

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-7219

Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

ROBERT DENNIS THOMPSON,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Southern District of Texas  
91 CR 365 1

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(April 23, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Defendant appeals his conviction for possession of marijuana with intent to distribute, challenging the admission at trial of the marijuana seized from his truck and the sufficiency of the evidence. We affirm.

I.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Thompson was employed as a truck driver by a Mission, Texas, trucking concern for several months prior to his arrest. On November 3, 1991, he was dispatched to take possession of a 1981 Peterbilt tractor-truck, hitch to it an empty trailer at another location, and deliver the trailer to a location in Houston.

The tractor was parked at the residence of the trucking concern's owner, Jose Luis Lopez. Before Thompson arrived at Lopez's residence, Lopez unlocked the tractor, inspected the interior of its cab, and prepared the tractor for the trip to Houston. Lopez examined the sleeping or bunk area of the cab, the toolbox, and a compartment between the bunk area and the toolbox; he did not observe any contraband or unauthorized items in the tractor.

Thompson took possession of the tractor from Lopez on the afternoon of November 3, 1991. Using a set of keys which had been provided to him, Thompson drove to the location where the empty trailer was parked.

Shortly after midnight on November 4, 1991, Thompson drove the Peterbilt tractor-trailer into the U.S. Border Patrol checkpoint facility near Falfurrias, Texas. Border Patrol Agent Leroy Bernal was standing at the passenger side of approaching vehicles and questioning the occupants when each vehicle reached the primary inspection area. As Thompson drove up to where Bernal was standing, Thompson opened the door of the tractor for Bernal. Bernal climbed the steps to its cabin and half-way entered the cab.

Thompson told Bernal that he was an American citizen, travelling alone, and that the trailer was empty.

Upon illuminating the cab of the tractor with a flashlight, Bernal glimpsed a large cellophane-wrapped bundle in a storage compartment beneath a bunk in the sleeping area. Bernal asked Thompson twice what he had under the bunk; both times, Thompson responded "Where?" or "What?" After the first inquiry, Thompson appeared to become nervous. Thompson then told Bernal that he did not know anything about it and that he was driving for someone else.

Agent Bernal asked Thompson to open the door of a storage compartment that was beneath the driver's door. When Thompson complied, Bernal found a bundle of marijuana in the compartment. Bernal then placed Thompson under arrest and advised him of his Miranda rights. Thompson acknowledged that he understood his rights.

Upon searching the interior of the tractor's cab, the agents discovered bundles of marijuana in the compartment under the bunk, in the toolbox, and in the compartment between the two. The agents seized six large bundles of marijuana weighing a total of 82.9 kilograms or 182.7 pounds. These bundles were photographed, initialed by Agent Bernal, and placed in a large metal container used to store contraband at the checkpoint.

Thompson told Agent Bernal that a man whom he did not know had asked him to transport a load of marijuana but that he had refused. Thompson said that he later discovered that a bundle of marijuana

had been placed on the mattress in his tractor. He said he placed this bundle in the toolbox back of the driver's door. Thompson said that when the man talked to him, he also placed \$2,500 in the glove box of the tractor. The money later was seized as evidence.

At about 11:15 on the morning of November 4, 1991, Thompson made a statement to Drug Enforcement Administration Special Agent Tim Jung. Thompson consented to speak with Jung after Jung advised him of his Miranda rights. Thompson told Jung that about two weeks prior to his arrest, he received a call on his pager. In response, Thompson called a Mission phone number and spoke to a man named Ramon. Thompson agreed to meet Ramon at a convenience store. At the meeting, Ramon offered Thompson \$50 per pound to transport marijuana from Mission to Houston; Thompson told Jung he declined the offer. On Friday, November 1, 1991, Ramon went to Thompson's house and again asked him to transport a load of marijuana; Thompson said that he again declined.

