

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7168
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARIO ALBERTO AYALA-ORTEGA,
ANASTACIO BOCANEGRA-SEPULVEDA,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
CR L 91 238 01

May 25, 1993

Before GARWOOD, JONES, and EMILIO GARZA, Circuit Judges.*

PER CURIAM:

Mario Alberto Ayala-Ortega (Ayala) was convicted by a jury of conspiracy to import, and importation of, marijuana. Ayala was sentence to concurrent terms of imprisonment of sixty-five months on each count to be followed by concurrent five-year terms of supervised release. On appeal, he argues only that the evidence was insufficient to convict him. We disagree and 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Ayala contends that he was helping a group of illegal aliens cross the Rio Grande River by boat from Mexico to America and that he was not involved in the drug importation conspiracy. Ayala claims that a Government agent committed perjury during the trial in testifying that Ayala made an incriminating statement and that the agent advised the other agents about the statement. Ayala points out that the other agents denied any knowledge of Ayala's statement. Ayala also argues that the Government failed to prove that the drugs emanated from a point outside of the United States or that Ayala had knowledge that a controlled substance was involved.

In reviewing an insufficiency of evidence claim, this Court must determine whether a rational trier of fact could have found that the Government proved each of the substantial elements of the offense beyond a reasonable doubt. U.S. v. Rojas-Martinez, 968 F.2d 415, 420 (5th Cir.), cert. denied, 113 S.Ct. 828 (1992) and cert. denied, 113 S.Ct. 995 (1992). All facts and credibility choices must be viewed in the light most favorable to the verdict. Id.

In order to prove a conspiracy, the Government need not prove a formal agreement, but must show that "two or more persons in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan." Id. at 421. (citation omitted). The elements of conspiracy may be shown by circumstantial evidence. Id. A conspiracy may be

inferred from concert of action, such as a group of individuals simultaneously transporting marijuana across the border. Id.

Importation requires proof that the defendant played a role in bringing a controlled substance from a foreign country into the United States. Id. at 420. Knowledge of possession of marijuana may be inferred if 1) an individual is travelling from Mexico on foot carrying bags "containing a uniquely odorous substance," 2) with a group of persons carrying the same smelly bags, and 3) the group attempts to evade law enforcement authorities. Id. at 421.

The evidence reflected that on October 29, 1991, U.S. Border Patrol agents staked out an area along the river on the American side of the Mexican-American border known to be commonly used by illegal aliens to enter the country. There was a steep landing on the American side of the river known as the "staircase landing" which was composed of a set of natural steps ascending the cliff.

About 7 p.m., the agents observed a truck proceeding to the river landing on the Mexican side of the river. The agents reported hearing splashing sounds in the river and, a short while later, heard loud "thud" sounds coming up the staircase landing. The agents observed an individual carrying a bundle, emerging over the cliff and proceeding down a trail, where he was met by another individual coming from the opposite direction of the trail. The agents then observed eight additional individuals, each carrying bundles, emerging over the cliff and proceeding down the trail.

The agents heard a creaking fence sound as the group proceeded. One of the agents observed an individual loading one of the bundles into a pick-up truck. After it appeared that no one else was coming over the cliff, the agents signaled to each other that it was time to apprehend the group. The agents set off a diversionary grenade and captured most of the group's members in the ensuing confusion.

Agent De La Cruz testified that he continuously watched the group as they proceeded up the trail and that, at the designated time, he ran up behind them and pushed Ayala and another member of the group to the ground. Although Ayala did not have a bag in his possession at the time that he was tackled, De La Cruz testified that he was positive that Ayala was one of the individuals he observed coming over the cliff carrying a bundle. De La Cruz noted that Ayala's clothing was wet. De La Cruz apprehended a third individual, co-defendant Martinez, about ten feet away from Ayala, and a fourth individual on the other side of the fence crossing the trail.

The agents discovered three duffel bags in the pick-up truck located in the area, three duffel bags adjacent to the vehicle, and three bags lying on the river side of the fence. The duffel bags were damp, had fresh mud on them, and carried a strong marijuana odor. The contents of the bags were subsequently sampled and were identified as marijuana.

John Gunnoe, a senior Border Patrol agent, testified that he interviewed Ayala at the office following his arrest and that

Ayala admitted that he was to be paid \$250-\$300 for carrying the "merchandise" over the border. Gunnoe testified that he reported this statement to Ramon Torres, the senior Customs agent investigating the case. Torres testified that he did not recall Gunnoe's advising him of Ayala's statement.

Ayala testified that he was transporting illegal aliens across the river on the night of his arrest. Ayala testified that he saw approximately 20 individuals arriving at the landing in two boats and carrying bundles over the cliff, but contended that he had no involvement with the group.

Viewing the evidence presented in the light most favorable to the verdict, a rational jury could have found that the Government proved the substantial elements of the conspiracy and importation offenses beyond a reasonable doubt. The evidence reflected that Ayala and other individuals acted in concert to transport marijuana across the border into the United States and that Ayala was aware that he was transporting marijuana.

The judgment of the district court is **AFFIRMED**.