UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-7539

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HOMER GARZA, FIDEL SALINAS
and JUAN JOSE VALDEZ

Defendants-Appellants.

Appeal from the United States District Court
For the Southern District of Texas
(CR M91 00263 06)

June 4, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

At a joint trial, Homer Garza, Fidel Salinas, and Juan Jose Valdez ("Juan Jose") were each convicted on one count of conspiring to possess marihuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1) and 846 (1988). Garza and Juan Jose were also each convicted on one count of possession of marihuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and of 18 U.S.C. § 2 (1988). Garza, Salinas, and Juan

---

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Jose appeal their convictions, arguing that there was insufficient evidence. Garza and Juan Jose also appeal their sentences, contending that the district court erred in failing to reduce their offense levels in light of their minimal or minor role in the conspiracy, as well as their acceptance of responsibility. Finding no error, we affirm.

I

Between September 16 and September 18, 1991, Antonio Ricardo Gonzalez and Roy Barnett, narcotics investigators with the Texas Department of Public Safety, worked through government informant, Orlando Zepeda, to negotiate the purchase of 1000 pounds of marihuana. On September 16, Zepeda informed Juan Jose's cousin, Juan Luis Valdez ("Juan Luis"), that he wanted to buy some marihuana. Juan Luis told Zepeda that he knew someone who could supply 30 pounds. A short while later, Juan Luis called Salinas, who informed him that Salinas no longer had the 30 pounds of marihuana, but that 1000 pounds of more expensive marihuana was available. Zepeda arranged a meeting between Juan Luis and Investigator Gonzalez, who would pose as a potential buyer.

A couple of days later))after the investigators engaged in negotiations for the sale of marihuana with various defendants[1]))Juan Jose, Garza and Gilbert Villareal met Investigator Barnett at Foy's Supermarket parking lot to view the money. After Investigator Barnett had shown them the purchase money, Juan Jose

[1] To the extent that events which took place during the negotiations support the convictions of these defendants, they are described in Part II of this opinion.

called Juan Luis and told him to take Investigator Gonzalez and Zepeda to a store on Three Mile Line. A couple of minutes after they arrived at the store, Salinas and Gerardo Villareal showed up. Investigator Gonzalez and Zepeda were introduced to the two men. Salinas told Juan Luis to wait around because the drop-off location for the marihuana had changed. After Salinas informed Juan Luis of the change, Investigator Gonzalez, Juan Luis, and Zepeda started driving around in their vehicle. Salinas and Villareal drove up in front of them, and motioned for them to follow. They proceeded to the next convenience store on Three Mile Line. Gerardo Villareal told Juan Luis that the marijuana was in two vehicles parked there. Investigator Gonzalez looked into the vehicles, and confirmed that they were filled with trash bags containing marihuana. Investigator Gonzalez returned to his car, purportedly to call the undercover agents at Foy's to authorize them to give the money to Garza and Juan Jose. Instead, he called a team of officers who arrested all of the defendants at the convenience store and at Foy's supermarket.

Eight defendants, including Garza, Salinas, and Juan Jose, were charged in a two-count indictment. Five defendants pleaded guilty. Garza, Salinas, and Juan Jose proceeded to a trial.[2] A jury convicted Garza, Salinas, and Juan Jose of conspiring to possess marihuana with intent to distribute, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(B) (1988). Garza and Juan

[2] Juan Luis testified for the government at the appellants' trial.

Jose were also convicted of possession of marihuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and of 18 U.S.C. § 2 (1988). Garza was sentenced by the district court to 97 months imprisonment on each count to run concurrently, followed by four years supervised release on each count to run concurrently. In addition, Garza was ordered to pay a $100.00 special assessment. Fidel Salinas was sentenced to 80 months imprisonment, followed by four years supervised release, and ordered to pay a special assessment of $50.00. Juan Jose was sentenced to 88 months imprisonment on each count to run concurrently, followed by four years supervised release on each count to run concurrently. He was also ordered to pay a special assessment of $100.00.

