IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7575

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONATO MARTINEZ-GONZALEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
CR M 92 058 01

June 18, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Donato Martinez-Gonzalez was convicted by a jury of (1) knowingly and intentionally possessing with intent to distribute 4.9 kilograms of cocaine and (2) knowingly and intentionally importing into the United States approximately 4.9 kilograms of cocaine from Mexico. Martinez now appeals from these convictions, asserting that the evidence is insufficient to

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* 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 Pursuant to that rule, we have determined that this opinion should not be published.

sustain them. Finding that the evidence is sufficient, we affirm.

I

Martinez asserts on appeal that the Government did not sufficiently prove the requisite intent elements of the crimes for which he was convicted. Specifically, Martinez asserts that the government failed to established that he "knowingly" or "intentionally" committed either offense.

A

In considering challenges to the sufficiency of the evidence supporting a conviction, we review the evidence to determine 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, 113 S. Ct. 1346 (1993). We construe all reasonable inferences from the evidence in accordance with the jury's verdict. Id. at 161. Moreover, we will not substitute our determination of credibility for that of the jury, for the jury is solely responsible for determining the weight and credibility of the evidence. Id.

To prove the knowledge element of 21 U.S.C. § 841(a)(1) (possession with intent to distribute more than 500 grams but less than 5 kilograms of cocaine), the government must establish that the defendant knowingly possessed a controlled substance. See United States v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992), cert. denied, 113 S. Ct. 1291 (1993). To prove the

knowledge element of 21 U.S.C. § 952(a) (importing into the United States an excess of 500 grams but less than 5 kilograms of cocaine), the government must prove that the defendant "intended or knew that the heroin he possessed was to be imported into the United States." Id. at 1226. In considering a challenge to the sufficiency of the evidence very similar to the challenge raised by Martinez, this court recently stated that:

> [t]he knowledge element in a possession case can rarely be established by direct evidence. Knowledge can be inferred from control of the vehicle in some cases; however, when the drugs are hidden, control over the vehicle alone is not sufficient to prove knowledge. The general rule in this circuit is that knowledge can be inferred from control over the vehicle in which drugs are hidden "if there exists other circumstantial evidence that is suspicious in nature or demonstrates guilty knowledge."

United States v. Garza, 990 F.2d 171, 174 (5th Cir. 1993) (internal quotation and citation omitted).

B

The evidence in the case before us establishes that, at approximately 6:40 a.m. on February 4, 1992, Martinez entered the United States from Mexico through the "port of entry" in Progresso, Texas. Immigration inspector Adriana Gonzalez was assigned to the primary station at Progresso. Because she received a "hit alert" on Martinez's license plate, she paid particular attention to the vehicle as it approached her. Gonzalez first asked Martinez if he was a United States citizen, and he responded by showing her his resident-alien card. Because Martinez did not look at Gonzalez as he handed her his card, she found his manner to be unusual.

Gonzalez then asked Martinez where he was coming from, where he lived, and where he was going. Martinez responded by stating that he was coming from Rio Bravo, Mexico, lived in "the Valley," and was going to Weslaco, Texas, to visit some friends. As he responded, Martinez's hands remained on the steering wheel, and he looked forward at all times. Gonzalez also noticed that Martinez's carotid artery was visibly pulsating, which suggested to her that he was extremely nervous. Because she was suspicious of Gonzalez's manner and nervousness, she directed him to the secondary inspection area.

The secondary inspection area was manned by inspector Leopoldo Reyes. Reyes asked Martinez to state the purpose of his trip to Mexico, and Martinez replied that he had been to Rio Bravo to visit some friends. Reyes then asked Martinez where he lived and where he was going. Martinez responded that he lived in Weslaco[1] and was going to his cousin's house, but, upon further questioning, admitted that he did not know his cousin's address.

