

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2539

Summary Calendar

United States of America,

Plaintiff-Appellee,

versus

Rene Augusto Rodriguez,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
CR H 91 165 8

(March 29, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Rene Augusto Rodriguez pleaded guilty to conspiracy to possess with intent to distribute over five kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846. The district court sentenced Rodriguez to 151 months of confinement and 5 years of supervised release. Rodriguez challenges the quantity of cocaine used to determine his sentence. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Rodriguez was involved with a cocaine smuggling organization headed by Jose Ignacio Palomo. Palomo imported Colombian cocaine via Guatemala. After 500 to 1,000 kilogram shipments of Colombian cocaine were flown to Guatemala, Palomo's Guatemala-based trucking company transported the drugs through Mexico to Houston, Texas.

Palomo's operation used tractor-trailers and pickup trucks equipped with secret fuel tank compartments. The trucks were driven to Palomo's mechanic shop in Houston and unloaded there. As part of its investigation of Palomo, DEA agents installed hidden video cameras inside and outside of the Houston shop. Their surveillance observed trucks used in the smuggling operation--load vehicles--arriving at and leaving the shop.

U.S. Border Patrol records show that on September 5, 1991, the Ford pickup truck with the Texas license plate 9848WU crossed the United States-Mexico border. The next day, Rodriguez was observed arriving at the mechanic shop driving that Ford pickup truck. The camera inside the shop recorded the presence and activities of Rodriguez and his coconspirators. On September 7, more load vehicles arrived. Three of them, a GMC pickup truck, a Chevrolet pickup truck, and a Dodge van,¹ had been sighted on August 29, 1991 at Palomo's business in Guatemala City. The DEA had previously examined the undercarriage of the Chevrolet pickup truck and determined that its gasoline tank had recently been removed. When later seized, the Chevrolet contained an altered gasoline tank.

¹Texas license plate 860TQ, 7769YB, and DXF91F, respectively.

Investigation and debriefings revealed that this Chevrolet had transported approximately 28 kilograms of cocaine. Border Patrol records showed that each of these vehicles had crossed the United States-Mexico border between May and September, 1991.

The camera inside Palomo's shop recorded conspirators cutting up empty gasoline tanks, unloading cocaine hidden in them, carrying packages of cocaine around the shop, and refitting the tanks. Rodriguez was present during this activity on September 9, 1991. He returned to the shop driving the Ford pickup truck on September 10. The camera recorded a coconspirator removing white packages from the truck. Rodriguez was arrested at the shop later that day.

Load vehicles were confiscated by the DEA that contained kilogram quantities of cocaine hidden in their gasoline tanks. A gray Chevrolet pickup truck² contained 14 kilograms of cocaine. Three Ford pickup trucks³ each contained 24 kilograms of cocaine. A total of 116 kilograms of cocaine was seized. The DEA estimated that between July and September, 1991, Palomo's organization imported approximately 227 kilograms of cocaine into the United States.

At his arraignment, Rodriguez admitted that he was paid to drive a truck containing hidden cocaine from Guatemala to Houston. The Probation Office concluded that Rodriguez had driven the Ford pickup truck to Palomo's shop during July 1991 as well as on

²El Salvador license plate P169084.

³Texas license plates 3963NK, 8577RC, and 9735TP, respectively.

September 6, 1991. It found that the truck contained two false gasoline tanks, each capable of holding 14 kilograms of cocaine. The Presentence Investigation Report recommended holding Rodriguez responsible for 56 kilograms of cocaine.

Rodriguez objected to using 56 kilograms to calculate his offense level. He argued that because the Ford truck was never recovered, it was not possible to correctly determine the number or volume of secret gasoline tank compartments, and hence the quantity of cocaine he transported. The district court overruled his objection, finding the Report's information "adequately supported by credible evidence." Rodriguez's offense level was determined by § 2D1.1 based on 56 kilograms, minus a § 3E1.1 reduction for acceptance of responsibility. As recommended by the prosecution, Rodriguez received the guideline minimum sentence of 151 months confinement.

On appeal, Rodriguez argues that the district court's use of 56 kilograms to calculate his offense level was clearly erroneous. He maintains that there was insufficient evidence for the court to determine that the Ford truck had two false tanks capable of holding 14 kilograms each. Therefore, he contends, the 56 kilogram quantity used was speculative and without foundation.

The district court's findings about the quantity of drugs to be used in setting the base offense level are factual findings protected by the clearly erroneous rule. United States v. Pierce, 893 F.2d 669, 678 (5th Cir. 1990). A clearly erroneous finding would be one that is not plausible in light of the record viewed in

its entirety. United States v. Sherrod, 964 F.2d 1501, 1508 (5th Cir.), cert. denied, 113 S. Ct. 832 (1992).

The district court may consider any evidence that has "sufficient indicia of reliability." Id.; U.S.S.G. § 6A1.3(a). A presentence investigation report generally bears sufficient indicia of reliability to be considered by the district court in making its determinations. United States v. Kim, 963 F.2d 65, 69 (5th Cir. 1992).

Where there has been no drug seizure

the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

United States v. Angulo, 927 F.2d 202, 204 (5th Cir. 1991) (citing U.S.S.G. § 2D1.4, comment. (n.2), amended Nov. 1, 1992, to appear at U.S.S.G. § 2D1.1, comment. (n.12)). The district court may examine the overall scheme and infer circumstantially the drug quantity involved. United States v. Smallwood, 920 F.2d 1231, 1237 (5th Cir.), cert. denied, 111 S. Ct. 2870 (1991).

In this case, the district court based its quantity determination on the presentence report, which referred to the findings of the DEA's investigation. DEA agents recorded the cocaine being unloaded from the Ford truck Rodriguez delivered. They discovered that Palomo's operation used similar vehicles capable of carrying from 14 to 28 kilogram volumes. The Probation Office found that the truck driven by Rodriguez held 14 kilograms

in each of two tanks. We are persuaded that the information contained in the presentence report is sufficiently reliable to constitute support for the district court's finding that Rodriguez transported 28 kilograms of cocaine on two occasions. The 56 kilogram total quantity is not clearly erroneous.

AFFIRMED.