

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-2367
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MIRYAM BALCAZAR and
JOSE ANTONIO CRUZ,

Defendants-Appellants.

Appeal from the United States District Court
For the Southern District of Texas

CR H 89 0012 01 & 02

May 27, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

On January 18, 1989, Miryam Balcazar, Jose Antonio Cruz, and Jose Alvaro Gallo were indicted for conspiracy to possess with intent to distribute in excess of five kilograms of cocaine, possession with intent to distribute in excess of five kilograms of cocaine, and money laundering.

The facts surrounding Gallo's arrest and that supported his conviction were described in his prior appeal as follows:

Gallo was arrested on January 12, 19[89], following the Drug Enforcement Administration's (DEA) surveillance of Miryam Balcazar and Jose Antonio Cruz. On January 12, 1990, DEA agents observed the activities of Cruz and Balcazar until they met at a skating rink in Kingwood, Texas. At the skating rink, Cruz parked his car, a silver Honda, next to Balcazar's blue Oldsmobile. The DEA agents then observed Balcazar and Cruz conversing outside the cars. When Balcazar and Cruz left the skating rink parking lot, DEA agent Turner followed Cruz to a gas station where Cruz made a telephone call. About two minutes later Gallo entered the gas station, driving a brown Mazda RX7, and parked near Cruz's car. After a short meeting at the gas station, Cruz and Gallo drove to a nearby auto shop. At the auto shop, Cruz and Gallo parked their cars within five to eight feet of each other. They then exited their cars and after a brief conversation, Cruz removed a brown box from the back of his car and placed it in the rear of Gallo's car. After this transfer, both Cruz and Gallo exited the parking lot and headed in opposite directions on the freeway. Agent Turner followed Gallo and attempted to read the car's rear license plate to determine its ownership. The license plate was covered with mud and was unreadable, therefore, Turner sought assistance from the Harris County Sheriff's Office and the Houston Police Department (HPD).

Houston police officer, J. R. Knott, received a dispatch from the DEA requesting a marked patrol car to check the license plate on a car that was currently being followed by a Harris County deputy sheriff. Officer Knott observed a Harris County Sheriff's car, with its emergency lights flashing, following a brown Mazda at a high rate of speed. Knott observed that the Mazda continued for several blocks without responding to the

Sheriff's unit. Knott then pulled alongside the Mazda and signaled for the driver, whom he identified as Gallo, to pull over. After Knott had stopped Gallo he discovered that Gallo's driver's license was suspended. Knott placed Gallo under arrest for driving with a suspended driver's license.

After deciding to impound Gallo's car, Knott inventoried the contents of the car pursuant to HPD procedure. The only item in the car was a closed cardboard box, which was in the rear hatchback area of the car. Knott listed one cardboard box on his inventory slip. Generally, the HPD automobile inventory procedure requires an officer to list items found inside the vehicle. If, however, there are circumstances that indicate that valuable or dangerous items may be hidden in a container inside the car, then these containers may also be inventoried. Officer Knott testified that he had listed "one cardboard box" on the wrecker slip when someone suggested that he look inside the closed box. Knott decided to look in the box to determine if it contained something of value. When Knott opened the box he saw that it contained thin packets wrapped in aluminum foil. Knott did not inventory the contents of the box and did not investigate the contents of the aluminum-foil packets. After Knott completed his inventory of the car, the officers at the scene decided to drive the car to the police substation rather than have it towed to a storage lot. At the police substation, DEA agents searched the box and discovered \$ 299,985 in United States currency wrapped in the aluminum-foil packets. Balcazar's fingerprints were later discovered on the aluminum-foil wrappings on the currency. Gallo told DEA agents that he did not know how the box got inside the car, and that someone else had put the box in the car.

United States v. Gallo, 927 F.2d 815, 817-18 (5th Cir. 1991)

On January 12, 1989--later during the same day DEA agents were watching Gallo, Balcazar, and Cruz--another group consisting of U.S. Customs Agents, IRS Agents, and Houston police officers was watching a residence at 2911 Park Garden in Kingwood. Henry L. Lewis, a Houston police officer, saw Cruz get into his car at that location, drive to a convenience store a few blocks away, and make a phone call. From there, Cruz drove to the skating rink parking

lot, where Officer Lewis observed Cruz park next to Balcazar's car. Cruz took a box from the trunk of his car and placed it in the back of Balcazar's car. Balcazar then handed Cruz a soft-sided bag that he put in the trunk of his car. The cars exited the scene in differing directions, and Officer Lewis followed Balcazar.

