

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 92-7502  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Versus

CHARLES W. MOORE,

Defendant-Appellant.

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

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(CR-C-92-7-1)

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(March 1, 1993)

Before JOLLY, DUHE, and BARKSDALE, Circuit Judges.

PER CURIAM:<sup>1</sup>

I

The facts that underlie this appeal are these: Charles W. Moore, the appellant, arrived at the checkpoint at 2:10 A.M on December 20, 1991. He showed Agent Gill a bill of lading and told

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<sup>1</sup> 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

him that his trailer was sealed and that it contained a load of bags. Moore gave Gill permission to break the seal and inspect the cargo after Gill advised him that he would be given a replacement seal and a letter to his employer explaining why the seal had been broken. Gill inspected the trailer without discovering any contraband and resealed the trailer with a Border Patrol seal. Moore waited in the cab during the search and resealing of the trailer. Gill thought that this behavior was odd, so he asked Moore if he could search the cab. Moore acquiesced, and Gill searched the cab and found a bundle of marijuana under a towel on the floor. After the marijuana was discovered, Moore was arrested and taken inside the checkpoint while agents searched the trailer a second time. He told Agent Allman that the marijuana in the cab belonged to a prostitute. The second search of the trailer revealed the large quantity of marijuana concealed in the cargo.

The cargo of bags belonged to the Duro Paper Bag Company. Richard Gilligan, Jr., a shipping supervisor for Duro, testified that the trailer was loaded with a partial shipment at a Duro facility in Richwood, Kentucky, on December 13, 1991. Moore picked the truck up the next day. The load was not sealed, but papers given to the driver included an optional seal bearing the number 12423. Moore's itinerary required that he pick up additional cargo in Brownsville, Texas. The extra cargo was loaded on the trailer at the Duro facility in Brownsville on December 18-19, 1991. Duro employees sealed the trailer with seal No. 7315 before releasing it to the driver. The sealed trailer contained paper bags, not

marijuana. Moore signed for the trailer around noon on December 19th. When Moore arrived at the checkpoint, almost fourteen hours later, the truck was sealed with the seal that he had been given in Kentucky instead of the one placed on the trailer in Brownsville.

The defense rested without presenting any evidence and the jury duly convicted Moore.

## II

Now on appeal, Moore suggests that the evidence was insufficient to support his conviction because the marijuana was so well hidden that a reasonable doubt exists whether a third party concealed it without his knowledge.

To convict Moore, the Government had to prove beyond a reasonable doubt that he knowingly possessed the contraband with the intent to distribute it. U.S. v. Molina-Iguado, 894 F.2d 1452, 1457 (5th Cir.), cert. denied, 111 S.Ct. 95 (1990). The Government was required to present sufficient evidence that Moore had "guilty knowledge" of the contraband. U.S. v. Diaz-Carreon, 915 F.2d 951, 953 (5th Cir. 1990).

In reviewing the sufficiency of the evidence, this Court must examine the evidence in the light most favorable to the Government and must uphold the conviction if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. U.S. v. Gallo, 927 F.2d 815, 820 (5th Cir. 1991). It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt. U.S. v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd, 462 U.S. 356 (1983). Intent

and knowledge may be established by circumstantial evidence. U.S. v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992). Possession may be actual or constructive and may be proved by either direct or circumstantial evidence. U.S. v. Rosas-Fuentes, 970 F.2d 1379, 1382 (5th Cir. 1992). Constructive possession is the knowing exercise of, or the knowing power or right to exercise dominion and control over the proscribed substance. U.S. v. Vasquez, 953 F.2d 176, 183 (5th Cir.), cert. denied, 112 S.Ct. 2288 (1992). Constructive possession may not be established by "mere proximity" to contraband; the Government must show that the defendant controlled or had the power to control the contraband. Rosas-Fuentes, 970 F.2d at 1382. "Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof." U.S. v. Ivey, 949 F.2d 759, 766 (5th Cir. 1991), cert. denied, 113 S.Ct. 64 (1992) (citation omitted).

The evidence supports the jury's verdict. Trial testimony established that the sealed trailer did not contain contraband when Moore picked it up from the Duro plant in Brownsville. Before Moore arrived at the checkpoint, marijuana was loaded on the trailer and the trailer was resealed with a seal that had previously been given to Moore. That is enough to show his knowing possession of a huge amount of marijuana that was intended for distribution.

### III

Moore urges that the prosecutor committed reversible error by

impermissibly "bolstering the testimony" of the Government's witnesses. Moore complains that the prosecutor told the jury that the Border Patrol agents' actions were reasonable under the circumstances and that "by all means" the jury could believe the agents' testimony. Moore failed to object to the prosecutor's arguments, and therefore this claim is reviewed for plain error. Fed. R. Crim. P. 52(b). Plain error is error that is "obvious, substantial, and so basic and prejudicial that the trial lacks the fundamental elements of justice." U.S. v. Carter, 953 F.2d 1449, 1460 (5th Cir.), cert. denied, 112 S.Ct. 2980 (1992) (internal quotation omitted).

After the prosecutor had completed his closing argument, the trial court instructed the jury that it should make credibility determinations based on the witnesses' testimony. The court told the jury that the lawyers' arguments were not evidence, and that "it is your own recollection and your own interpretation of the evidence that controls the case." The jury is generally presumed to have followed the instructions of the trial court. See Greer v. Miller, 483 U.S. 756, 766 n.8, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987). Assuming, arguendo, that the prosecutor's remarks were inappropriate, Moore has failed to demonstrate that the prosecutor's statements rose to the level of plain error. Parker, 877 F.2d at 332.

#### IV

For the reasons we have set out above, the conviction of Charles W. Moore is

A F F I R M E D.

