

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7172
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JULIO MARTIN CONTRERAS-AQUINO, and
AUGUSTO CESAR GOMEZ-RUBIO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
CR M 91 277 02

August 25, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

DAVIS, Circuit Judge:¹

Appellants Contreras-Aquino and Gomez-Rubio challenge the sufficiency of the evidence to support their conspiracy to import, importing, conspiracy to possess and possession with intent to distribute cocaine. We affirm.

I.

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Sunday, September 29, 1991, was a busy morning at the Hidalgo Port of Entry into the United States, at McAllen, Texas. Dina Vela, a six-year veteran Customs Inspector, was working in the port's primary inspection area when a 1980 Ford Futura driven by appellant Gomez-Rubio (Gomez) and occupied by appellant Contreras-Aquino (Contreras) approached her booth. Vela saw that the vehicle had Guatemalan license plates and a Texas inspection sticker. The two men appeared nervous to Vela.

Gomez and Contreras told Vela they had come from Guatemala and needed immigration permits so they could go to Austin, Texas. Vela sent appellants and their vehicle to the secondary inspection area for further checks.

At the secondary inspection area Gomez and Contreras spoke with Carlos Barajas, a customs inspector for more than 22 years, who requested them to declare any items they were bringing into the United States. After the appellants made a negative declaration, Barajas asked them to remove their luggage from their vehicle's trunk and place it on a table for inspection. When the luggage was removed from the Ford, Barajas immediately noticed that the spare tire was sitting about one and one-half to two inches higher than usual on the tire well. Barajas then noticed that the forward section of the trunk was not flat, as it should have been. The Ford also had fresh undercoating.

Two narcotics-sniffing dogs alerted to the presence of contraband in the trunk of the vehicle. Customs Special Agent Lawrence Krautkremer was called to the scene; he punched a hole in

the tire well with a screwdriver. He found a white powdery substance on the end of the screwdriver; it field-tested positive for cocaine. The officers later found that the Ford had a secret compartment, constructed with welded metal plates and covered with bondo. Inside the compartment were 40 packages which weighed 92 pounds and contained 96% pure cocaine worth at least \$4,000,000.

Contreras and Gomez were then detained and questioned by Agent Krautkremer; Barajas acted as the interpreter. Contreras said that he did not know who had given him the \$1,000 in twenty-dollar bills found in his possession. He stated that he had been paid \$1,000 to drive a bus to Guatemala from Austin, but that he did not know where he and Gomez were supposed to stay in Austin or whom they were supposed to meet there. In Contreras's wallet Krautkremer found what appeared to be directions to Houston, not Austin, written on a slip of paper.

When Gomez was first questioned, he stated that he was a truck driver but that he did not know how to contact the person he was to meet in Austin, where he was to stay in Austin, or the name of the man who had hired him and had given him money. Later, Gomez said that a man named Mario Galvez provided the vehicle and directed him to stay at any motel in the south part of Austin. Gomez said that the people he was supposed to meet would locate him and the car would be picked up by someone who had a key to it.

At the trial David Figueroal, the registered owner of the Ford Futura, testified that he had purchased it for \$1,100 and sold it to an unidentified Mexican national for \$1,650. Figueroal

testified that he believed it was coincidental that another vehicle which he had sold to a different person had been seized one year earlier with 98 pounds of cocaine in it.

Appellant Gomez testified that he and his family lived in Villanueva, Guatemala, and that he was licensed to work as a driver of buses and trucks. He testified that he would go to the town park daily to look for work, as he had done on September 23, when he met Galvez. He said that Galvez offered to pay him 1,500 quetzales, or \$300, to drive a car to Austin and return with a bus. Galvez met with Gomez and Contreras on September 26 and suggested that they leave the next morning. Galvez gave Gomez U.S. currency to cover his expenses, \$500 for the trip to Austin and \$500 or \$1,000 for the return trip. Gomez testified that Contreras received \$1,000 expense money from Galvez for the return trip.

According to Gomez, neither he nor Contreras knew how to get to Austin and they were not given any directions. He did not ask any of his fellow drivers for directions or consult any maps. He testified that Galvez instructed him to stay at a motel at the entrance to town so that Galvez could locate him on September 30. Gomez testified that he did not notice anything unusual about the construction of the Ford's trunk, nor did he notice the fresh undercoating or weld marks when he went underneath the car to fix the fuel switch. He said he did not know how Galvez intended to get to Austin. Gomez denied that he knew the Ford contained cocaine.