Balcazar first drove slowly for about two miles down a dead-end street, then turned around and drove out of the cul-de-sac. She then drove into the Kingwood subdivision and began to weave through it, making several turns onto side streets. Based on his experience, Officer Lewis believed that Balcazar was making a "heat run," driving evasively to see if anyone was following her. Balcazar then pulled up to an elementary school and entered a queue of vehicles waiting to pick up schoolchildren. Balcazar remained stationary for about ten minutes; no one entered her car.

Balcazar then drove to another elementary school. She pulled up to a school-crossing crosswalk where the crossing guard had stopped traffic for the schoolchildren to cross. Some children were halfway across the street when Balcazar accelerated through the crosswalk. At that time, Lewis and the other agents decided to stop Balcazar. She was stopped because the manner in which she was driving was perceived as a threat to the public, and because her evasive driving tactics elevated the belief of the officers that Balcazar had engaged in a narcotics transaction with Cruz.

Prior to the January 12, 1989 surveillance and arrest of Balcazar, IRS Special Agent Karnick had received information that Balcazar might be involved in money laundering. Agent Karnick

arrived at the scene while Balcazar was being detained, informed her of her rights, and asked her if she understood those rights. Agent Karnick then told Balcazar that she had been observed passing a package and receiving a box and that it was his belief that either drugs or money was in the box. Balcazar told Agent Karnick that money was in the box, that she received it from someone named Lewis Carillo, and that she was delivering it for a friend to someone in Houston named Carlos.

When Balcazar's car was stopped, the box was in plain view in the back of the car. A drug-sniffing dog was brought to the scene, and it alerted to the box. Agent Karnick took possession of the box and later opened it pursuant to a search warrant. The box contained \$300,000 wrapped in aluminum foil.

At the time of Balcazar's arrest, the IRS and Customs Agents were unaware that the earlier arrest of Gallo resulted in the recovery of money from the conspiracy. The agents were aware that there had been a stop earlier in the day, that the DEA was involved, and that the individual stopped was carrying money. They were unaware that the earlier arrest related to Balcazar or Cruz.

U.S. Customs Special Agent Kane followed Cruz from the skating rink, the site of the exchange between Balcazar and Cruz, to the residence at 2911 Park Gardens Drive. Cruz stayed in the residence for about an hour and then drove to a travel agency on Kingwood Drive. Officer Eric Williams entered the travel agency and overheard Cruz requesting tickets to Colombia for himself and his girlfriend. Officer Williams exited the travel agency after ten

minutes, and Cruz exited about twenty minutes later. Cruz sat in his car in the travel agency parking lot and then left looking around the parking lot. Officer Williams followed Cruz from the parking lot through a residential area where the speed limit was 30 to 35 miles per hour. Cruz was driving at 50 to 60 miles per hour.

Special Agent Robert Rutt also followed Cruz and saw him exceed the speed limit and cut off a tractor-trailer rig. Cruz was watching the rear-view mirror more than the road ahead of him. Because Cruz was apparently aware of the surveillance and because there was a possibility that he would elude further surveillance, the decision was made to stop him. Balcazar had already been arrested, and Agent Karnick had received information from the DEA regarding the earlier transfer of money.

Cruz was stopped; neither Agent Rutt nor Officer Williams saw a blue bag in the car. Cruz was advised of his rights, and Officer Williams asked him where the tickets were. Cruz responded that they were still at the travel agency.

Based on information gathered from the morning and afternoon investigations, search warrants were obtained for the residences at 2911 Park Gardens (Cruz's residence), 2047 Little Cedar (Balcazar's residence), and for the box in Balcazar's car. At 2911 Park Gardens, agents recovered about fifty kilograms of cocaine from the garage of the house. Twenty-five pounds and twelve ounces of the cocaine was found in the blue bag that Cruz had carried earlier in the day.

At 2047 Little Cedar, agents recovered \$1,240,810 in currency. Part of the currency was wrapped in aluminum foil and placed inside a brown leather carrying bag. Other currency, also wrapped in foil, was stored inside a brown suitcase and a cardboard box. A money-counting machine, used for sorting and counting large numbers of bills, was also found in the house.

On June 28, 1989, the district court found the defendants guilty on all counts. Gallo filed a timely notice of appeal of his conviction, urging the warrantless stop and search of his car was illegal and that the evidence against him was insufficient. This Court affirmed the conviction. Gallo, 927 F.2d at 817.

Balcazar and Cruz did not file timely notices of appeal; however, the district court granted them leave to file an out-of-time appeal. They argue on appeal: (1) that the district court erred by not granting motions to suppress evidence obtained through the warrantless search of the box found in the car driven by Gallo; (2) that the Government lacked probable cause to stop and arrest Balcazar and Cruz; (3) that there was insufficient evidence to sustain Balcazar's drug-related convictions; and (4) that the evidence is insufficient to sustain the convictions of Balcazar and Cruz for money laundering, because the transactions did not affect interstate commerce.