II

A

Garza, Salinas, and Juan Jose contend that the evidence was insufficient to support their convictions. "The standard of review for sufficiency of the evidence is whether *any* reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." *United States v. Martinez,* 975 F.2d 159, 160-61 (5th Cir. 1992), *cert. denied,* ___ U.S. ___, 113 S. Ct. 1346, 122 L. Ed. 2d 728 (1993). "In evaluating the sufficiency of the evidence, we consider the evidence in the light most favorable to the government with all reasonable inferences and credibility choices made in support of the verdict." *United States v. Ivy,* 973

F.2d 1184, 1188 (5th Cir. 1992), *cert. denied,* 1993 WL 58534, 61 U.S.L.W. 3683 (U.S. Apr. 5, 1993) (No. 92-7747).

1

Conspiracy

To sustain Garza's, Salinas's, and Juan Jose's convictions of conspiracy to possess marihuana with the intent to distribute it, the evidence must show the existence of an agreement to possess marihuana with the intent to distribute it,[3] each appellant's knowledge of that agreement, and their voluntary participation in the scheme. *Martinez,* 975 F.2d at 161. Proof of an express agreement is not required, however; tacit agreement suffices. *United States v. Greenwood,* 974 F.2d 1449, 1457 (5th Cir. 1992), *petition for cert. filed,* (U.S. Feb. 1, 1993) (No. 92-9713). Moreover, "the elements of the offense may be established solely by circumstantial evidence." *Id.*

a

Homer Garza

Prior to one of the meetings with the investigators, the Valdezes and Salinas went to Garza's auto repair shop. *See* Record on Appeal, vol. 6, at 50. The Villareals, who pleaded guilty to the conspiracy, appeared at the shop a short while later. *See id.* at 50, 117. The Villareals and Salinas subsequently (1) met with Investigators Gonzalez and Barnett at their hotel room, (2) went back to Garza's shop after the meeting, and (3) returned to the

[3] Garza, Salinas, and Juan Jose do not deny the existence of a conspiracy to sell marihuana. Instead, each denies that he was personally involved in the conspiracy.

investigators' hotel room. *See id.* at 50, 52-53. When they returned to the hotel room, Juan Jose told Investigator Gonzalez that his partner wanted to see the money at a hotel room. *See id.* vol. 7, at 139-40. After leaving the hotel room, Juan Jose called Juan Luis and told him that Garza was reluctant to accompany him to Foy's to see the money. *See id.* vol. 6, at 59. Juan Luis replied that Juan Jose should take "Homer" by the hand and lead him to Foy's, confirming that Garza's presence was essential to the consummation of the transaction. Subsequently, Garza, Juan Jose and Gilberto Villareal arrived at Foy's. *See id.* vol. 7, at 222. Juan Jose introduced Garza to Investigator Barnett as being the man who needed to see the money. *See id.* at 221-23. Garza asked Investigator Barnett how much money he had brought and told Villareal to examine the money. In addition, after Juan Jose told Investigator Barnett that Garza would telephone Garza's people and tell them to deliver the marihuana to Investigator Gonzalez, Garza entered a drug store, out of Investigator Gonzalez's sight. *See id. vol.* 8 at 226.

At trial Garza claimed that he merely accompanied Juan Jose in his vehicle to determine whether or not the vehicle was running properly, and did not go with Juan Jose to see the money. Garza denied any involvement in the conspiracy, suggesting that Investigator Barnett and Juan Luis were lying about their conversations with or about him. Credibility is for the jury, which chose to believe Investigator Barnett and Juan Luis and not Garza. *United States v. Carter,* 953 F.2d 1449, 1455 (5th Cir.),

cert. denied, ___ U.S. ___, 112 S. Ct. 2980, 119 L. Ed.2d 598 (1992). We hold that there was ample evidence for the jury to find Garza guilty of conspiracy beyond a reasonable doubt.

