

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7363
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUADALUPE ISLAS-MOLINERO,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

(CR-L-92-47)

(January 8, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Guadalupe Islas-Molinero was convicted by a jury of possession with intent to distribute marihuana. He complains on appeal that the evidence was insufficient to support his conviction. We disagree and, finding no reversible error by

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

I

FACTS AND PROCEEDINGS

On a rainy January morning in 1992, Islas drove a tractor-trailer dump truck into the permanent border checkpoint on Highway 16 near Hebbronville, Texas. The checkpoint was closed but Border Patrol Officer Patricio Hernandez was standing under the canopy that sheltered the entrance to the checkpoint when the truck driven by Islas pulled in and stopped.

As Hernandez approached to tell the driver that the checkpoint was closed, he noticed that the truck was unusually clean and appeared to have been freshly-painted. Hernandez told Islas that the checkpoint was closed but asked Islas about his immigration status. Hernandez was told by Islas that he was born in Mexico but had a temporary resident-alien card. Hernandez testified that Islas 1) kept a "white-knuckle grip" on the steering wheel with one hand while handing his resident-alien card to Hernandez with the other; 2) was trembling and appeared nervous; and 3) explained that he was on his way to Poteet, Texas, to pick up a load of sand for the Los Cuates Construction Company of Rio Grande City.

Hernandez also testified that his interest was so piqued by the truck's fresh paint job and Islas's nervous behavior that Hernandez asked Islas to pull into the secondary station of the checkpoint. There, Hernandez asked Islas if he knew who owned the truck, to which Islas responded that he had purchased the truck in McAllen just two weeks earlier. Hernandez asked Islas to exit the

truck and requested permission to inspect it, to which Islas consented. Hernandez testified that he noticed an unusual, dull thud when he tapped the gas tank on the driver's side. In response to Hernandez's question whether there was anything inside the tanks, Islas answered that there was not.

When Hernandez asked Islas where he had fueled the truck, he answered that he filled the tanks at Canales Drive-In in Rio Grande City. Hernandez, a native of Rio Grande City, informed Islas that the Canales Drive-In did not sell diesel fuel. Islas replied that it must have been at Porras' Service Station, another station in Rio Grande City.

Hernandez next asked permission to have the truck "sniffed" by a dog trained to alert to the scent of narcotics, and Islas consented. Before calling the officer who is the dog's handler, however, Hernandez called his own supervisor to inspect the truck's fuel tanks. The supervisor shared Hernandez's suspicions, so the dog handler was called. The dog "alerted" to all three tanks on the truck. Islas maintained his innocence, stating that anything that was in the tanks was placed there before he bought the truck.

The agents then drilled test holes at the location on the tanks that had emitted the dull sounds. Following each drilling, deposits of marihuana debris were found on the drill bit. The agents then cut open the tanks and seized bundles containing 658 pounds of marihuana.

The dog handler, testified that in his opinion the marihuana was fresh and had been packaged within a week prior to the seizure.

He estimated that the marihuana compartments in the fuel tanks reduced the truck's fuel capacity to ten gallons per tank.

A deputy at the Webb County Sheriff's Office and DEA agent took custody of the marihuana. He learned that neither the license plates nor the vehicle identification number related to Islas. The truck's license plates were traced to a resident of Rio Grande City, and the trailer plate was registered to a resident of Brownsville. Through the vehicle identification number of the truck, its ownership was traced to a resident of Woodson, Texas.

An owner of Los Cuates Construction Company testified that Islas had never worked there. Islas's wife testified that Islas left home at approximately five o'clock in the morning on the day of the incident, telling her that he was going to Poteet to pick up a load of sand. She stated that her husband did not own the truck or the trailer, and that he usually worked for Flores Trucking.

Islas did not move for acquittal either at the close of the government's case or at the close of the evidence.

II

ANALYSIS

Islas argues that the evidence was insufficient to support his conviction. He is incorrect.

We review a claim of insufficiency of the evidence presented at trial in the light most favorable to the guilty verdict. United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988). Islas did not move for acquittal during trial. Consequently, our standard of review of the sufficiency of

the evidence here is plain error, i.e., whether the conviction produces a manifest miscarriage of justice. Such a miscarriage exists only if the record is devoid of evidence pointing toward guilt. United States v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988); United States v. Pierre, 958 F.2d 1304, 1310 (5th Cir.) (en banc), cert. denied, 113 S.Ct. 280 (1992).

To prove the offense of possession with intent to distribute marihuana, in violation of 21 U.S.C. § 841(a)(1), the government was required to prove beyond a reasonable doubt that Islas 1) knowingly 2) possessed marihuana 3) with the intent to distribute it. United States v. Pruneda-Gonzalez, 953 F.2d 190, 194 (5th Cir.), cert. denied, 112 S.Ct. 2952 (1992). A jury may infer the intent to distribute from the possession of a large amount. Id. Islas does not dispute that the agents seized in excess of 650 pounds of marihuana in the tanks of the truck.

As this case involves hidden compartments in the tanks of the truck, in and of itself Islas's control over the vehicle is not enough to prove that he knew of the presence of the marihuana. United States v. Gibson, 963 F.2d 708, 710 (5th Cir. 1992). Islas's guilty knowledge can be inferred only if there were "circumstances evidencing a consciousness of guilt." United States v. Richardson, 848 F.2d 509, 513 (5th Cir. 1988). "Inconsistent stories may constitute substantive evidence of a defendant's guilty knowledge. Circumstantial factors also include lack of knowledge of the true owner and implausible explanations for one's travels." Gibson, 963 F.2d at 711.

The evidence adduced by the government shows that at the Hebronville checkpoint Islas was visibly nervous; gave inconsistent explanations of where he purchased diesel fuel; incorrectly stated that he was the owner of the truck; and stated falsely that he worked for the Los Cuates Construction Company. Islas's inconsistent explanations coupled with the less-than-credible gaps in his story support the jury's determination that he had knowledge of the presence of the marihuana. See Gibson, 963 F.2d at 711. As the record is not devoid of evidence of the elements of the crime for which he was convicted, there was no manifest miscarriage of justice in Islas's trial or the conviction resulting therefrom. Ruiz, 860 F.2d at 617; Pierre, 958 F.2d at 1310. His conviction is therefore
AFFIRMED.