At that point, Reyes asked Martinez for identification. Martinez produced his driver's license, which indicated that he lived in Houston. When Reyes questioned Martinez about the discrepancy between his statement that he lived in Weslaco and the information on his driver's license, Martinez's voice got "shaky" and, rather than answering the question, Martinez stated

[1] At trial, Martinez denied ever telling Reyes that he lived in Weslaco.

that he had the papers to his car in the glove compartment. Reyes then commented that it was unusual for someone to have no change of clothes for a trip that far, and, rather than responding, Martinez nervously stated that he had just bought the car and that it was registered to him. Reyes asked to see the title and registration papers and, as Martinez handed them over, his hand was trembling. Upon inspecting these papers, Reyes noticed that Martinez had purchased the car the previous day and that the seller also had a Houston address.

Because Reyes was suspicious, he escorted Martinez into the customs office and informed him that the search was going to continue. During the search, Reyes noticed a strong smell of deodorizer near the passenger-side door. Upon closer inspection, Reyes saw that the screws on the vent by the "kick panel" had been tampered with. He then removed the vent and discovered several packages; the substance in those packages later tested positive for cocaine weighing 4.9 kilograms and worth between $60,000 and $70,000.

At trial, Martinez testified that he lived in Houston, bought the car from a man who also lived in Houston, and travelled to Mexico the day after he bought the car solely by coincidence. According to Martinez, the purpose of the trip was to help friends of a man named Joel Martinez,[2] and Joel had agreed to pay him $100 for making the trip to Mexico. Martinez stated that he, Joel, and Joel's two friends traveled to Rio

[2] Joel is not related to the defendant.

Bravo, Mexico and, while they were there, he lent his car to Joel. Joel returned the car to Martinez, and, although the men parted, they allegedly agreed to meet the following morning at a gas station located in Weslaco, Texas. According to Martinez, Joel did not tell him how he was going to get to Weslaco and, the following day, Martinez arrived at the border alone.

C

This court has held that, although nervousness is generally insufficient to support a finding of guilty knowledge when there are not other facts linking it to an underlying consciousness of criminal behavior, "[n]ervous behavior at an inspection station frequently constitutes persuasive evidence of guilty knowledge." United States v. Diaz-Carreon, 915 F.2d 951, 954-55 (5th Cir. 1990). In addition, intent to distribute may be inferred from the possession of a large quantity of narcotics. See United States v. Kaufman, 858 F.2d 994, 1000 (5th Cir. 1988) (stating that defendant possessed more than ten pounds of marihuana, "a larger quantity than an ordinary user would possess for personal consumption"), cert. denied, 110 S. Ct. 245 (1989).

As stated above in Part I.C., 4.9 kilograms of cocaine were found in Martinez's car. See Kaufman, 858 F.2d at 1000 (intent to distribute may be inferred from possession). Upon being questioned by the border agents, Martinez became excessively nervous, made inconsistent statements, and gave explanations which it would have been reasonable for a jury to find suspect. See Diaz-Carreon, 915 F.2d at 954-55 (nervous behavior at an

inspection station may constitute persuasive evidence of guilty knowledge.). Although this evidence is circumstantial, it is sufficient to enable the jury to infer knowledge from Martinez' control over a vehicle containing cocaine worth between $60,000 and $70,000. See Garza, 990 F.2d at 174 (where there is other circumstantial evidence, knowledge can be inferred from control over a vehicle in which drugs are hidden). Moreover, as is established by the record, the agents thoroughly questioned Martinez, thereby presenting him with a full opportunity to explain his trip to Mexico and how he came to possess an automobile with a secret compartment containing 4.9 kilograms of cocaine. The same opportunity was presented to Martinez at trial when he testified before the jury. Showing deference to the jury's credibility determinations and construing all reasonable inferences from the evidence in accordance with the jury's verdict, we cannot conclude that no reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. Martinez, 975 F.2d at 160-61. Accordingly, we conclude that the evidence is sufficient to sustain Martinez's convictions.

II

For the foregoing reasons, we AFFIRM Martinez's convictions.