b

Fidel Salinas

Salinas contends that, although he associated with the conspirators, there was insufficient evidence to prove that he participated in the conspiracy. We disagree. Salinas supplied Zepeda with the first marihuana sample. *See* Record on Appeal, vol. 6, at 41. In addition, there was testimony from which a reasonable jury could infer that Salinas was engaged in counter-surveillance on at least two occasions: Salinas was in a gray Nissan observing the meeting between the investigators and Juan Luis at the M. Rivas store, and remained outside the hotel room where the investigators met with the Valdezes. *See id.* at 46-47, 52-53. In addition, Salinas gave Juan Luis the license plate number of Investigator Gonzalez's vehicle, and was with Juan Luis when he confronted Zepeda upon learning that the name of the registered owner of the vehicle did not match Investigator Gonzalez's pseudonym. *See id.* at 54-55. In addition, Salinas was present at the two meetings at Garza's auto repair shop. *See id.* at 50, 53. Salinas also told Juan Luis that the drop-off point had been changed, and subsequently led him, Investigator Gonzalez, and Zepeda to the convenience store where the marihuana was located. *See id.* at 60-63, 93. We hold that there was sufficient evidence for a

reasonable jury to find Salinas guilty of conspiracy beyond a reasonable doubt.

c

Juan Jose Valdez

Juan Jose argues generally that there was insufficient evidence to support his conviction for conspiracy. Juan Jose's argument is unconvincing. Juan Jose brought a van containing a sample of marihuana to an H.E.B. store and switched vehicles with Juan Luis so that Juan Luis could show the sample to Investigator Gonzalez. *See id.* at 43-45. In addition, as soon as Juan Luis introduced Juan Jose to the investigators in their hotel room, Juan Jose alone negotiated the sale of marihuana. *See id.* at 52, 68, 80; *id.* vol. 7, at 138-40, 218-20. During the negotiations, Juan Jose (1) stated that he owned the marihuana, (2) personally guaranteed the weight of the marihuana, and (3) offered not to count the purchase money until after the marihuana was delivered. *See* Record on Appeal, vol. 6, at 52, 68, 80; *id.* vol. 7, at 138-40, 218-20. Furthermore, Juan Jose made the arrangements for the display of the purchase money and convinced Garza to go to Foy's. *See id.* vol. 6, at 52, 57-60; *id.* vol. 7, at 141-44, 146-47. At Foy's, Juan Jose acted as an intermediary between him, Investigator Barnett and the other conspirators. *See id.* vol. 7, at 222-25; *id.* vol. 8, at 226. There was sufficient evidence for the jury to find, beyond a reasonable doubt, that Juan Jose was a knowing and voluntary participant in the conspiracy.

2

Possession

Garza and Juan Jose argue that the evidence was insufficient to support their convictions for possession with intent to distribute marihuana. To prove possession with intent to distribute, the government must show beyond a reasonable doubt that each defendant knowingly possessed the marihuana with the intent to distribute it. *United States v. Rojas-Martinez,* 968 F.2d 415, 420 (5th Cir. 1992), *cert. denied,* ___ *U.S.* ___, 113 S. Ct. 828, 121 L. Ed. 2d 698 (1992), *cert. denied,* ___ U.S. ___, 113 S. Ct. 995, 122 L. Ed. 2d 146 (1993). The requisite possession may be either actual or constructive. *Ivy,* 973 F.2d at 1188. Actual possession of contraband is defined as having direct physical control over it, whereas constructive possession is defined as having both the power and the intention to exercise ownership, dominion, or control over the contraband or over the premises where it is known to be located. *United States v. Onick,* 889 F.2d 1425, 1429 (5th Cir. 1989).

