

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-7302  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE FERNANDO GARCIA HERNANDEZ  
and JOSE PABLO GARCIA HERNANDEZ,

Defendants-Appellants.

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Appeal from the United States District Court  
For the Southern District of Texas  
(M-91-CR-293-01 & 02)

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(September 30, 1993)

Before POLITZ, Chief Judge, KING and WIENER, Circuit Judges.

POLITZ, Chief Judge:\*

Jose Pablo Garcia Hernandez and his brother Jose Fernando Garcia Hernandez challenge the sufficiency of the evidence supporting their convictions of narcotics offenses. 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

Acting on a tip from a confidential informer, law enforcement authorities established surveillance of a suspected marihuana "stash house" in Roma, Texas. In the ensuing two hours, agents saw no one enter or leave the premises. As the agents approached the house to execute a search warrant they heard someone inside shout a warning and two men exited the back of the house but were apprehended in the rear yard. The two men were the Garcia Hernandez brothers.

The house was unfurnished and apparently uninhabited. Authorities found 361 pounds of marihuana in a bedroom, a .357 magnum handgun and a walkie-talkie next to a mattress in the living room, and a baggie of marihuana, a marihuana cigarette, and marihuana residue in the kitchen. A television in the living room was turned on. The odor of marihuana permeated the house.

Two other houses were situated within the compound with the "stash house." One was similarly unfurnished; the other was a well-appointed residence. The agents conducted consensual searches of both houses. In the former they found 168 pounds of marihuana and a walkie-talkie. In the latter they found a small quantity of marihuana and a walkie-talkie set to the same frequency as those found in the other houses. They arrested at these houses Jose Guadalupe Bazan Lopez and Mario Ceasar Salazar Garza.

The Garcia Hernandez brothers, Bazan Lopez, and Salazar Garza were indicted for conspiracy to possess with intent to distribute more than 100 but less than 1000 kilograms of marihuana in

violation of 21 U.S.C. § 846, together with the underlying substantive offense, 21 U.S.C. § 841(a)(1). Bazan Lopez and Salazar Garza were released on bond and did not appear for trial. The Garcia Hernandez brothers were convicted by a jury and sentenced to 63 months imprisonment. This appeal timely followed.

### Analysis

In evaluating its sufficiency, we view the evidence in the light most favorable to the verdict and decide whether a rational jury could have found each essential element of the offense proven beyond a reasonable doubt.<sup>1</sup> Although the evidence herein was in part thin, we cannot say that it was insufficient for a rational jury to convict.

To establish a conspiracy under 21 U.S.C. § 846 the government must prove an agreement between two or more persons to violate the drug laws, along with knowledge of the agreement and voluntary participation by each defendant.

An agreement may be inferred from concert of action, participation from a collocation of circumstances and knowledge from surrounding circumstances. Mere presence at the scene and close association with those involved are insufficient factors alone; nevertheless they are relevant factors for the jury.<sup>2</sup>

To establish possession with intent to distribute, the government must prove possession of the contraband by the defendant, knowledge

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<sup>1</sup>**United States v. Rodriguez**, 993 F.2d 1170 (5th Cir. 1993).

<sup>2</sup>**Id.**, 993 F.2d at 1175 (internal quotations and citations omitted).

and intent to distribute. The elements of this offense likewise may be proven by circumstantial evidence. In particular, constructive possession can be inferred from dominion over the premises where the drugs are found<sup>3</sup> and intent to distribute can be inferred from possession of a larger quantity of drugs than that normally possessed for personal consumption.<sup>4</sup>

The defendants insist that the government proved nothing more than their mere presence at a house containing marihuana. Fernando testified that he and his brother recently had arrived from Mexico on three-day border crossing passes, had worked in the yard of their brother-in-law, Salazar Garza, the day before the arrest, and had been hired by Bazan Lopez to clean the yards of the other two houses in the compound. They began the task that same afternoon and returned the next day to finish. Immediately prior to their arrest Fernando maintains that they entered one of the houses to wash up for lunch. That was when the agents appeared. Spotting a Border Patrol vehicle Pablo shouted "Immigration"; the two fled, fearful of apprehension because they had overstayed their three-day passes.

The jury was entitled to discredit the defendants' version of events. Indeed, the testimony of several agents that they had seen no one outside the house, certainly no one working in the yard, in the preceding two hours compelled the jury to choose between

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<sup>3</sup>**United States v. Carter**, 953 F.2d 1449 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2980, 119 L.Ed. 2d 598 (1992).

<sup>4</sup>**Rodriguez**.

conflicting accounts. Fernando's account did not explain why the television was on when the agents entered. Nor did he explain how he failed to notice the odor of a substantial amount of marihuana in the house. An internally inconsistent or inherently implausible explanation of a defendant's actions may present evidence of guilt.<sup>5</sup>

The evidence placed the Garcia Hernandez brothers alone in the house for at least two hours. The jury was entitled to infer that the owners of the marihuana would not have allowed the brothers such extended, unsupervised access to the contraband unless they were part of the venture.<sup>6</sup> At least one of the brothers was in the living room watching television. There, in plain view, was a .357 magnum and a walkie-talkie. This too was incriminating evidence, as was, of course, the pervasive odor of marihuana. Finally, the brothers fled when authorities arrived. Although flight alone is insufficient to support a conviction, it may be probative of guilt.<sup>7</sup> The record herein, however, contains sufficient additional evidence connecting the defendants to the marihuana to sustain their convictions.

Both convictions are AFFIRMED.

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<sup>5</sup>**Id.**

<sup>6</sup>**See United States v. Chavez**, 947 F.2d 742 (5th Cir. 1991); **United States v. Gallo**, 927 F.2d 815 (5th Cir. 1991).

<sup>7</sup>**United States v. Lopez**, 979 F.2d 1024 (5th Cir. 1992), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 113 S.Ct. 2349, 124 L.Ed. 2d 258 (1993).