IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7285

Summary Calendar

United States of America,

Plaintiff-Appellee,

versus

Sergio Romero Munoz,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR L 91 223)

(November 18, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Sergio Romero Munoz entered a conditional guilty plea to charges of conspiracy and possession with intent to distribute approximately three hundred grams of heroin. He now appeals the district court's denial of his motion to suppress his allegedly involuntary confession. During the evidentiary hearing below, Munoz claimed that the incriminating statements made by him at the time of his arrest were prompted by police officers' explicit promises that his acceptance of culpability would secure the release of his relatives also in custody. The police officers categorically denied that any promises were made.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The district court declined to resolve this sharp conflict in testimony on grounds that the presence of such a direct promise would not support a finding that Munoz's confession was involuntary. Our precedents provide, however, that promises may in some circumstances render a confession involuntary and thus required the district court to examine the truthfulness of Munoz's allegations. The absence of any findings on this factual issue precludes this court from determining whether Munoz's confession was voluntary. Since Munoz conditioned his guilty plea on this court's review of his motion to suppress, we must VACATE Munoz's conviction and REMAND the case in order that he may replead.

I.

Laredo Police Officer Michael Wu, assigned to the DEA Narcotics Task Force, received a tip that approximately $40,000 worth of heroin could be found at a residence in Laredo, Texas occupied by, among others, Sergio Romero Munoz. On October 9, 1991, a surveillance team observed a white Chevrolet and beige station wagon depart from the residence and head north on IH-35. Rosaura Larumbe De Cruz, Munoz's mother-in-law, her son Juan Rene Cadena-Larumbe, Maria Medellin Robles, Cadena's wife, and their two children were in the Chevrolet. Munoz, his wife Maria Magdalena, and Arnoldo Vitela occupied the station wagon. When the group arrived at the Border Patrol checkpoint, both vehicles were directed to the secondary inspection area.

According to Munoz, a bearded DEA agent immediately addressed him: "Where is the chiva? You tell me where it [is] and I'll let all the people around here go home." Sup.R. 1 at7. Munoz disclaimed all knowledge of possible contraband, stating "Go ahead and check my car. Check it all well. Because I don't know what's going on." The officers found nothing in the cars, but then noticed Rosaura Larumbe cowering behind a patrol car with her hand in her purse. After seizing the purse, the officers discovered a bundle of heroin wrapped in gray duct tape. The officers then arrested all of the occupants of both cars and took the group to the DEA office in Laredo.

Upon their arrival at the DEA office, Munoz and Caneda declared that they did not wish to make any statements. Rosaura Larumbe, however, told the officers that the heroin belonged to

Munoz and Vitela and that they were attempting to transport it to Vitela's home in Dallas when they were stopped. After two hours of separation in different rooms during processing, the relatives encountered each other in the office hallway while being prepared for transport to Webb County Jail. After noticing that Rosaura Larumbe was quite distraught, Munoz and Caneda informed the officers that they now wished to talk. According to the government, their change of heart was motivated by the sight of the nearly hysterical Rosaura Larumbe. Munoz, however, maintains that he and Caneda were again approached by the bearded agent, who admonished them for being foolish and promised that all of the women would be released if they confessed. Munoz and Caneda then gave substantially similar accounts of their plan to transport the heroin.

The grand jury filed a superseding indictment on December 10, 1991, charging Munoz and Caneda with conspiracy and possession with intent to distribute heroin and Rosaura Larumbe with conspiracy and aiding and abetting. All three defendants filed motions to suppress their incriminatory statements. After the district court denied these motions on January 16, 1992, all three entered guilty pleas. Only Munoz, pursuant to Fed. R. Crim. P. 11 (a) (2), conditioned his plea on his right to appeal the district court's denial of his motion to suppress.[1] The district court sentenced Munoz to concurrent terms of 70 months imprisonment and five years supervised release. This appeal followed.

II.

The government has the burden of proving by a preponderance of the evidence that Munoz's confession was voluntary. United States v. Rojas-Martinez, 968 F.2d 415, 417 (5th Cir. 1992) (citing Colorado v. Connelly, 107 S.Ct. 515, 522-23 (1986)). "Voluntariness depends on the totality of the circumstances and must be evaluated on a case-by-case basis." Rojas-Martinez, 968 F.2d at 417; United States v. Rogers, 906 F.2d 189, 191 (5th Cir. 1990). We are bound by the district court's credibility choices and factual findings unless they are clearly erroneous. United States v. Menesses,

[1] In the absence of a conditional plea, a guilty plea "waives all non-jurisdictional defects in the proceedings leading to conviction." United States v. Smallwood, 920 F.2d 1231, 1240 (5th Cir. 1991) (citing Barrientos v. United States, 668 F.2d 838, 842 (5th Cir. 1982)).

962 F.2d 420, 428 (5th Cir. 1992); United States v. Raymer, 876 F.2d 383, 386 (5th Cir.), cert. denied, 110 S.Ct. 198 (1989). The ultimate issue of voluntariness is, however, a legal question subject to de novo review. Rojas-Martinez, 968 F.2d at 418; Raymer, 876 F.2d at 386.

