

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7455

Summary Calendar

United States of America,

Plaintiff-Appellee,

versus

Lorenzo Guerrero,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-L-91-275)

February 19, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Guerrero appeals his conviction at trial of conspiracy to possess with intent to distribute marijuana and of possession with intent to distribute marijuana. Guerrero makes three complaints: (1) that a confession was impermissibly admitted at trial; (2) that the government's release of undocumented alien witnesses required a dismissal of the charges; and (3) that the district judge

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

prejudiced his trial by reopening the government's case to introduce the written confession. We affirm.

I

On the night of December 7, 1991, border patrol agents were watching a creek which runs into the Rio Grande near Laredo, Texas. The creek runs behind Guerrero's residence. The agents observed eight men wearing packs coming from the river. The agents followed those men into Guerrero's back yard. First one man went alone to Guerrero's house, then others carried bundles to the house. Agents observed a man looking out of the rear window of the Guerrero house, while they could hear the noise made by the couriers.

The agents called for backup, and as additional units arrived the men under observation scattered and fled. Most of them escaped, but agents discovered an alien hiding on the floor of a Suburban automobile parked in Guerrero's driveway. Another alien was found hiding under a tarp by Guerrero's kitchen door. Two bags of marijuana was found by the door and large bundles of marijuana were discovered in the Suburban. The two aliens were arrested.

Guerrero was at home at the time, and Border Patrol Agent Villarreal testified that he told Guerrero his Miranda rights. Guerrero indicated that he understood his rights. Guerrero and his wife were transported along with their child to the border patrol office around midnight. Around 4:00 a.m., customs agents picked up the Guerrero family. Customs Agent Torres testified to giving Guerrero Miranda warnings at the border patrol office. Customs agents then took the Guerrero family to the Customs Service office,

where Guerrero signed a waiver of his rights and wrote an incriminating statement around 7:00 a.m.

Guerrero's statement says that he was contacted by a "wetback" who told Guerrero that Mario¹ would pay Guerrero \$4500 to deliver a load of marijuana to the car lot where Mario worked. Guerrero wrote that marijuana was brought across the river and loaded into the Suburban, which Guerrero had borrowed from his brother-in-law Roach. Roach was to drive the load to Mario.

Before trial, Guerrero moved to suppress the written confession. Guerrero contended that the statement was coerced, that he was denied counsel after requesting assistance,² and that he was not advised of his Miranda rights. Following a pretrial suppression hearing, the district court denied Guerrero's motion. At trial, Guerrero testified about the circumstances surrounding the giving of the statement, and the district court instructed the jury to consider whether the statement was voluntarily made in determining its verdict.

Guerrero also filed a motion to dismiss the indictment because the government released the two aliens before affording Guerrero an opportunity to interview these witnesses. The record does not reflect whether or when these aliens were deported, as Guerrero

¹Guerrero's statement says that he could not recall Mario's surname as he was writing the confession.

²Guerrero has not asserted a violation of the prophylactic rule of Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981), in his brief on appeal. His failure to prosecute that issue on appeal constitutes waiver of the claim. See United States v. Green, 964 F.2d 365, 371 (5th Cir. 1992), cert. denied, 61 U.S.L.W. 3478 (Jan. 11, 1993).

contends. Guerrero sought a hearing on this motion in March, 1992. The government stated that the two aliens had invoked their Miranda rights and refused to answer questions. Charges against the two had been dismissed in January 1992 due to the insufficiency of evidence against them. Noting the tardiness of Guerrero's motion, the district court denied it.

II

Guerrero contends that his confession was inadmissible, because he did not receive Miranda warnings and because intoxication and coercion prevented any waiver of rights from being knowingly and voluntarily made. When reviewing a pretrial suppression ruling, we must give credence to the credibility choices and findings of fact of the district court unless clearly erroneous. United States v. Rogers, 906 F.2d 189, 190 (5th Cir. 1990). A fact finding is clearly erroneous only when the reviewing court is left with the definite and firm conviction that a mistake has been committed. The issue of voluntariness, however, is a legal question which we may independently determine in light of the facts as found. See id.

The government bears the burden of proving that both the waiver of Miranda rights and the confession were voluntary. United States v. Raymer, 876 F.2d 383, 386 (5th Cir.), cert. denied, 493 U.S. 870 (1989). The totality of circumstances must be considered in determining whether a statement is the product of the accused's free and rational choice. Rogers, 906 F.2d at 190. Although a defendant's mental state is considered, coercive police activity is

a necessary predicate to finding that a confession or waiver of Miranda rights was made involuntarily. Colorado v. Connelly, 479 U.S. 157, 167-70, 107 S. Ct. 515, 522- 523 (1986).