OPINION

Balcazar and Cruz argue that the district court erred by not granting motions to suppress evidence obtained through the warrantless search of the box found in the car driven by Gallo.

Neither Balcazar nor Cruz may challenge the search of the box in Gallo's car or the legality of Gallo's arrest. Fourth Amendment rights are personal and may not be vicariously asserted. United States v. Mendoza-Burciaga, 981 F.2d 192, 196 (5th Cir. 1992). Only Gallo had standing to challenge the search of the box in his car or the existence of probable cause for his arrest.

Balcazar and Cruz next argue that the Government lacked probable cause to stop and arrest them; therefore, the district court erred by not granting their motion to suppress evidence. They are incorrect.

The standard of review for denial of a motion to suppress based on live testimony at a suppression hearing requires acceptance of the trial court's factual findings unless clearly erroneous. United States v. Piaget, 915 F.2d 138, 139 (5th Cir. 1990). Furthermore, this Court must view the evidence in the light most favorable to the party who prevailed below, in this case, the Government. Id. at 140. However, the ultimate determination of the reasonableness of a search is a conclusion of law and is reviewed de novo. United States v. Harrison, 918 F.2d 469, 473 (5th Cir. 1990) (investigatory stop).

"Probable cause exists when the facts and circumstances known to the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed and the arrested person is the guilty person." United States v. Ramirez, 963 F.2d 693, 698 (5th Cir. 1992). The relevant inquiry is "the degree of suspicion that attaches to particular

types of non-criminal acts." United States v. Mendoza, 722 F.2d 96, 101 (5th Cir. 1983). Illinois v. Gates, 462 U.S. 213, 244 (n. 13), 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). A probable cause determination must be viewed in the light of the observations, knowledge, and training of the law-enforcement officers. United States v. Muniz-Melachor, 894 F.2d 1430, 1438 (5th Cir. 1990). "[I]f the arresting officer has no personal knowledge of any of the facts establishing probable cause, he may make an arrest in carrying out directions from another officer who does have probable cause." Charles v. Smith, 894 F.2d 718, 724 (5th Cir. 1990).

The factors that led to the arrests of Balcazar and Cruz are as follows: (1) The Government had received information that Balcazar was involved in money and drug transactions; (2) the agents who arrested Cruz had information of the earlier arrests of Gallo and Balcazar and Cruz's transactions with Balcazar and Gallo; (3) both Balcazar and Cruz engaged in counter-surveillance action including the use of pay phones and elusive driving; (4) at the time of the arrests, agents believed that a money or drug transaction had transpired earlier in the day between Balcazar, Cruz, and Gallo. The use of pay telephones and counter-surveillance techniques can provide corroboration for an informant's tip regarding narcotics trafficking. United States v. Abadie, 879 F.2d 1260, 1263-64 (5th Cir. 1989). The type of transfer in this case, combined with the knowledge that Balcazar was reported to be involved in drug distribution or money laundering, supports a finding of probable cause. Piaget, 915 F.2d

at 139-140. The district court properly denied the motion to suppress. Piaget, 915 F.2d at 140.

Balcazar argues that there was insufficient evidence to sustain her drug-related convictions. She is incorrect.

A conviction at a bench trial will be sustained if there is substantial evidence to support it. United States v. Jennings, 726 F.2d 189, 190 (5th Cir. 1984). The standard of review is whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The standard of review is the same, whether the evidence is direct or circumstantial. United States v. Bryant, 770 F.2d 1283, 1288 (5th Cir. 1985), cert. denied, 475 U.S. 1030 (1986).

In order to sustain a conspiracy conviction under 21 U.S.C. § 846, the Government must prove "(1) the existence of an agreement between two or more persons to violate the narcotics laws, (2) that each alleged conspirator knew of the conspiracy and intended to join it, and (3) that each alleged conspirator did participate in the conspiracy." United States v. Stone, 960 F.2d 426, 430 (5th Cir. 1992). Each of the elements may be inferred from circumstantial evidence and "[c]ircumstances altogether inconclusive, if separately considered, may, by their joint operation . . . be sufficient to constitute conclusive proof." United States v. Salazar, 958 F.2d 1285, 1291 (5th Cir. 1992) (quoting United States v. Roberts, 913 F.2d 211, 218 (5th Cir. 1990) (citation omitted), cert denied, 111 S. Ct. 2264 (1991)).

In order to sustain a conviction for possession of a controlled substance with intent to distribute under 21 U.S.C. § 841(a)(1), the Government must prove that the defendant had "(1) knowing (2) possession of the illicit substance (3) with intent to distribute it." United States v. Martinez-Mercado, 888 F.2d 1484, 1491 (5th Cir. 1989).

