UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5725
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CARLOS VASQUEZ-MARTINEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-92-CR-138(3))

June 2, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Carlos Vasquez-Martinez appeals the judgment entered on his plea of guilty. We **AFFIRM**.

I.

In May 1992, Vasquez-Martinez was indicted with Ernesto Varela and Juan Cavazos Sanchez (see attached unpublished opinion in No. 92-5718, ***United States v. Sanchez***, rendered April 16, 1993) for conspiracy to distribute cocaine and possession with intent to

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

distribute the same. Both Sanchez and Martinez pled guilty, but Sanchez entered a conditional plea premised on his motion to suppress evidence.[2] Vasquez-Martinez did not join the motion to suppress. His sentence included, *inter alia*, 120 months in prison.

II.

The only issue raised by Vasquez-Martinez is ineffective assistance of counsel because neither of his court-appointed attorneys filed a motion to suppress.[3] But, we generally do not consider an ineffective assistance claim raised for the first time on direct appeal. We have done so "only in rare cases where the record allowed us to evaluate fairly the merits of the claim". ***United States v. Higdon***, 832 F.2d 312, 314 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075 (1988). We consider it here, however, because we have previously decided the suppression issue on its merits. It is clear, therefore, that Vasquez-Martinez could not establish a valid claim for ineffective assistance of counsel under ***Strickland v. Washington***, 466 U.S. 668 (1984).

In order to establish such a claim, the defendant must show that (1) counsel's performance was deficient, and (2) that deficiency prejudiced the defendant's case. ***Id***. at 687. We need

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[2] Vasquez-Martinez states that Varela also filed a motion to suppress. However, we cannot confirm that allegation as the record in Varela's case has not come before this court.

[3] A federal public defender was initially appointed for Vasquez-Martinez. Alleging ineffective assistance, Vasquez-Martinez sought, and was granted, a new lawyer. He contends that both were ineffective. A third attorney was appointed for purposes of appeal.

not address both components if an inadequate showing is made as to one. Vasquez-Martinez cannot prove the requisite prejudice. As reflected in the attached opinion in ***Sanchez***, we affirmed the denial of his co-defendant's (Sanchez's) motion to suppress, considering the same points that Vasquez-Martinez raises. Therefore, even if his counsel had filed a motion to suppress, it would have been properly denied.[4] As a result, he has not suffered prejudice from the failure to file it.

III.

Accordingly, the judgment is

AFFIRMED.

ATTACHMENT 1

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5718

Summary Calendar

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[4] We note that the challenged search took place at Sanchez's home. The government asserts that, as a mere visitor, Vasquez-Martinez had no reasonable expectation of privacy in that home, and thus would have lacked standing to challenge the search. We need not reach this issue. For purposes of this case, we assume standing.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JUAN CAVAZOS SANCHEZ,

Defendant-Appellant.

Appeal from the United States District Court

for the Western District of Texas

(SA-92-CR-138(2))

April 16, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*****

***** 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

Pursuant to a conditional plea of guilty, Juan Cavazos Sanchez appeals the denial of his motion to suppress. We **AFFIRM**.

I.

In March 1992, San Antonio Police Narcotics Detective Juan Campacos purchased cocaine from Sanchez. Campacos reported his purchase to Drug Enforcement Administration (DEA) Agent George Delaunay and told him that Sanchez claimed to have a source for kilogram quantities of cocaine. Campacos and Delaunay met with Sanchez, Campacos posing as the buyer; Delaunay, as the investor. They bought an ounce of cocaine and, over time, negotiated for the purchase of a kilogram.

On April 29, Campacos and Sanchez had several telephone conversations to arrange the transaction; and, that evening, Campacos met Sanchez at Sanchez's home to complete the purchase. When Campacos arrived, the supplier was not there. Campacos left, but he and Sanchez agreed that Sanchez would page him when "the package" arrived. Campacos met Delaunay a few blocks away, where they awaited Sanchez's call. Within five or ten minutes, Delaunay received a call on his cellular phone from Sanchez, notifying him that the package had arrived; and Campacos returned to the house. He was invited in, the door was locked behind him, and he was introduced to co-defendants Varela and Vasquez-Martinez. Campacos was given a kilogram package, and he purported to examine it for quality. Once he had confirmed that it contained cocaine, he announced a pre-arranged bust signal through a transmitter with

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should not be published.

which he had been wired. Campacos also communicated with Delaunay under the guise of calling his investor to deliver the money.

