UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7619
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EFRAIN ZUNIGA-AMARO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
CR C92 138 01

March 31, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[1]

Efrain Zuniga-Amaro (Zuniga-Amaro) appeals his conviction on drug trafficking charges. He asserts that the district court erred in refusing to suppress the fruits of a search and in failing to suppress statements he made to law enforcement officers. We find no error and affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Zuniga-Amaro was arrested and charged with conspiracy and a substantive count of possession with intent to distribute approximately 401 kilograms of marijuana. During pretrial proceedings, Zuniga-Amaro moved to suppress evidence, contending that evidence was seized at a checkpoint without probable cause and without consent. Zuniga-Amaro also moved to suppress evidence of statements made without waiver of counsel and under circumstances of coercion.

The district court, after a suppression hearing, denied both motions. A jury convicted Zuniga-Amaro of both counts. Zuniga-Amaro was sentenced to concurrent terms of 80 months incarceration. This appeal followed.

II.

A.

Zuniga-Amaro argues first that the district court erred in refusing to suppress the fruits of the search because the detention and search by the Border Patrol beyond the questioning regarding his citizenship was without probable cause and violated his rights under the Fourth Amendment.

At the suppression hearing, Tom Hicks, a Ryder Service Center Manager, testified that as he was driving into the service center yard at 8:25 in the evening, he noticed unauthorized vehicles parked there. A red Suburban was parked behind a tractor-trailer that was about to leave. Hicks testified that loading and unloading of any vehicle in the yard was unacceptable. Hicks

recognized Zuniga-Amaro and codefendant Gilbert Moreno, two Ryder driver-employees, who were driving the tractor-trailer. He called Edward Brook, manager for Ryder Distribution Resources, and reported suspected drug-related activities at the service center.

Brook testified that, having been alerted by Hicks, he was also suspicious and called Paul Craine, a DEA agent. Brook told Agent Craine about the incident and gave a description of the truck-trailer. Brook also provided a "unit number." Brook described the rig and trailer and requested that the trailer be searched when it passed through the Falfurrias checkpoint, a permanent checkpoint located about eighty miles from the Mexican border. Agent Craine relayed the information to Border Patrol Agent Mike McCord and gave a description of the truck and the trailer. Mike Patrick, a Border Patrol Agent at Falfurrias, testified that he was alerted by radio to be on the lookout for the rig. He was further informed that the trailer might be carrying contraband.

Fifty minutes later, Zuniga-Amaro and Moreno arrived at the checkpoint. Zuniga-Amaro was driving. Agent Patrick conducted a routine immigration check and inquired concerning their citizenship and requested a bill of lading. Everything checked out all right until he noticed that the trailer did not have an inspection door and, aided by his flashlight, he saw "laughing heads eating" on the side panel, matching the description of the suspect trailer. Agent Patrick estimated that he detained the rig about one minute so he could look at the back of the trailer.

Agent Patrick then asked Zuniga-Amaro if he would drive to the secondary search area. Zuniga-Amaro replied, "Sure, okay." Both Zuniga-Amaro and Moreno walked to the rear of the trailer and Agent Patrick asked Zuniga-Amaro "if he would mind opening the trailer" so he could look inside. Zuniga-Amaro consented. "Several minutes" lapsed from the time Agent Patrick first detained the rig until he asked Zuniga-Amaro to open the trailer. Agent Patrick climbed in and observed "duffle bags and soft-side luggage and plastics bags stacked all around the edges of the boxes of salad." Patrick cut open one bag, which contained marijuana. A total of 1200 pounds of marijuana was found in the trailer. Zuniga-Amaro and Moreno were arrested.

The district court concluded that the truck was lawfully stopped pursuant to routine immigration questioning. The district court held that the information obtained by Agent Patrick raised a "reasonable suspicion" and justified the detention and trip to secondary, where Zuniga-Amaro then consented to a search. The district court also held that Brook consented to the search of the trailer, thereby rendering Zuniga-Amaro's consent "superfluous." The district court also concluded that, in light of "circumstances observed by Tom Hicks and eventually communicated to the DEA," probable cause existed to search the trailer even without consent.

Zuniga-Amaro contests the determination of probable cause and the viability of Brook's consent. He also argues that, due to the lack of probable cause, the agent violated the Fourth Amendment by referring him to secondary and questioning him about anything

beyond his immigration status.

In routine traffic stops, temporary detention for questioning generally requires that "the officer must also have reasonable suspicion of illegal transactions in drugs or of any other serious crime." **See United States v. Kelley**, 981 F.2d 1464, 1468, 1470 (5th Cir. 1993). But, greater intrusions are allowed at permanent checkpoints without violating Fourth-Amendment rights. **See United States v. Martinez-Fuerte,** 428 U.S. 543, 557-67, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (l976). "Vehicles may be ordered into secondary search areas at permanent checkpoints without probable cause or "individualized suspicion." **United States v. Dovali-Avila**, 895 F.2d 206, 207 (5th Cir. 1990); **United States v. Garcia**, 616 F.2d 210, 211-12 (5th Cir. 1980). Of course a warrantless search of that same vehicle requires consent or a determination of probable cause. **Dovali-Avila**, 895 F.2d at 207.