Contreras testified at trial that he was licensed to drive buses and vehicles of over four tons and that he, too, met Galvez at a park in Villanueva, Guatemala. He testified that he and Gomez were to stay at the first hotel they saw in Austin, and that Galvez would look for them. He also confirmed that Galvez had given him the \$1,000 which he had at the port of entry. Contreras did not know where Galvez lived or did business and he knew of no way to contact Galvez if he had an accident on the road. He testified that he did not notice anything unusual about the trunk area when he removed and replaced his luggage during the three days on the road. Contreras denied that he knew the Ford contained cocaine. He testified that in June 1991, he went to Houston to drive a truck back to Guatemala. He testified that during that trip he made notes of the routes travelled because of his curiosity to know the United States; these were the notes the customs inspector discovered in his wallet on September 29.

II.

Both Gomez and Contreras contend that the evidence was insufficient to support their convictions of conspiracy to import, importing, conspiracy to possess, and possessing with intent to distribute cocaine. They argue, with respect to each count of the indictment, that the Government failed to prove they knew that the Ford Futura in which they were riding contained cocaine.

In a criminal conviction, "[t]he standard of review for sufficiency of evidence is whether **any** reasonable trier of fact could have found that the evidence established guilt beyond a

reasonable doubt." **United States v. Martinez**, 975 F.2d 159, 160-61 (5th Cir. 1992) (emphasis in the original), **cert. denied**, 113 S.Ct. 1346 (1993). In evaluating the sufficiency of the evidence, we consider the evidence in the light most favorable to the verdict. **United States v. Ivy**, 973 F.2d 1184, 1188 (5th Cir. 1992), **cert. denied**, 113 S.Ct. 1826 (1993). Neither the jury nor the reviewing court is required to examine each piece of evidence in isolation. **See United States v. Magee**, 821 F.2d 234, 239 (5th Cir. 1987). Items of evidence which would be inconclusive if considered separately may, upon being considered in the aggregate, constitute conclusive proof of guilt. **See Id.; United States v. Lechuga**, 888 F.2d 1472, 1476 (5th Cir. 1989).

For a conviction of possessing a controlled substance with intent to distribute to be upheld, there must be proof of three elements beyond a reasonable doubt: (1) knowing (2) possession of the controlled substance (3) with intent to distribute. **United States v. Ojebode**, 957 F.2d 1218, 1223 (5th Cir. 1992), **cert. denied**, 113 S.Ct. 1291 (1993). The "'intent to distribute a controlled substance may generally be inferred solely from possession of a large amount of the substance.'" **Id.** (quoting **United States v. Prieto-Tejas**, 779 F.2d 1098, 1101 (5th Cir. 1986)). "The same elements, along with proof that the defendant played a role in bringing the controlled substance from a foreign country into the United States, will prove importation." **Id.**

Possession of a contraband substance may be either actual or constructive and it may be proved by either direct or

circumstantial evidence. **United States v. Vergara**, 687 F.2d 57, 61 (5th Cir. 1982). Constructive possession may be shown by "dominion or control over the premises or the vehicle in which the contraband was concealed." **United States v. Salinas-Salinas**, 555 F.2d 470, 473 (5th Cir. 1977).

"In the nature of things, proof that possession of contraband is knowing will usually depend on inference and circumstantial evidence." **United States v. Richardson**, 848 F.2d 509, 514 (5th Cir. 1988). Furthermore, "**knowledge** of the presence of the contraband may ordinarily be inferred from the exercise of control over the vehicle in which it is concealed." **Id.** at 513 (emphasis in the original). When drugs are hidden in a vehicle, however, such knowledge can be inferred only "if there exists other circumstantial evidence that is suspicious in nature or demonstrates guilty knowledge." **United States v. Garza**, 990 F.2d 171, 174 (5th Cir. 1993) (quoting **United States v. Anchondo-Sandoval**, 910 F.2d 1234, 1236 (5th Cir. 1990)). Nervous behavior which "derives from an underlying consciousness of criminal behavior" constitutes evidence of guilty knowledge. **United States v. Diaz-Carreon**, 915 F.2d 951, 954 (5th Cir. 1990).

The essential elements of a narcotics conspiracy are "the existence of an agreement that entails a violation of the narcotics laws, the defendants' knowledge of the agreement, and their voluntary participation in it." **United States v. Ayala**, 887 F.2d 62, 67 (5th Cir. 1989). "An agreement between the other conspirators and the defendant need not be proved by direct

evidence, but may be inferred from concert of action." **Magee**, 821 F.2d at 239.