At trial, Border Patrol Agent Villarreal testified that he read Guerrero Miranda rights at his house. At his suppression hearing, Guerrero admitted that border patrol agents read him his rights. Customs Service agents arrived at the border patrol office to take custody of Guerrero around 4:00 a.m. Customs Agent Simmons testified at the suppression hearing that Customs Agent Torres gave Guerrero Miranda warnings at the border patrol office. Agents Simmons and Torres took the Guerrero family to the Customs Service office. Agent Simmons stated at the hearing that he advised Guerrero of his rights once more at the Customs Service office before interrogating Guerrero. At trial, Agent Simmons testified that he showed Guerrero his rights in writing. The district court's rejection of the contention that Guerrero was not advised of Miranda rights before questioning is not clearly erroneous.

Guerrero maintains that he was extremely intoxicated during questioning, so that any waiver of his rights was not knowingly and voluntarily made. Guerrero testified at trial that on December 7 he consumed almost a dozen drinks and beers and more than two grams of cocaine. He claimed that when agents arrived at his residence, he swallowed another four grams of cocaine.³ According to Guerrero, at the time of his arrest, in the presence of agents and

³At the suppression hearing, Guerrero claimed that he swallowed three grams of cocaine.

his wife, he put a plastic bag containing the cocaine in his mouth, chewed it until the cocaine dissolved, and spit out the bag.

Border Patrol Agent Melendez testified at trial that he was present when Guerrero first exited the house. Melendez instructed Guerrero to show his hands and watched Guerrero while other agents spoke to him. Agent Melendez testified that Guerrero did not have anything in his hands and did not put anything into his mouth. Dr. Pena, the specialist in addictive disorders who testified at trial, stated that a sleep-deprived person who ingested five grams of cocaine at one time would die or exhibit psychotic behavior. A person who consumed cocaine in the manner Guerrero described himself as doing would not be capable of behaving in a calm manner and answering questions understandably. Customs agents testified, however, that Guerrero was calm and collected during his interrogation and confession.

Guerrero also argues that he was coerced into writing the statement. Guerrero emphasizes that he was separated from his wife and child at the Customs Service office, and had been kept awake all night without eating. According to Guerrero, customs agents told him that his family could leave if he signed a statement. Agent Torres testified at the suppression hearing that Mrs. Guerrero was released before 7:00 a.m., when she was deemed no longer a suspect. Mrs. Guerrero and her child had to wait at the Customs Service office for about an hour for someone to come to pick them up. They were free to leave before Guerrero signed his

statement at about 7:00 a.m. Agents Torres and Simmons denied making any promises or threats to Guerrero.

Guerrero claims that Agent Simmons coached him in writing the statement, saying that it would help Guerrero and that Agent Simmons would "go easy" on Guerrero. On cross-examination Guerrero admitted that he wrote the statement, but claimed that he had no recollection of its contents, which were dictated to him by Agent Simmons.

At the suppression hearing, Agent Torres said that he advised Guerrero of his rights at the border patrol office. Agent Simmons repeated the Miranda warning at the Customs Service office. Agent Torres testified that Guerrero acknowledged understanding his rights and was willing to speak to the agents. Guerrero reportedly offered to provide information on criminal activity and was told that cooperation would be reported to the U.S. Attorney.

The preponderance of the evidence reflects that Guerrero voluntarily waived his Miranda rights and gave an incriminating statement. Guerrero's assertion that he was incapable of acting voluntarily must fail because the claim that he ingested three to four grams of cocaine at the time of his arrest is not credible. It is contradicted by the observation of the arresting officer, the medical testimony regarding the effects of such consumption, and the evidence of Guerrero's demeanor while in custody. The legibility of the statement which Guerrero claims to have written while extremely intoxicated also belies his assertion. Since there is no credible evidence that Guerrero lacked mental competence, we

cannot independently find that Guerrero's confession or waiver of rights was involuntary on that basis.⁴

Likewise, the district court did not clearly err in finding that government agents did not improperly coerce or induce Guerrero to write a confession. The testimony of Agents Simmons and Torres was consistent and denied police overreaching. Guerrero's testimony, in contrast, lacked consistency. For example, he testified that he remembered particular inducements made by agents but denied recalling the contents of the statement that he wrote. Where both the district court and a jury have heard a defendant's claims of coercion and rejected them, we give great weight to their findings. See United States v. Causey, 835 F.2d 1527, 1528-29 (5th Cir. 1988).

