

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7534

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

VICTOR MANUEL CORTES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 92 45)

July 13, 1993

Before REAVLEY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Cortes challenges his conviction on drug trafficking charges claiming that the district court erred in denying his motion to suppress evidence obtained during a search and in denying his motion to dismiss the indictment for governmental overreaching. We affirm, but for reasons different than the district court.

I.

Victor Manuel Cortes was indicted on one count of conspiracy and one count of aiding and abetting the possession with intent to

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. He was also charged with a § 924(c)(1) firearms count. Before trial Cortes moved to suppress evidence obtained by government agents during their search and seizure of the Ford car that he was driving when he was stopped. Cortes also moved to dismiss the indictment due to governmental overreaching. A magistrate judge recommended that Cortes's motion to suppress be denied. After hearing the evidence at trial, the district court agreed. The motions to suppress and to dismiss were denied.

Cortes was convicted on the two drug trafficking counts and acquitted on the firearms count. This appeal followed.

II.

A.

Cortes first challenges the district court's conclusion that he had no standing to object to the search of the Ford Probe he was driving.

Standing to contest a search is based on a defendant's showing that he had a "legitimate expectation of privacy" in the area searched. Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). The driver of a vehicle who is in legitimate possession of it has standing to object to the search of the vehicle, even though the driver does not own the vehicle. United States v. Arce, 633 F.2d 689, 694 (5th Cir. 1980), cert. denied, 451 U.S. 972 (1981).

Because there is much in the record to suggest that Cortes was in legitimate possession of the Ford, and nothing to suggest that

he was not, he has standing to challenge the search.

B.

Cortes argues next that the district court erred when it overruled Cortes's motion to suppress because the search and seizure of his vehicle was without probable cause. This argument is meritless because, as will be discussed, even if the officers lacked probable cause to search the vehicle, they had probable cause to arrest Cortes and to conduct a search incident to that arrest.

"The Fourth Amendment imposes limits on search and seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).

The "custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment." United States v. Hernandez, 825 F.2d 846, 852 (5th Cir. 1987) (internal quotation marks and citation omitted), cert. denied, 484 U.S. 1068 (1988). If the custodial arrest is lawful, "a search incident to the arrest requires no additional justification." Id. A search "incident to the arrest" may be valid even if the search occurred simultaneously with or just before the actual arrest, so long as the arrest followed "quickly on the heels of the challenged search." Id. (citation omitted).

The Supreme Court, in Brinegar v. United States, 338 U.S. 160 (1949), defined probable cause as simply "a reasonable ground for

belief of guilt." Probable cause may be based upon facts and circumstances within the agents' collective knowledge so long as it is based on reasonably trustworthy information that warrants a reasonable belief that the defendant had committed or was committing a crime. Charles v. Smith, 894 F.2d 718, 723 (5th Cir.), cert. denied, 498 U.S. 957 (1990). The existence of probable cause is determined by reviewing the totality of the circumstances. United States v. Antone, 753 F.2d 1301, 1304 (5th Cir.), cert. denied, 474 U.S. 818 (1985). "A succession of otherwise 'innocent' circumstances or events . . . may constitute probable cause when viewed as a whole." United States v. Muniz-Melchor, 894 F.2d 1430, 1438 (5th Cir.), cert. denied, 495 U.S. 923 (1990). Factors need not be considered in isolation, but may be "consider[ed] . . . in their interrelated context, where each may reinforce the other, so that the laminated total may indeed be greater than the sum of its parts." Id.

Testimony at trial revealed that Ruben Duque, a native Colombian, contacted DEA authorities and volunteered to infiltrate a Colombian cocaine distribution organization. He was enlisted by the DEA to work undercover as a trucker. In this capacity, he infiltrated one of the channels passing through Guatemala. Duque met Oscar Guzman who agreed to provide cocaine, which he obtained from Colombia, for transport to the United States. Federal agents observed Guzman deliver the cocaine to Duque. Duque transported the cocaine in his car to the DEA office in Guatemala City. Duque traveled by air to the United States with DEA agent Mike Sanders.

Guzman had instructed Duque to contact him as soon as he reached Houston, Texas, so he could instruct Duque where to deliver it.

Once in Houston, Duque made several recorded telephone calls, including an initial call to Guzman and then to "Gabriel" or "Junior," who was later found by the district court to be Cortes. Guzman provided Duque with Gabriel's "beeper" number. Duque arranged a delivery with Gabriel, who also inquired concerning the quality of the "merchandise." The cocaine was also referred to as "gifts." Although Duque eventually agreed with Guzman to collect \$20,000 at \$2,000 per kilo, paying Guzman \$5,000 and keeping the rest, Duque secretly agreed with the DEA to retain \$5,000 and surrender \$10,000 to the government. Gabriel refused at first to pay any money for the delivery, but later told Duque that he would send someone else to meet him and indicated that the money would be in the car. Gabriel gave Duque his cellular phone number.

Gabriel told Duque that he would send a woman named "Esther" to complete the transaction. A meeting was arranged at a Denny's restaurant. "Esther," later identified as Alexandra Gonzalez, and Yesenia Avendano, arrived in a Nissan. Duque agreed to take the car, retrieve \$20,000 lying under a blanket, and put the cocaine in the car. Duque took the car and delivered the money to the DEA headquarters. The cocaine was then placed in the trunk of the Nissan and driven to Jojo's restaurant where it was picked up by Gonzalez and Avendano.