A. Appellant Gomez

Gomez contends that the evidence was insufficient to support his convictions because the Government failed to prove beyond a reasonable doubt that he knew the Ford Futura that he was driving contained cocaine. The customs authorities found 92 pounds of 96% pure cocaine in a hidden compartment in that vehicle, which Gomez operated over the course of several days. Gomez's nervousness at the Port of Entry is reliable evidence of his guilty knowledge because he made inconsistent statements to the customs authorities and his explanation of his alleged employment by Galvez was not plausible. **See Garza**, 990 F.2d at 174-75.

Initially, Gomez told Customs Inspector Barajas and Agent Krautkremer that he did not know the name of the person who had hired him and provided the Ford Futura he was driving, and that he did not know where he was to meet the person. Gomez later changed his version of the events, stating that a man named Galvez had hired him, that he was to stay at any motel at the entrance of the City of Austin, and that Galvez would find him.

Gomez's account of how he said he met and was hired by Galvez was not plausible. Gomez maintained that Galvez agreed to pay him \$300 to drive a bus from Austin to Guatemala and that after he drove the Ford to Austin, Galvez would find him at the motel. If the car became inoperable, Gomez said, he had no way to contact Galvez. He could not explain how Galvez was to get the car back to

Guatemala. Gomez also asserted that he did not notice the new undercoating when he was underneath the car fixing the fuel switch.

The jury was entitled to find it implausible that Galvez, who supposedly did not know either Gomez or Contreras before he hired them, would give them \$1,000 each in Guatemala for their expenses for the **return** trip. Gomez said that Galvez planned to meet them in Austin, so logically he would have given them their expense money immediately before they began their return trip. The jury was also entitled to find it unreasonable for Galvez not to tell them where to meet him in Austin with the carload of cocaine worth more than \$4,000,000. With the \$2,500 which Gomez and Contreras had, if they did not know the Ford contained the cocaine as Gomez said, they may have abandoned the Ford if it became inoperable during the long trip, and used other transportation.

Gomez's inconsistent and implausible statements opened the door to the jury's consideration of his nervousness at the Port of Entry as evidence of his consciousness of guilt. **Garza**, 990 F.2d at 174-75. There was ample evidence to support an inference of guilty knowledge.

Gomez also contends that the evidence was insufficient to prove that he was guilty of conspiracy. But once the jury determined that he was aware of the presence of cocaine in the car, it follows that his actions were consistent with transporting illegal narcotics into the United States in concert with others. Gomez admittedly was working for Galvez, who provided the car which contained the cocaine. Contreras acted with Gomez, if not to help

with the driving, then to help protect the cocaine by decreasing his vulnerability during the lengthy trip from Guatemala. The fact that Gomez possessed the same amount of money in the same denominations as Contreras suggests they were paid as equal partners for the trip. Finally, the cocaine obviously was intended for delivery to a person or persons in the United States. A rational jury was entitled to find that Gomez conspired to import cocaine and to possess it with intent to distribute it.

B. Appellant Contreras

The evidence introduced at trial, when viewed in the light most favorable to the jury's verdicts, supports the verdicts rendered against Contreras. His nervousness was reliable evidence of his guilty knowledge because his statement that he was going to Austin was inconsistent with the possession of written directions to Houston. **Garza**, 990 F.2d at 174-75. For the same reasons stated above concerning Gomez, except that there is no evidence that he was in a position to observe the Ford's undercoating, Contreras's implausible statements to Barajas and Krautkremer and trial testimony were probative of his guilty knowledge.

No direct evidence was presented that Contreras ever drove the Ford. However, circumstantial evidence was presented of his intention to exercise control over the cocaine and that he aided and abetted Gomez's possession of it. 18 U.S.C. § 2. "In order to sustain a conviction for aiding and abetting, the government must demonstrate that the defendant: 1) associated with a criminal venture; 2) participated in the venture; and 3) sought by action to

make the venture succeed." **United States v. Murray**, 988 F.2d 518, 522 (5th Cir. 1993). The court so instructed the jury in Gomez's and Contreras's case.

Contreras testified that he, along with Gomez, had been hired to drive to the United States. The fact that each of them possessed \$1,000 in twenty-dollar bills is circumstantial evidence that they had an equal interest in seeing that the trip through Mexico culminated in delivery of the Ford Futura to a location in the United States. It is also significant that Contreras possessed the only set of directions to a destination in this country. A reasonable conclusion from the evidence is that Contreras aided and abetted Gomez.

III.

Because the evidence is sufficient to support these convictions, the judgments appealed from are affirmed.

AFFIRMED.