

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2635

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAFAEL REAL-GARCIA and
FERNANDO ALMESTICA-COLLAZO,

Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Texas
(CR-H-92-61-4)

(September 29, 1994)

Before Judges GARWOOD, JOLLY, and STEWART, Circuit Judges.

E. Grady Jolly, Circuit Judge.*

The district court found the defendants Rafael Real-Garcia ("Real-Garcia") and Fernando Alместica-Collazo ("Alместica") guilty of drug-related offenses. The defendants appeal. They first challenge the sufficiency of the evidence that supports their convictions, and second, they challenge an upward departure in their sentences for obstruction of justice based on their use of

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

false identities from the time of their arrest through trial. We affirm.

I

Because the parties are challenging the sufficiency of the evidence, we will address the facts of this case with some detail. The immediate events leading to the defendants' arrests are significant.

On February 4, 1992, "Lisa" and her husband "Dennis," who were cooperating with the Drug Enforcement Agency ("DEA") began negotiating with Shaul Danon, acting as a broker, to buy 15 kilograms of cocaine. Dennis had bought cocaine through Danon on several previous occasions. On February 11, Danon arranged to sell Lisa or Dennis ten kilograms of cocaine the next day. Danon arranged to obtain the cocaine from Francisco Medina Laborda. They agreed that Laborda would bring the cocaine to Danon's Houston, Texas, townhouse. The plan was to transport and deliver the cocaine in two cars--one car containing two kilograms and the other containing eight. The purchaser was to pay for and take delivery of the two kilograms first; if this transaction went smoothly, then the remainder of deal would be completed. Based upon this information, the DEA began surveillance of Danon's residence on the afternoon of February 12.

Danon arrived at his house about 3:30 p.m. on the afternoon of February 12. A friend of Danon's, Michael Cohen, arrived shortly thereafter. Lisa arrived about 7:30 or 8:00 p.m., wearing a

concealed microphone. A DEA agent waited for Lisa in her car while Lisa went inside to talk to Danon. After Danon explained the buying procedure to Lisa, she returned to her car to await a signal from Danon that the sale could be made. (Danon testified that he kept the buyers and sellers separated to help them remain calm, as well as to ensure that the parties did not bypass him [as broker] in a future deal.) The sellers would arrive with 10 kilograms. They would deliver the first two kilograms; she would pay for those and take delivery. Then the sellers would deliver the remaining eight kilograms.

Around 8:00 p.m. Laborda and the defendants arrived at Danon's. Laborda drove a white, two-door Oldsmobile. Real-Garcia was his passenger. Almestica drove a tan, four-door Chevrolet sedan. Almestica's Chevrolet was in the lead. The cars drove past the townhouse, and then took an immediate right into a dead-end alleyway running alongside Danon's residence. After one to two minutes, the cars emerged from the alleyway and stopped in the middle of the street near the townhouse. Almestica got out of his car and walked back to the Oldsmobile. Both Laborda and Real-Garcia stepped out of the car and conferred with Almestica briefly. The parties returned to their respective vehicles and then parked the cars a number of spaces away from each other in parking spaces provided along the street for the townhouses.

The Oldsmobile, still driven by Laborda with Real-Garcia as passenger, parked briefly, then left the parking space and again

drove into the same alleyway located beside Danon's townhouse. The car turned around, exited the alleyway once more and stopped in the middle of the street. Almestica stepped out of his car and ran over to the driver's door of the Oldsmobile, had a brief conversation with the driver, and then went back to his Chevrolet. The Oldsmobile then proceeded down the street and pulled into a parking place near Danon's townhouse.¹

Laborda and Real-Garcia then exited the car and went into Danon's residence. Laborda had not told Danon that a second person would accompany him; however, Laborda assured Danon that Real-Garcia could be trusted and was part of the deal. Laborda and Danon talked briefly in the kitchen (away from Cohen and Real-Garcia in the den). Laborda then went to the car and returned with the first two kilograms of cocaine.

Danon next directed Laborda and Real-Garcia to go upstairs to a bedroom so that he could signal Lisa on her pager to come inside. Lisa came inside and inspected the cocaine. She told Danon that she would return to her car for the money for all 10 kilograms. At that point, the DEA and Houston Police raided the residence, arresting Danon and Cohen downstairs, Real-Garcia and Laborda upstairs, and Almestica in his car with the remaining eight kilograms of cocaine.