Authorities conducted surveillance at Jojo's. Gonzalez and Avendano left Jojo's, drove to an apartment complex where they

entered an apartment for 15-20 minutes, then drove to a Supersonic drive-in grocery store. The Nissan was abandoned in the grocery-store parking lot and the two women joined another individual, later identified as Cortes, driving a white Ford. The women got into the car with Cortes and drove away. When they returned to the apartment complex, a fourth individual, Wilmar Rodriguez, joined them and they all left in the Ford. Rodriguez, Gonzales, and Avendano were dropped off at the grocery-store parking lot where they left in the Nissan. When Cortes began turning the Ford quickly, driving without the lights on, passing through several neighborhoods, and making what appeared to be "heat runs" in an attempt to evade surveillance, agents were notified to stop the vehicle.

Five vehicles converged on the Ford. It was detained and Cortes was removed from the vehicle, handcuffed, and placed "spread eagle" on the ground behind the vehicle. The driver's side door of the vehicle was left open leaving the driver's seat open to full view.

One DEA agent, Ray Ollie, searched the vehicle's front seat, floorboard, and backseat for weapons. The hatchback which was observable from the interior of the vehicle was also checked. A black bag was observed with one open pouch. Money was visible inside the pouch as well as a pager and some paperwork. The initial search by Ollie was limited to weapons.

At about the same time, another agent, Wendell Campbell, asked for identification. Cortes told the agent, verbally and by head

motioning, that it was in a bag in the car. The agent understood his words and gestures to be consent to search the bag. The digital pager responded to the number Guzman gave to Duque in order to contact "Gabriel."

A cellular phone, in plain view on the front seat, was plugged into the cigarette lighter. Agent Mike Sanders, who was also at the scene, used his mobile phone to call the cellular phone number given by Guzman to reach "Gabriel." The Ford's cellular phone rang. Sanders placed Cortes under formal arrest. Cellular telephone records later also confirmed the communications made between "Gabriel" and Duque.

Rodriguez was later arrested while he was putting 10 kilos of cocaine into his automobile. He consented to the search of his apartment which was being used by Gonzalez to store cocaine. Rodriguez testified that Cortes was the one who supplied the cocaine.

In routine traffic stops, the general rule is that temporary detention for questioning without probable cause requires that "the officer must also have reasonable suspicion of illegal transactions in drugs or of any other serious crime." United States v. Kelley, 981 F.2d 1464, 1467-68 (5th Cir. 1993) (citations omitted); see Terry v. Ohio, 392 U.S. 1 (1968). The magistrate judge concluded that, because the stop was justified under Terry, "the seizure of the mobile phone in plain view on the front seat of the automobile was permissible." The magistrate judge also concluded that, although officers "lacked probable cause to believe contraband or

other evidence of criminal activity would be present in the car," Cortes's consent to search the bag to obtain his driver's license led to the discovery and seizure of the pager. The district court, assuming arguendo that Cortes had standing to object to the search of the vehicle, adopted the magistrate judge's findings of fact and conclusions of law.

The surveillance, stop, and subsequent arrest of Cortes was from the outset much more than a "routine traffic stop." Before the arrest the DEA agents had collective knowledge that was "reasonably trustworthy" and reliable that Cortes was involved with the cocaine conspiracy. The facts and circumstances of this case, taken together, could lead a reasonable person to conclude that there was a "fair probability" that Cortes was linked with the crime. See Antone, 753 F.2d at 1304. Contrary to Cortes's argument, this was more than an "inarticulate hunch or suspicion."

Because there was probable cause to arrest Cortes, we need not consider whether the magistrate judge's Terry analysis is accurate. The act of removing Cortes from the vehicle and restraining him with handcuffs constituted an arrest -- irrespective of when the arresting officers considered the formal arrest to have occurred. See United States v. Gentry, 839 F.2d 1065, 1070 (5th Cir. 1988), cert. denied, 111 S.Ct. 2034 (1991). The search incident to arrest was therefore lawful. Hernandez, 825 F.2d at 852.²

III.

² Our conclusion that the search was proper as incident to a lawful arrest makes it unnecessary to consider the district court's alternate holding that Cortes consented to the search.

Cortes argues finally that the district court erred when it denied his motion to dismiss the indictment because the government's conduct in this case was so outrageous that the indictment violated his civil rights. Cortes argues that the government did more than "merely offer an individual an opportunity to commit a crime" when it not only "developed a cooperating individual," but also imported both the individual and the cocaine into the United States. Cortes also argues that "but for" the government's extensive participation, the offense would not have occurred.

Although the Due Process Clause prohibits outrageous conduct by law enforcement agents, "a due process violation will be found only in the rarest and most outrageous circumstances." United States v. Nissen, 928 F.2d 690, 693 (5th Cir. 1991). The Due Process Clause of the Fifth Amendment is violated when the challenged conduct offends "that 'fundamental fairness, shocking to the universal sense of justice.'" United States v. Evans, 941 F.2d 267, 271 (5th Cir.), cert. denied, 112 S.Ct. 451 (1991) (citations omitted).

"[T]he [due process] defense generally requires 'proof of government overinvolvement in the charged crime and proof of the defendant's mere passive connection to the government orchestrated and implemented criminal activity.'" United States v. Duvall, 846 F.2d 966, 973 (5th Cir. 1988) (quoting United States v. Nations, 764 F.2d 1073, 1077 (5th Cir. 1985) (emphasis in original)). While it is clear that the government's activity was extensive, it cannot

be said that Cortes, alias "Gabriel," played a passive role. See Evans, 941 F.2d at 270-71. He was a key player in the conspiracy. He had a pager and a cellular phone with which to coordinate transactions. He recruited others and arranged for storage of illegal drugs. Nor does Cortes challenge the district court's conclusion that he also operated independently or "at arm's length" from Duque. This is not a case where a passive defendant was propelled into a crime by an "overinvolved" government.

Cortes's argument that the government's conduct violated the Due Process Clause is therefore meritless.

AFFIRMED.