asking Customs Agent Sherry Erickson, on direct examination, whether the baggie containing the heroin, which was inside the shoe, had been fingerprinted. Mena's argument ignores the fact that, earlier in the trial, when cross-examining Griffin, Mena's attorney specifically asked him whether any fingerprints were taken from the packages of heroin found inside the shoes. Also, it was the only time the prosecutor referred to Mena's post-arrest, post-Miranda silence. The government was entitled to make a "fair response in rebuttal" to Mena's argument regarding the government's failure to

[3] In closing, Mean's attorney asked the jury,

> What else has the government brought you? Nothing. Ms. Erickson was asked about fingerprints. Were any fingerprints found on this heroin? No . . . . Well, did anyone even attempt to fingerprint the shoes to see if there were any fingerprints on the shoes? Don't you think that would have been a reasonable thing for the government to do to prove to you beyond a reasonable doubt that Fernando Mena was guilty of knowing possession of heroin with the intent to distribute?

fingerprint the bags of heroin and the shoes. See Lowenberg, 853 F.2d at 303.

II.

Mena argues that the district court should not have increased his offense level for obstruction of justice based upon its finding that he had perjured himself at trial. See U.S.S.G. § 3C1.1. If a defendant "gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory," a district court may increase his offense level under section 3C1.1. United States v. Dunnigan, 113 S. Ct. 1111, 1116-18 (1993).

The Court also determined that if a defendant objects to an obstruction-of-justice enhancement resulting from his trial testimony, the district court "must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same," under the above-mentioned perjury definition. Id. at 1117. The district court's determination that enhancement is required is sufficient, however, "if the court makes a finding of an obstruction or impediment of justice that encompasses all of the factual predicates for a finding of perjury." Id.

The district court's finding of obstruction of justice based upon Mena's perjury at trial is as follows:

> This Court does not believe that Mr. Mena did not know that there was something illegal hidden in his shoes. The 253 grams of heroin found there were in rock and powder form and had to be extremely uncomfortable to

> walk upon . . . . [O]ne cannot believe that he did not know that some sort of contraband was hidden in the soles of his shoes.
>
> This Court is, consequently, convinced that defendant Mena lied from the witness chair about matters central to the charge against him. A two-level upward adjustment for obstruction of justice is warranted.

Mena never denied possessing the heroin in his shoes. Instead, he claimed he did not know the heroin was there and claimed to be surprised when customs agents found the heroin. Additionally, he said that the shoes were not uncomfortable when walking. The jury, however, was allowed to feel the rocks of heroin from the shoes.

The jury also heard Mena's unlikely story as to how he had gained possession of the shoes and the inconsistencies between his testimony as to why he was in the United States and Griffin's testimony. The jury must have determined that Mena was lying when he testified that he did not know that contraband was in his shoes. The district court made a similar but independent finding. Consequently, the district court's finding of obstruction of justice meets the Dunnigan factors. See Dunnigan, id.

## III.

Mena argues that the district court erred in denying him a downward departure for a "single act of aberrant behavior," when it misapplied the concept. Generally, we will not disturb a sentencing court's discretionary decision not to depart downward from the guidelines. United States v. Soliman, 954 F.2d 1012, 1014 (5th Cir. 1992). Such deference is not given, however, if the sentenc-

ing court mistakenly believed that departure was not permitted. Id.

The guidelines state that the Sentencing Commission "has not dealt with the single acts of aberrant behavior that may still justify probation at higher offense levels through departures." U.S.S.G. ch. 1, pt. A, intro. comment. 4(d). While the guidelines do not define the term "aberrant behavior," we have concluded "that it requires more than an act which is merely a first offense or `out of character' for the defendant." United States v. Williams, 974 F.2d 25, 26 (5th Cir. 1992), cert. denied, 113 S. Ct. 1320 (1993). Williams quotes the definition of aberrant behavior provided in United States v. Carey, 895 F.2d 318, 325 (7th Cir. 1990):

> [T]here must be some element of abnormal or exceptional behavior . . . . A single act of aberrant behavior . . . generally contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning because an act which occurs suddenly and is not the result of a continued reflective process is one for which the defendant may be arguably less accountable.

Williams, 974 F.2d at 26-27 (internal quotations and citation omitted).

In Williams we assumed, without deciding, that a downward departure based upon a single act of aberrant behavior might be authorized when the defendant has committed a violent crime. Id. We then reviewed for clear error the district court's determination that Williams's act did not qualify as aberrant behavior. Id. Finding no clear error in the court's finding that Williams's

conduct was neither spontaneous nor thoughtless, we determined that departure was not justified. Id.

In the instant case, the sentencing court did not question whether it had the authority to depart downward based upon aberrant behavior, but, instead, determined that if smuggling heroin worth $180,000 was a single act of aberrant behavior for Mena, it was so aberrant as to be "offensive to the peace and security of our nation." Mena argues that his individual character should have been examined in determining whether to depart downward for aberrant behavior. Nothing, however, suggests that a district court is required to depart downward for a single act of aberrant behavior. Even if the district court mischaracterized "aberrant behavior," its refusal to depart downward should not be disturbed.

AFFIRMED.