III

Guerrero contends that he was denied his right to confrontation and compulsory process by the government's release of the two aliens found on his property. He suggests that the aliens could have testified as to who instructed them to deliver marijuana to his property and who they were to meet there.

"The mere fact that the Government deports . . . [alien] witnesses is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process

⁴Of course, Guerrero's mental condition alone could not render his waiver of rights or confession involuntary in the constitutional sense. See Connelly, 479 U.S. 157, 107 S. Ct. 515 (1986). The point is that if there was no mental incompetence, police could not have knowingly exploited or otherwise acted improperly with respect to it.

Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense." United States v. Valenzuela-Bernal, 458 U.S. 858, 872-73, 102 S. Ct. 3440, 3449 (1982). If the defendant is not afforded an opportunity to interview a witness prior to his release, the specificity required in showing materiality is relaxed, but is not eliminated. Id. at 870, 102 S. Ct. at 3448. Guerrero must make "a plausible showing" that the deported witnesses' testimony would have assisted his defense. To do so, he "may advance additional facts, either consistent with facts already known to the court or accompanied by a reasonable explanation for their inconsistency with such facts." Id. at 873, 102 S. Ct. at 3449.

Guerrero has not advanced additional facts, by stipulation or verified by oaths or affirmation, showing that the two alien witnesses would have supported his claim of innocence. Guerrero would infer their ability to inculcate him from the fact that the government released them,⁵ arguing that otherwise the government would have detained them and produced them as witnesses against him. On the contrary, the government represented that the aliens had invoked their right to silence, so their knowledge and hence ability to inculcate or exculpate Guerrero was unknown. According to the government, the aliens were release due to insufficiency of evidence against them.

⁵It is not evident from the record that the aliens were deported.

Guerrero has not made a plausible showing that the missing alien witnesses could have supported his defense. He has no suggestion how their testimony could have contradicted his written confession, or the fact that marijuana was placed in the Suburban, the keys of which were in his possession. The government will be penalized for deporting alien witnesses "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." Id. at 874, 102 S. Ct. 3450. In this case, even if we would speculate that the aliens would deny Guerrero's involvement, the reasonable likelihood is that Guerrero would have been convicted on the basis of the other evidence. The record does not support Guerrero's compulsory process and confrontation rights claims.

IV

Guerrero finally complains that the district judge prejudiced his trial by causing his written statement to be introduced into evidence after the government rested its case-in-chief. On the first morning of trial, Judge Kazen asked counsel outside the presence of the jury if there were any objections to the exhibits. Defense counsel objected to the introduction of the written statement which he had previously moved to suppress, and Judge Kazen noted that he had already found it admissible. During the direct and cross-examinations of Agent Simmons, counsel for both sides referred to the confession. After the government rested, defense counsel moved for an acquittal, to which Judge Kazen responded by noting that the confession established the elements of

the offenses. Judge Kazen then asked whether the government had formally admitted the document in evidence. The prosecutor thought that it was in evidence, but Judge Kazen thought that it was not admitted. The government promptly offered the document, and the district court overruled defense counsel's objection that it should not be admitted because the government had rested its case.

The reopening of a criminal case after the close of evidence lies within the sound discretion of the district court. United States v. Walker, 772 F.2d 1172, 1177 (5th Cir. 1985). "In exercising its discretion, the court must consider the timeliness of the motion, the character of the testimony, and the effect of the granting of the motion." Id. (quoting United States v. Thetford, 676 F.2d 170, 182 (5th Cir. 1982), cert. denied, 459 U.S. 1148 (1983)).

The formal admission of the document occurred immediately after the government rested its case-in-chief. Guerrero was not prejudiced by its late admission. The statement had obvious probative value. Defense counsel had not objected when Agent Simmons testified as to the contents of the statement, and defense counsel referred to it during cross-examination. Apparently defense counsel did not realize that the document was not in evidence, as it was the court which raised this question. Guerrero cannot maintain that the district judge's action somehow prejudiced the jury, because the jury was excused from the courtroom and not made aware of the court's involvement in allowing this exhibit to be admitted. We find that the district court did not abuse its

discretion in reopening the government's case to permit the formal admission of the confession in evidence.

AFFIRMED.