In addition, each appellant also was charged with aiding and abetting under 18 U.S.C. § 2 (1988). Co-conspirators are liable for the substantive offenses committed by other members of the conspiracy in furtherance of the common plan. *United States v. Alvarado,* 898 F.2d 987, 993 (5th Cir. 1990); see also United States v. Valencia, 907 F.2d 671, 678 (7th Cir. 1990). Therefore, Garza and Juan Jose may be held liable for possession of marihuana with intent to distribute if other members of the conspiracy actually or constructively knowingly possessed the marihuana with the intent to

distribute it. *See Alvarado,* 898 F.2d at 993; *Valencia,* 907 F.2d at 678.

a

Homer Garza

Garza argues that there was no evidence that (1) he was the partner who needed the see the money before the marihuana would be exchanged, and (2) he had control over the marihuana. We disagree. Based on Juan Luis's and Investigator Barnett's testimonies, the jury reasonably could infer that Garza was the partner who needed to see the purchase money. *See* Record on Appeal, vol. 6, at 50, 53, 59; *id.* vol. 7, at 139-41, 147, 219, 223-26; *id.* vol. 8, at 271-72. In addition, the record reflects that the sale of the marihuana could not proceed until the partner was satisfied that the investigators had money to buy the marihuana. Although Garza did not personally view the money, Garza directed Villareal to do so. *See id.* vol. 7, at 224. After Villareal viewed the money, Juan Jose told him that Garza would call his people and tell them to deliver the marihuana to Investigator Gonzalez. *See id.* vol. 8, at 226. Subsequently, Garza entered a drug store, out of Investigator Barnett's sight. The jury reasonably could infer that Garza went into the drug store to call his people. We hold that there was sufficient evidence to support the conclusion that Garza knowingly and constructively possessed the marihuana. In addition, because the evidence also established that Garza was a co-conspirator, his possession conviction is also proper under the aiding and abetting statute, 18 U.S.C. § 2 (1988). *See Alvarado,*

898 F.2d at 993. We affirm Garza's possession conviction on the basis of both his constructive possession and his status as a co-conspirator.

b

Juan Jose Valdez

We reject Juan Jose's argument that there was insufficient evidence to support his possession conviction. Juan Jose stated that he owned the marihuana, and that he would personally guarantee the amount of marihuana. *See* Record on Appeal, vol. 6 at 52, 68, 80; *id.* vol. 7, at 138-39, 220. We hold that there was sufficient evidence to support the jury's conclusion that Juan Jose constructively possessed the marihuana. Even if, as Juan Jose argues, the Villareals actually owned the marihuana, *see* Brief for Juan Jose at 8, there was sufficient evidence for the jury to reasonably conclude that Juan Jose was a co-conspirator. Therefore, Juan Jose's possession conviction was also proper under the aiding and abetting statute, 18 U.S.C. § 2. *See Alvarado,* 898 F.2d at 993. We affirm Juan Jose's possession conviction on the basis of his constructive possession, as well as his status as a co-conspirator.

B

Salinas and Juan Jose both appeal their sentences. We will affirm the district court's sentence "so long as it results from a correct application of the guidelines to factual findings which are not clearly erroneous." *United States v. Sarasti,* 869 F.2d 805, 806 (5th Cir. 1989); *see also United States v. Carr,* 979 F.2d 51,

55 (5th Cir. 1992). "A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole." *United States v. Sanders,* 942 F.2d 894, 897 (5th Cir. 1991).

1

Minimal or Minor Participant

Salinas and Juan Jose both contend that they were entitled to a two or four point offense level reduction, under § 3B1.2 of the sentencing guidelines, as minimal or minor participants in the offense(s). *See* United States Sentencing Commission, *Guidelines Manual,* § 3B1.2 (Nov. 1992). Section 3B1.2 permits the district court to reduce a defendant's sentence when the defendant is "substantially less culpable than the average participant in the offense." U.S.S.G. § 3B1.2, comment. (backg'd.); *see also United States v. Buenrostro,* 868 F.2d 135, 138 (5th Cir. 1989), *cert. denied,* 495 U.S. 923, 110 S. Ct. 1957, 109 L. Ed. 2d 319 (1990). Section 3B1.2 permits the district court to decrease a defendant's offense level by four points for minimal participation in the offense and by two points for minor participation in the offense. U.S.S.G. § 3B1.2.