"To have aided and abetted a crime within the meaning of 18 U.S.C. § 2, a defendant must have (1) associated with the criminal venture, (2) participated in the venture, and (3) sought by action to make the venture succeed." Stone, 960 F.2d at 433 (citation omitted).

The circumstantial evidence, when viewed cumulatively, was sufficient to establish Balcazar's actual possession of the cocaine recovered from the blue bag at Cruz's residence and her knowledge that it was cocaine. Officer Lewis testified that the blue bag recovered from Cruz's residence was the same blue bag that he had seen Balcazar deliver to Cruz in exchange for the box containing nearly \$300,000. Cruz returned to his residence immediately after receiving the bag and no longer carried it when he left the residence about an hour later. Because the bag contained cocaine when the search warrant was executed and was observed to be full at the time of transfer, a rational trier of fact could reasonably conclude that the bag was full of cocaine when Balcazar delivered it to Cruz.

Balcazar's knowledge of the cocaine may be inferred from her exercise of control over the container in which it was concealed.

See Gallo, 927 F.2d at 821. The records contains evidence of Balcazar's exercise of control over the blue bag, her attempts to evade pursuing surveillance officers, and her false explanation concerning the identity of the party from who she had received the box of currency in exchange for the bag. Balcazar's attempt to avoid surveillance and her false statements were circumstances from which the factfinder could infer guilty knowledge.

Balcazar also possessed \$1,240,810 in cash and a money-counting machine in her home. That evidence, and her receipt of \$300,000 in cash from Cruz in exchange for the bag, also supports the reasonable inference that she knew the bag contained narcotics. See United States v. Munoz-Romo, 947 F.2d 170, 178 (5th Cir. 1991). There was sufficient evidence that Balcazar knew she was participating in a conspiracy to possess cocaine with the intent to distribute and that she knowingly aided and abetted in the possession of cocaine with the intent to distribute it; therefore, her conviction should be affirmed.

Balcazar and Cruz argue that there was insufficient evidence to sustain their convictions for money laundering because their transactions did not affect interstate commerce as required by 18 U.S.C. § 1956. They are incorrect.

Balcazar and Cruz were convicted of aiding and abetting money laundering in violation of 18 U.S.C. § 1956(a)(1), which prohibits knowing involvement in a financial transaction that uses the proceeds of some form of unlawful activity. The term "transaction" includes the "transfer, delivery or other disposition" of these

proceeds. 18 U.S.C. § 1956(c)(3). "Financial transaction" means the "movement of funds by wire or other means ... which in any way or degree affects interstate or foreign commerce." 18 U.S.C. § 1956(c)(4).

Balcazar was arrested while transporting \$ 300,000 in her car. To establish that Balcazar knew that the money in her car was the proceeds of narcotics trafficking, the Government introduced evidence that Balcazar received the box containing the money from Cruz, a suspected narcotics trafficker who had been under DEA surveillance for several months. After searching Balcazar's house, the DEA discovered \$ 1,240,810 and a money-counting machine.

Cruz was arrested after his transactions with Gallo and Balcazar. These transactions involved the transfer of \$599,985. Gallo, 927 F.2d at 818. Twenty-five pounds and twelve ounces of the cocaine was found in the blue bag that Cruz had received from Balcazar in exchange for the box containing \$300,000. Based on the concert of action among Gallo, Cruz, and Balcazar, the district court could reasonably infer that Balcazar and Cruz knew that they were transporting the proceeds of unlawful activity. 18 U.S.C. § 1956(a)(1).

Balcazar and Cruz assert that the Government failed to establish that the transfer of currency in his car had any discernible impact on interstate commerce. Section 1956 applies to conduct that "in any way or degree affects interstate or foreign commerce." 18 U.S.C. § 1956(c)(4). The legislative history of the Act indicates that this phrase was derived from the Hobbs Act, 18

U.S.C. § 1951, "and is intended to reflect the full exercise of Congress's power under the Commerce Clause." S. Rep. No. 433, 99th Cong. 2d Sess. 13 (1986). We take note in this instance of 21 U.S.C. § 801, and Congressional findings and declarations, on the issue of whether Balcazar and Cruz's transportation of the proceeds of drug trafficking affected interstate commerce. Section 801 states that:

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because --

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

21 U.S.C. §§ 801(3)(A), (B), & (C), and 801(4). The Congressional intent of this chapter is clear; drug trafficking affects interstate commerce. The proceeds of drug trafficking have a similar effect. Therefore, we conclude that Balcazar and Cruz's transportation of the proceeds of drug trafficking affected interstate commerce and that there was sufficient evidence to sustain their money-laundering convictions. See also, Gallo at 823.

AFFIRMED.