The district court found that the police advised Munoz and Caneda of their Miranda rights before any incriminatory statements were given. The court also found that Munoz and Caneda agreed to talk only after they encountered their relatives in the hallway while preparing for transfer from the DEA office to the Webb County jail. The court finally found that the confessions of Munoz and Caneda "were motivated by a desire to have the women and children released from custody." These factual findings are not clearly erroneous; they are, however, incomplete. Citing police officers' testimony that no promises of leniency or release were offered, the government contends that Munoz's decision to confess was the product of his own free and voluntary choice. Munoz, however, offers a markedly different account, asserting that "some agent told them that if either or both of them accepted responsibility for the heroin, the others could go free." The district court did not decide this factual question because it believed that "even if [Munoz's allegations are true], under the totality of the circumstances, the resulting statements would not be legally involuntary." This was error.

As Munoz notes, the Supreme Court at one time held that a confession may not be "'extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight.'" Bram v. United States, 168 U.S. 532, 542-43 (1897). This court has recognized, however, that "the Bram test 'has not been interpreted as a per se proscription against promises made during interrogation,' and the test has been tempered by subsequent holdings that, depending on the totality of the circumstances, certain representations will not render a confession involuntary." Hawkins v. Lynaugh, 844 F.2d 1132 (5th Cir. 1988) (quoting Miller v. Fenton, 796 F.2d 598, 608 (3d Cir. 1986)). The district court thus properly rejected Munoz's broad contention that the existence of any promise requires the suppression of the statement.

On the other hand, it is clear that some promises may combine with other circumstances to make a confession involuntary. In holding that a promised release of Munoz's relatives could not, as a matter of law, render his subsequent confession involuntary, the district court departed from our precedents. In contrast with the categorical rule apparently embraced by the district court, we have frequently singled out such offers of leniency or release as "promises [which], if not kept, are so attractive that they render a resulting confession involuntary." Streetman v. Lynaugh, 812 F.2d 950, 957 (5th Cir. 1987) ("A promise of immediate release or that any statement will not be used against the accused is such a promise"). See, e.g., Menesses, 962 F.2d at 428 (noting that a confession "induced by an assurance that there will be no prosecution is not voluntary" but refusing to suppress statement because evidence did not suggest that defendant "was acting under what she considered to be a promise that her husband would go free if she cooperated"); Rogers, 906 F.2d at 191-92 (confession involuntary when prompted by promises that defendant would not be prosecuted); Rojas-Martinez, 968 F.2d at 418 (finding confession voluntary where "officers made no statements to the defendants that could be construed as a promise" and facts "d[id] not give rise to an inference that the officers were trying to make the defendants believe that they would be released if they confessed").

Motions to suppress allegedly involuntary confessions require courts to determine whether an officer's comments "cross the line between expressions of sympathy and kindness and promises of leniency" and distinguish between an improper promise and a permissible "'prediction about future events beyond the parties' control or regarded as inevitable.'" Hawkins, 844 F.2d at 1139 (quoting United States v. Fraction, 795 F.2d 12, 15 (3d Cir. 1986) ("In this context, a 'promise' is an offer to perform or withhold some future action within the control of the promisor, in circumstances where the resulting action or inaction will have an impact upon the promisee")). As these standards suggest, "a valid waiver of constitutional rights does not occur in a vacuum but rather in response to a particular set of facts." Rogers, 906 F.2d at 191. Accordingly, a court may conclude that a confession is voluntary only after carefully examining whether, and to what extent, the police

promised something in return. See, e.g., Menesses, 962 F.2d at 428 (confession voluntary when "[a] reasonable reading of [defendant's] testimony is that she believed that by taking all the blame herself, her husband would necessarily be helped"); United States v. Kolodziej, 706 F.2d 590, 594-95 (5th Cir. 1983) (confession voluntary where alleged threats were merely statements of fact and decision to cooperate was "made after several hours of sober reflection [and] motivated by a desire to improve the situation of [defendant's] entire family"); Tuttle v. Decker, 386 F.2d 814, 815 (5th Cir. 1967) (confession voluntary where police did not initiate conversation and state alleged that officer "was only stating a customary result, not making a promise").

The district court incorrectly held that Munoz's confession would be voluntary even if the police offered to release his relatives in exchange for his acceptance of culpability. The court's mistaken view of the law led it to omit the crucial factual determination that our precedents--because they provide that some promises may render a confession involuntary--require district courts to make in every case. The district court conducted extensive hearings on this matter and the record contains a large amount of testimony bearing directly on this question. We cannot, however, decide this unresolved factual dispute from our appellate post and thus cannot determine whether Munoz's confession was voluntary. See, e.g., United States v. Hahn, 922 F.2d 243, 248 (5th Cir. 1991). We therefore cannot affirm the district court's denial of Munoz's motion to suppress. Since "[Munoz's] plea of guilty--on which his conviction rests--was expressly conditioned on his right to appeal the district court's ruling on his motion to suppress," we must treat Munoz's appeal of his conviction as a request to withdraw his guilty plea. Id. at 248 & n.12. We therefore VACATE Munoz's conviction and sentence and REMAND in order that he may replead.