a

Juan Jose Valdez

Juan Jose concedes that he failed to request a downward adjustment for his alleged minor or minimal role in the offenses. *See* Brief for Juan Jose at 10. Because Juan Jose did not request a downward adjustment, the district court did not make a finding as to whether or not Juan Jose was a minor or minimal participant in

the offenses. Issues raised for the first time on appeal "are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice." *United States v. Garcia-Pillado,* 898 F.2d 36, 39 (5th Cir. 1990). Juan Jose's claim involves a factual issue))whether or not he was a minor or minimal participant, *see Carr,* 979 F.2d at 55, that we cannot address for the first time on appeal.

b

Fidel Salinas

Salinas contends that he "had little or no role" in the offense, and that therefore the district court erred by failing to grant his request for a reduction in his offense level. In declining to reduce Salinas's offense level, the district court found that of the eight defendants, Salinas was the third most culpable. *See* Record on Appeal, vol. 2, at 134 (adopting the factual findings in the PSR); Presentence Investigation Report for Fidel Salinas at 11 (sealed). Trial testimony established that Salinas (1) provided Zepeda with a sample of marihuana, (2) performed counter-surveillance on two occasions, (3) was present at the meetings between the co-conspirators, (4) was with Juan Luis when Juan Luis confronted Zepeda upon learning that the name of the registered owner of Investigator Gonzalez's vehicle did not match Gonzalez's pseudonym, (5) told Juan Luis that the drop-off location for the marihuana had been changed, and (6) led Investigator Gonzalez to the drop-off location for the marihuana. *See* discussion *supra* part II.1.b. The record contains ample support

for the district court's finding that Salinas was not "substantially less culpable than the average participant," and that therefore Salinas was not a minor or minimal participant in the offense. Because the district court's finding was not clearly erroneous, Salinas is not entitled to have his offense level reduced

2

Acceptance of Responsibility

Salinas and Juan Jose also contend that they were entitled to a downward adjustment, under § 3E1.1 of the sentencing guidelines, because they each accepted responsibility for the offense(s). *See* U.S.S.G. § 3E1.1 (Nov. 1992). Salinas and Juan Jose argue that they went to trial for unspecified tactical reasons, and admitted their involvement to the probation officer and expressed remorse to the district court at their sentencing hearings. *See* Brief for Salinas at 11; Brief for Juan Jose at 11. The district court's finding that a defendant did not accept responsibility is "even more deferential than a pure clearly erroneous standard." *United States v. Baty,* 980 F.2d 977, 979 (5th Cir. 1992).

Section 3E1.1(a) of the sentencing guidelines provides that a defendant who "clearly demonstrates a recognition and affirmative acceptance of responsibility for his [or her] offense" may receive a two-level decrease in his or her offense level. Section 3E1.1(a) "requires a showing of a sincere contrition on defendant's behalf to warrant the reduction." *United States v. Beard,* 913 F.2d 193, 199 (5th Cir. 1990); *United States v. Reed,* 882 F.2d 147, 150 (5th

Cir. 1989). The commentary to section 3E1.1 states that "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1, comment. (n.2). Furthermore, only "[i]n rare situations [may] a defendant . . . clearly demonstrate an acceptance of responsibility for his conduct even though he exercises his constitutional right to a trial." *Id.* Such a rare situation may occur "where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.,* to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct)." *Id.* The burden of proving entitlement to the adjustment is upon the defendant. *Baty,* 980 F.2d at 979.

Both Salinas and Juan Jose plead not guilty, and proceeded to trial to challenge their factual guilt. The trial record shows that they contended in the district court, as they do in this Court, that the evidence was insufficient to support their convictions. *See* Record on Appeal, vol. 8, at 263-66, 338-39. In addition, Salinas and Juan Jose did not admit their involvement and express remorse for their conduct until after the jury returned a verdict of guilty. In light of these facts, the district court did not err in finding that neither Salinas nor Juan Jose accepted responsibility.

III

For the foregoing reasons, we **AFFIRM** the district court's judgment in all respects.