Campacos asked Sanchez to let him out onto the front porch to await that delivery. Sanchez did so, but soon spotted the arrival of an unmarked police car, yelled "Narcos!", and locked Campacos out. Other agents, poised to enter from the rear of the house, did not realize that Campacos had been locked out. They heard scuffling and running inside, then entered and arrested the three defendants. Detective Carlson, a member of the entry team, testified that he heard running water in the bathroom. From experience, he knew that "commonly that is one form that [drug dealers] will destroy evidence with", so he entered the bathroom. He noticed that the water in the toilet bowl had been disturbed and the tank lid was ajar. When he lifted the lid, he spotted the kilogram package on top of the float, partially submerged in water.

Sanchez and his co-defendants were charged in a two-count indictment with conspiracy to distribute 500 grams or more of cocaine (count 1), and possession with intent to distribute the same (count 2). Sanchez moved to suppress any evidence obtained in the April 29 warrantless search of his home. After a hearing where evidence was adduced by both the government and Sanchez, the motion was denied. The government dismissed the charge in count 1 in return for Sanchez's conditional plea of guilty to count 2, entered with an express reservation of the right to appeal the suppression ruling.

II.

Sanchez contends that the denial of his motion to suppress was in error because his warrantless arrest was unlawful, the search incident to that arrest exceeded its permissible scope, and no exigent circumstances justified opening and searching the toilet tank without a warrant.

In reviewing the denial of a motion to suppress, we view the evidence in the light most favorable to the prevailing party, and, as always, accept the district court's findings of fact unless they are clearly erroneous or influenced by a legal error. The ultimate questions of the legality of a search or arrest are legal questions subject to *de novo* review. ***United States v. Cooper***, 949 F.2d 737, 744 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2945 (1992).

A.

The district court found the arresting officers had probable cause to arrest the defendants and faced exigent circumstances justifying their entry into the house without a warrant, because they believed a fellow officer was inside and in need of assistance, and also suspected that contraband was being destroyed. We conclude that these factual findings are not clearly erroneous and agree that they constitute exigent circumstances sufficient to justify a warrantless entry and arrest.

Once Sanchez had shown the kilogram of cocaine to Campacos, as indicated by the bust signal from Campacos, there was probable cause to arrest him; and no warrant was required, because the felony had been committed in the presence of a police officer. *See*

Gerstein v. Pugh, 420 U.S. 103, 113-114 (1975). Detective Carlson, recognizing that Campacos's cover had been blown, entered the house to assist in the arrest. Such warrantless entry was justified. Carlson testified that before he entered the house, he heard scuffling and running inside. He knew drugs were in the house and believed that Campacos was still inside. He testified that his primary concerns were to avoid any harm to the agent inside and to retrieve the evidence before it was destroyed. We have previously recognized that these are the types of circumstances which justify the warrantless entry into a residence. ***United States v. Capote-Capote***, 946 F.2d 1100, 1103 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 2278 (1992). We hold that these exigent circumstances justified the officers' entry into Sanchez's home and gave them insufficient time to secure a warrant for the defendants' arrest.

Sanchez seems to assert that, because Campacos "tricked" him into inviting Campacos into his home, any subsequent exigencies are vitiated by this deception. In prior cases involving similar facts, we have not discounted exigent circumstances because an undercover law enforcement agent was involved in the drug transaction. *See* ***United States v. Hultgren***, 713 F.2d 79 (5th Cir. 1983). Sanchez offers no distinguishing reason why we should do so here.

B.

Sanchez also takes issue with the scope of the search, attacking its potential justification as a "safety check". We

conclude it was, instead, a valid search based on probable cause, and pursuant to a lawful arrest. Given the officers' concern regarding the possible destruction of evidence, its scope was most reasonable.

We agree with the district court that the exigent circumstances described above justified the search which produced the cocaine. Detective Carlson testified that his experience counseled that the sound of running water was a sign of destruction of evidence. Campacos also testified that he heard scurrying inside in the area where the cocaine was last seen, and feared that the defendants might be destroying the drugs. Needless to say, the touchstone of a legal search is reasonableness. *See* ***United States v. Webster***, 750 F.2d 307, 327 (5th Cir. 1984), *cert. denied*, 471 U.S. 1106 (1985). Given these circumstances, it was more than reasonable for Detective Carlson to follow the sound of running water into the bathroom. When he saw that the water in the toilet had been disturbed and the tank lid dislodged, it was also more than reasonable for him to lift the lid and look inside. Had the Constitution required that he obtain a search warrant at this stage, the cocaine partially submerged in water might well -- probably would -- have been destroyed before the warrant was obtained. This is precisely the reason that potential for destruction of evidence is a recognized "exigent circumstance" justifying a warrantless search. As stated, we conclude that the warrantless search was legal and, therefore, that Sanchez's motion to suppress was properly denied.

III.

Accordingly, the judgment is

AFFIRMED.