Thompson told Jung that he obtained possession of the tractor and trailer on November 3. He said that after he returned home to make final preparations for the Houston trip, at about 7:00 p.m., his wife told him there was a dark-colored car parked near his rig. Thompson did not see the car, but upon investigation, he said he discovered a single large bundle of marijuana on top of the sleeper. Thompson stated that he removed the bundle from the cab and placed it in the driver's side storage compartment of the tractor. There was a permeating odor of marijuana in the cab, which he tried to mask by spraying with an air freshener. Thompson

told Jung that as he removed the air freshener from the glove box, he discovered the \$2,500 there. When Jung asked him why he did not notify the authorities, Thompson kind of shrugged his shoulders and said he did not know why. On rebuttal, DEA Agent Douglas Irr testified similarly concerning Thompson's statements to Agent Jung.

Lopez testified that when he took possession of his tractor-trailer from the Border Patrol after Thompson was arrested, there was a stronger perfume odor in the cab than there had been when he gave the tractor to Thompson. Lopez also testified that he spoke with Thompson after Thompson had been arrested. Thompson first told Lopez that he did not know anything about the marijuana. Then he told Lopez that someone put it in the rig and that he, Thompson, had been forced to do what he did. Thompson told Lopez that before he got to the checkpoint some of the bundles of marijuana had started coming out, but that he kept on going.

Thompson was the only defense witness. At trial, he again asserted that his wife had told him she saw a dark-colored car parked near the rig at his residence. However, he added that he drove his rig to the residence of a friend who was having car trouble. Thompson testified that he did not discover the single bundle of marijuana until he climbed into the sleeping area of the tractor for a nap, north of Edinburg, Texas. Thompson placed the bundle in the tool compartment. He testified that he did not know the bundle contained marijuana and that he thought some of his friends had placed it there as a prank.

Agent Jung took possession of the six marijuana bundles that Agent Bernal had placed in the checkpoint storage container. Subsequently, Jung placed a one-kilogram brick of the marijuana and ten samples from the remaining marijuana in a package, marked with his initials and the case number, and mailed it to the DEA laboratory in Dallas. The parties stipulated at trial that DEA chemist, Buddy Goldston, had analyzed the substances submitted by Agent Jung and concluded that they were marijuana.

## II.

Thompson contends that he is entitled to reversal on grounds that the government agents illegally searched the tractor-truck that he drove to the checkpoint. He acknowledges that he did not file a motion in the district court to suppress the evidence obtained in the search. Based on his analysis of the relevant evidence concerning the search, however, he argues that it constituted plain error.

Rule 12(b)(3), Fed. R. Crim. P., provides that motions to suppress evidence must be raised prior to trial. Rule 12(f) provides that a party's failure to make such a motion shall constitute a waiver thereof, "but the court for cause shown may grant relief from the waiver." Because Thompson failed to request relief from the waiver in the district court, his only ground for relief is plain error.

Rule 52(b), Fed. R. Crim. P., provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." We have said that

"when a new factual or legal issue is raised for the first time on appeal, plain error occurs where our failure to consider the question results in `manifest injustice.'" United States v. Lopez, 923 F.2d 47, 50 (5th Cir.), cert. denied, 111 S.Ct. 2032 (1991). However, "[f]or a fact issue to be properly asserted [as plain error on appeal], it must be one arising outside of the district court's power to resolve." Id.

To the extent Thompson argues that he did not open the cab door on his own volition, this fact issue could and should have been determined by the district court upon a motion to suppress the evidence. We find no miscarriage of justice. See United States v. Pierre, 958 F.2d 1304, 1308-10 (5th Cir. 1992) (en banc).

### III.

Thompson contends that he is entitled to reversal on grounds that the Government failed to prove an unbroken chain of custody of the bundles of marijuana. He therefore asserts that the court erred by admitting the marijuana samples and the laboratory analyses conducted on them. The defense did not object to introduction of the samples and agreed that the jury could consider the stipulation that the chemist had analyzed the samples and that they were marijuana, as if he had so testified in court.

Thompson does not make a plain-error argument to support this point. He could have filed a motion to suppress the samples on chain-of-custody grounds, and rather than stipulating to the chemist's testimony, he could have objected to it as being "fruit of the poisonous tree." See Wong Sun v. United States, 371 U.S.

