UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7287
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE RAMIREZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR-C-91-400)

(January 29, 1993)

Before POLITZ, Chief Judge, JOLLY and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge:[*]

Jose Ramirez appeals his conviction of possession of marihuana with intent to distribute, contending that statements given to authorities after his arrest should have been suppressed. Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

On November 18, 1991 Trooper Caro of the Texas Department of Public Safety stopped a speeding tractor-trailer driven by Ramirez who identified himself as Sabas Davila, Jr., but had neither log books nor a driver's license in that name. Caro requested and received permission to search the truck. The irregular stacking of bell pepper crates alerted the officer who, aided by a drug-sniffing dog, found 691 kilograms of marihuana hidden beneath the bell peppers. Caro arrested Ramirez.

After informing Ramirez of his **Miranda**[1] rights, who acknowledged an understanding, DPS Sergeant Aguilar questioned Ramirez, who neither requested counsel nor suggested a desire to remain silent. Ramirez's lethargic demeanor made Aguilar suspect the influence of a narcotic. After nearly one-half hour of denying any knowledge of the marihuana, in a sudden reversal Ramirez claimed that he had stolen it from smugglers at the Mexican border by impersonating a police officer. With that Aguilar terminated the questioning. The next day Aguilar obtained a photo of Sabas Davila which confirmed his suspicion that Ramirez had lied about his identity. He restated the **Miranda** warnings, which Ramirez again acknowledged, and resumed the interview. Again Ramirez did not resist the questioning nor did he ask for counsel. When he claimed again to be Sabas Davila, Aguilar presented the photo of that gentleman whereupon Ramirez stated: "Now you know who I'm not

[1] **Miranda v. Arizona**, 384 U.S. 436 (1966).

and it's your job to find out who I am." With that Aguilar terminated the questioning.

Just over a week later Aguilar conducted another interview, this time armed with a police photo of Ramirez. After a third recitation of the **Miranda** litany, and a third acknowledgment of understanding but neither voiced resistance nor request for assistance of counsel, Aguilar showed Ramirez his police photo. At this point Ramirez said that the marihuana belonged to two others who had hired his transportation services. He offered more information if Aguilar would assist him in getting his bond reduced. Aguilar refused.

Ramirez was indicted for possession with intent to distribute marihuana. An *in limine* motion to suppress his inculpatory statements was denied, the jury found him guilty, and he was sentenced to 210 months imprisonment, five years supervised release, and a $1000 fine. He timely appealed.

Analysis

Ramirez contends that his statements were not voluntary and that Aguilar had violated the protective rules of **Miranda** by conducting the second and third interviews. We address each contention in turn.

A. Voluntariness

Due process guarantees prohibit the use at trial of

involuntary statements given to the police.[2] The government must prove voluntariness by a preponderance of the evidence.[3] We evaluate voluntariness on a case-by-case basis, considering the totality of the circumstances,[4] accepting fact findings unless clearly erroneous but reviewing the ultimate legal conclusion *de novo*.[5] Only statements produced by free and unconstrained choice will be deemed voluntary.[6] Absent coercive interrogation tactics, a defendant's mental impairment alone will not constitute a lack of voluntariness.[7] The exploitation of a suspect's mental condition through subtle forms of psychological persuasion may constitute proscribed coercive tactics.[8]

Ramirez insists that the use of a narcotic clouded his mind during the first interview, vitiating voluntariness. We are not persuaded. The district court found that although Ramirez was

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[2] **Self v. Collins**, 973 F.2d 1198 (5th Cir. 1992).

[3] **United States v. Raymer**, 876 F.2d 383 (5th Cir. 1989).

[4] **United States v. Rojas-Martinez**, 968 F.2d 415 (5th Cir. 1992).

[5] **Raymer**.

[6] **Self** (citing **Schneckloth v. Bustamonte**, 412 U.S. 218 (1973)).

[7] **Colorado v. Connelly**, 479 U.S. 157 (1986).

[8] **Raymer**.

under the slight influence of an intoxicant during the first interview, he clearly and rationally responded to Aguilar's questions and when he asked that the discussion terminate it was immediately ended. These findings are not clearly erroneous and support a conclusion that Ramirez spoke voluntarily.[9]

Ramirez claims coercion in the two subsequent interviews because of the use of the photographs, first of Sabas Davila and then of himself. This action was neither coercive nor improper and, standing alone, could not produce "psychological pressure strong enough to overbear the will of a mature, experienced man."[10]

B. Subsequent interviews

Ramirez contends that the second and third interviews violated **Miranda** because he had terminated questioning after about 30 minutes on the night of his arrest. **Miranda** requires that when a suspect invokes the right to remain silent, questioning must cease. Authorities may, however, obtain admissible statements in questioning resumed after invocation of the right to remain silent

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[9] **Raymer** (the mere questioning of defendant suffering from mental defect not coercion rendering responses involuntary). Without supporting authority, Ramirez also argues for the first time on appeal that the trial court should have suppressed the statements made at the initial interview as constituting a far-fetched story and therefore lacking indicia of reliability. In view of our conclusion about voluntariness, we find this argument unpersuasive. Cf. **United States v. Meyer**, 733 F.2d 362 (5th Cir. 1984) (inherently unbelievable statement which defendant made to grand jury admissible at trial as tending to prove consciousness of guilt).

[10] **Hawkins v. Lynaugh**, 844 F.2d 1132, 1141 (5th Cir. 1988) (quoting **Miller v. Fenton**, 796 F.2d 598 (3d Cir. 1986)).

provided the authorities "scrupulously honor" the suspect's right to terminate questioning.[11]

In the case at bar there was no campaign of repeated interrogations in rapid succession designed to wear down Ramirez's resistance.[12] Aguilar allowed ample time to pass between interviews, and promptly honored each request by Ramirez to terminate questioning. Ramirez at no time requested the presence of counsel.[13] Further, Aguilar reiterated the **Miranda** warnings before each session. We conclude that Aguilar "scrupulously honored" Ramirez's invocation of the right to terminate interrogation.

The trial court did not err in declining to suppress the inculpatory statements. The conviction and sentence are AFFIRMED.

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[11] **Mighigan v. Mosley**, 423 U.S. 96 (1975).

[12] See **Kelly v. Lynaugh**, 862 F.2d 1126 (5th Cir. 1988) (police "scrupulously honored" defendant's right to end questioning where they conducted three interviews spread over a total of eight hours concerning same crime); compare **United States v. Hernandez**, 574 F.2d 1362 (5th Cir. 1978) (police failed to "scrupulously honor" defendant's right to terminate questioning where they made two further attempts to obtain statement within 45 minutes of defendant's initial invocation of right to remain silent). Aguilar's use of photographs at the latter interviews does not alter our conclusion. In **Kelly**, we found no **Miranda** violation where police obtained the defendant's statement after informing him that a codefendant had made a statement implicating him. **Kelly**, 862 F.2d at 1130.

[13] A request for counsel precludes further interrogation absent counsel or an initiation of discussions by the defendant. **Minnick v. Mississippi**, 498 U.S. 146 (1990).