1 At trial, a DEA agent testified that this conduct was consistent with counter-surveillance techniques used by drug traffickers to ensure that they are not followed by authorities.

Real-Garcia and Almestica falsely identified themselves at that time. They even produced identification cards bearing their respective aliases. The significance of the false identifications will be discussed infra.

In addition to the 10 kilograms of cocaine, various items of evidence were seized. The police seized a pager from Almestica, which had been acquired under the name of Viterbo Cedeno. The police also seized a pager from Real-Garcia, which had been obtained in the name of Orlando Carbonell. Laborda was arrested in possession of a number of items, including an index card with names and a code system of letters on the opposite side of the card and various business cards, including Danon's. The following items were also seized from Real-Garcia: a Texas identification card bearing the name of "Rafael Real-Garcia," a paging company receipt in the name of Orlando Carbonell, a letter addressed to "Servando," a handwritten list of names and numbers, and two receipts from Western Union dated February 6, 1992, in the amount of \$1,000 each, wired to the Dominican Republic by Cervando De La Cruz. The police found on Almestica a Texas identification card bearing the name of "Fernando Almestica," several business cards with handwritten pager numbers, and a card bearing a prayer in Spanish and the name of "Viterbo Cedeno."

The DEA analyzed these various coded lists and cards filled with aliases and found that Real-Garcia and Almestica had in common fourteen pager and phone numbers on their lists. The DEA also

found that Labordo had records of two numbers in common with Real-Garcia and Almestica.

Danon, Labordo, Cohen, Real-Garcia, and Almestica were indicted and charged with drug-related offenses. The charges against Cohen were subsequently dropped. Prior to trial and pursuant to a plea agreement, Danon and Labordo pled guilty to their respective charges. Real-Garcia and Almestica were each charged with two counts of drug-related offenses: first, a violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A)(ii)--that the parties did knowingly and unlawfully conspire, confederate, and agree with others to possess with intent to distribute in excess of five kilograms of cocaine, and second, a violation of 21 U.S.C. §§ 841(a)(1), 841 (b)(1)(A)(ii), and 18 U.S.C. § 2--that the parties, while aiding, abetting and assisting others, did knowingly and unlawfully possess with intent to distribute in excess of five kilograms of cocaine. Real-Garcia and Almestica entered pleas of not guilty to these charges.

On May 27, 1992, a jury found Real-Garcia and Almestica each guilty on both counts. During the preparation of their presentencing investigation reports following the trial, both Real-Garcia and Almestica revealed their true identities. Real-Garcia admitted that his true name was Servando De La Cruz, and Almestica admitted that his true name was Viterbo Cedeno-Alfonso. The district court considered these misrepresentations when determining the defendants' sentences and imposed a two-point upward adjustment

for obstruction of justice under U.S.S.G. § 3C1.1. With a total offense level of 34, the defendants were sentenced to concurrent 165-month terms of imprisonment under counts one and two, ordered to serve concurrent five-year terms of supervised release, and ordered to pay \$100 in mandatory costs. The district court imposed no fines.

Both Real-Garcia and Almestica appeal their convictions, challenging the sufficiency of the evidence. Each also appeals the upward departure in his offense level for obstruction of justice. Additionally, Almestica challenges the legality of the search of his car.

II

A

We first address Almestica's challenge to the search of his car. Almestica argues that he was seized and his car was searched without probable cause, a warrant, or exigent circumstances. We hold that his challenge is without merit, and affirm the district court's denial of his motion to suppress.

An appellate court must accept the district court's findings of fact in a suppression hearing unless they are clearly erroneous or are influenced by an incorrect view of the law. United States v. Thomas, 12 F.3d 1350, 1366 (5th Cir. 1994). Furthermore, the evidence must be viewed in the light most favorable to the prevailing party. Id. Clear error is demonstrated when the reviewing court "is left with the definite and firm conviction that

a mistake has been committed." Anderson v. City of Bessemer, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511 (1985) (quoting United States v. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 541 (1948)).