471, 487-88 (1963). Because there was no such objection to the stipulated testimony, Thompson's only recourse would be to show that its introduction constituted plain error. Fed. R. Evid. 103(a)(1), (d); see United States v. Waldrip, 981 F.2d 799, 804-05 (5th Cir. 1993). We also refuse to review this issue under the plain error doctrine. In light of Thompson's admission to DEA agents that he knew he was carrying marijuana, we see no manifest injustice.

#### IV.

Finally, Thompson contends he is entitled to reversal on grounds that the evidence did not establish beyond a reasonable doubt that he knew the bundles, found in the tractor he was driving, contained marijuana. Relative to this claim, he asserts that "the record does not clearly establish that [he] stated that the alleged bundles contained marijuana prior to the point in time when the border patrol agent told [him that they did]." He argues that reversal is required because the "evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence," quoting from United States v. Sanchez, 961 F.2d 1169, 1173 (5th Cir.), cert. denied, 113 S.Ct. 330 (1992).

With criminal convictions, "[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, 1993 WL



14320 (1993). "In evaluating the sufficiency of the evidence, we consider the evidence in the light most favorable to the government with all reasonable inferences and credibility choices made in support of the verdict." United States v. Ivy, 973 F.2d 1184, 1188 (5th Cir. 1992), pet. for cert. filed, No. 92-7747 (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, be seen to constitute conclusive proof of guilt. See United States v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989). Furthermore, "[i]t is not necessary that the evidence exclude every hypothesis of innocence, and `a jury is free to choose among reasonable constructions of the evidence.'" United States v. Guerra-Marez, 928 F.2d 665, 674 (5th Cir.) (quoting United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc)), cert. denied, 112 S.Ct. 322, 443 (1991).

For a conviction of possessing marijuana with intent to distribute to be upheld, there must be proof of three elements beyond a reasonable doubt: (1) knowing (2) possession of marijuana (3) with intent to distribute. United States v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992), cert. denied, 1992 WL 332153 (1993). Possession of a contraband substance may be either actual or constructive, United States v. Lindell, 881 F.2d 1313, 1322 (5th Cir. 1989), cert. denied, 493 U.S. 1087 (1990), 496 U.S. 926 (1990), and it may be proved by either direct or circumstantial

evidence. United States v. Vergara, 687 F.2d 57, 61 (5th Cir. 1982). One definition of constructive possession is "ownership, dominion or control over the ... vehicle in which the contraband was concealed." United States v. Posner, 868 F.2d 720, 722-23 (5th Cir. 1989).

"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). Finally, the "[i]ntent to distribute a controlled substance may generally be inferred solely from possession of a large amount of the substance." United States v. Prieto-Tejas, 779 F.2d 1098, 1101 (5th Cir. 1986); see also Ojebode, 957 F.2d at 1223.

Lopez testified that Thompson admitted that he knowingly transported marijuana in the tractor-truck. Thompson also admitted to Agent Bernal that he knew that he possessed a bundle of what he thought was marijuana, which he placed in the tool compartment of the tractor. Thompson admitted to Agent Jung, in the presence of Agent Irr, that he had used air freshener in an attempt to mask the odor of the marijuana in the tractor. Lopez testified that there was no marijuana in the tractor when he turned it over to Thompson. Thompson himself testified that he possessed the tractor for about nine hours before he drove it to the checkpoint. From this

evidence a reasonable jury could find that Thompson knowingly possessed the marijuana found in the tractor, with actual or constructive knowledge that it was marijuana.

Thompson contends that the Government's failure to bolster Agent Bernal's testimony, that Thompson identified the bundles as bundles of marijuana, meant that the Government did not establish beyond a reasonable doubt that he made the statement prior to the agents' telling him it was marijuana. He argues that "[t]he record gives equal, or nearly equal, support to Mr. Thompson's allegation that he was merely repeating what the agents had said." This contention is without merit. The credibility of the witnesses was the province of the jury, Sanchez, 961 F.2d at 1173, and there was other evidence, detailed ante, that Thompson knew the bundles contained marijuana.

AFFIRMED.