We review de novo the district court's conclusion regarding probable cause. United States v. Chappell, 6 F.3d 1095, 1100 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1232, 127 L.Ed.2d 576, and cert. denied, ___ U.S. ___, 114 S.Ct. 1235, 127 L.Ed.2d 579 (1994). "[P]robable cause to search an automobile exists when 'trustworthy facts and circumstances within the officer's personal knowledge would cause a reasonably prudent man to believe that the vehicle contains contraband.'" United States v. Cooper, 949 F.2d 737, 745 and n.26 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 2945, 119 L.Ed.2d 569 (1992)(quoting United States v. Shaw, 701 F.2d 367, 376 (5th Cir. 1983)(internal citation omitted)). Probable cause for a warrantless arrest, seizure, or search may develop from information communicated to the arresting officers from their colleagues. See Chappell, 6 F.3d at 1100 and n.18.

We conclude that probable cause existed to search and seize the Chevrolet. The authorities had reliable information that two cars would be involved in the drug transaction, with both cars carrying cocaine. The two cars arrived at the same time, and it was clear from the parties' movements that they were acting together. Real-Garcia and Laborda exited their car and went into the townhouse where the drug transaction was to transpire. Then Laborda returned to the Oldsmobile, retrieved a bag, and carried it

inside the townhouse. The informant subsequently identified the contents of the bag as cocaine, and this information was relayed to the authorities. Thus, a reasonably prudent person could conclude that because the first car had transported cocaine, the second car--the Chevrolet--also contained contraband.

Once a vehicle is lawfully stopped, any item within the plain view of the officer is "subject to seizure and may be introduced into evidence." Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968). The white bricks of cocaine seized from Almestica's Chevrolet were in the police's plain view at the time of Almestica's arrest and the search of his vehicle. The black bag containing the cocaine was unzipped and sitting on the floor board of the back seat when the police apprehended Almestica. Thus, no warrant was necessary to conduct a lawful search and seizure in this instance.

Finally, Almestica argues that there were no exigent circumstances that justified a warrantless search. Because the car was searched and the evidence was seized pursuant to a lawful stop, we need not address this issue at length. We find Almestica's arguments on this issue to be without merit. We, therefore, hold that the district court properly denied Almestica's motion to suppress.

B

The defendants next challenge the sufficiency of the evidence establishing their guilt. We hold that this challenge is without

merit and hereby affirm the district court's judgments of conviction on each of the defendants' charges. It is clear from the facts that both of these individuals aided, abetted, and conspired to distribute greater than five kilograms of cocaine. Because of the overwhelming weight of evidence, we need not reach the question of the standard of review on the issue of sufficiency of the evidence to uphold the verdict. The evidence--as set out earlier in this opinion--is ample under any standard to connect each defendant to the crimes charged beyond a reasonable doubt.

C

Finally, we hold that the sentences were appropriately enhanced to account for the defendants' misrepresentations of their identities throughout the trial. Both defendants admitted during interviews by the probation officers that prior to sentencing they had been using assumed names. Real-Garcia's real name was Servando De La Cruz, and Almestica's real name was Viterbo Cedeno-Alfonso.

The district court increased Real-Garcia's and Almestica's offense levels by two points each for this conduct. The district court found that their failure to reveal their true identities constituted an obstruction of justice because this deception impeded the investigation and "provid[ed] materially false information to a judge or magistrate." U.S.S.G. § 3C1.1, commentary (n.3(f)).

We review the district court's determination of fact for clear error and its interpretation of the Sentencing Guidelines de novo.

United States v. Rodriguez, 942 F.2d 899, 901 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 990, 117 L.Ed.2d 151 (1992). We find no clear error in the district court's determination of fact. The defendants cannot deny that they used false identities throughout the trial. Furthermore, the district court did not err when it found that the defendants' misrepresentations impeded the investigation. The defendants' use of false names slowed the investigation because the authorities were required to decipher a maze of aliases and codes in order to link the defendants to each other. The false identities also hindered law enforcement's search for previous criminal conduct by these defendants.

A review of the record also shows that the defendants provided materially false information to the magistrate judges and district judges in violation of the Sentencing Guidelines. Although the defendants argued that the information was not material because the proper defendants were in custody, the district court concluded that the giving of false names was material. The district court reasoned that the defendants had the duty and responsibility to reveal their true identities. Furthermore, the court noted that the defendants used the names of actual persons living in Puerto Rico, which made the misrepresentation even more material because an innocent person could be linked with the judgment. We agree.

Since we find no error in the district court's application of the Sentencing Guidelines, we affirm each sentence.

III

For the above stated reasons, the judgment of the district court is

A F F I R M E D.