Thus, to determine whether the officers were justified in referring the vehicle to secondary inspection, we need not consider whether the district court's findings of reasonable suspicion and probable cause are supported by the record. No reason is required to order a vehicle to secondary at permanent checkpoints. **Dovali-Avila**, 895 F.2d at 207. Zuniga-Amaro does not contest his consent to the search once the vehicle was in the secondary search area. Because Zuniga-Amaro consented to the search, the district court correctly denied the motion to suppress the fruits of the search.

B.

Zuniga-Amaro also argues that statements he made during

custody were involuntary and were induced by the Government agent's promise that the law would permit a sentence at the "lower end" of the guidelines if he admitted his guilt.

"Voluntariness depends upon the totality of the circumstances and must be evaluated on a case-by-case basis. [A] confession is voluntary in the absence of official overreaching, in the form either of direct coercion or subtle forms of psychological persuasion." **United States v. Rojas-Martinez**, 968 F.2d 415, 418 (5th Cir.) (citations omitted), **cert. denied**, 113 S.Ct. 828 (1992). Encouraging a defendant to tell the truth or indicating that his cooperation would be made known to the court does not render a subsequent confession involuntary. **See United States v. Paden**, 908 F.2d 1229, 1235 (5th Cir. 1990), **cert. denied**, 111 S.Ct. 710 (1991); **United States v. Ballard**, 586 F.2d 1060, 1063 (5th Cir. 1978). Nor do truthful statements made by authorities regarding the possible penalties involved. **Paden**, 908 F.2d at 1235; **Ballard**, 586 F.2d at 1063. Such comments, if made in a non-coercive manner, allow the defendant to make an "informed and intelligent appraisal of the risks involved." **Ballard**, 586 F.2d at 1063.

"The [G]overnment bears the burden of proving by a preponderance of the evidence that both the waiver of *Miranda* rights and the confession were voluntary." **United States v. Raymer**, 876 F.2d 383, 386 (5th Cir.) (citation omitted), **cert. denied**, 493 United States 870 (1989). The district court's rulings on motions to suppress based on questions of law are reviewed **de novo**. **United States v. Coleman**, 969 F.2d 126, 129 (5th

Cir. 1992) (citation omitted).

When he was arrested, the officers read Zuniga-Amaro his **Miranda** rights from a standard form. Zuniga-Amaro stated that he understood them and signed the form. Zuniga-Amaro did not request an attorney at that time. Zuniga-Amaro denied any knowledge of the marijuana and said that he was "not involved in the loading."

Tim Jung, a DEA agent, met with Zuniga-Amaro the next morning and again gave him the **Miranda** warnings. Zuniga-Amaro signed the form and indicated that he understood his rights. Zuniga-Amaro never requested an attorney. Zuniga-Amaro again denied any knowledge of the marijuana.

Agent Jung then told Zuniga-Amaro that the evidence against him provided by Hicks was strong and that the charges against him were serious, constituting a federal offense. Agent Jung explained that neither probation nor parole would be available for such an offense. Agent Jung denied making any threats or promises. Agent Jung explained the sentencing guidelines, characterizing them as having a "high side" and a "low side," and he explained that his acceptance of responsibility for the crime could result in a sentence at the "lower end" of the guideline. Agent Jung also explained that substantial cooperation with authorities *could* result in a lighter sentence but that any agreements had to be made between his attorney and the United States Attorney. He also stated that, even as to acceptance of responsibility, only the United States Attorney could make a deal. Agent Jung made no representation as to the range of years of his potential sentence.

Not admitting any participation, Zuniga-Amaro was placed in a holding cell.

After Agent Jung interviewed Moreno, Agent Jung and another agent drove Moreno and Zuniga-Amaro to Corpus Christi. On the way, Moreno told Jung that he would take responsibility for half of the marijuana. When Agent Jung inquired what "half" meant, Moreno explained that he and Zuniga-Amaro were being paid $40 per pound to transport the marijuana and that they would divide the proceeds. Agent Jung told Moreno that he could not take responsibility for "half" if he knew all the marijuana was in the trailer. Moreno admitted that the red Suburban was the source of marijuana.

Agent Jung asked Zuniga-Amaro, who had been listening, if Moreno's account was correct, and he replied "yes." Zuniga-Amaro also admitted that he knew the marijuana was in the truck and he was getting half of the $40-per-pound proceeds for hauling it. Zuniga-Amaro admitted that the marijuana came from the red Suburban and that they were transporting it to Houston to unload it.

The district court concluded that the statements made by Zuniga-Amaro were made by one "fully informed of his rights." The district court held that, because comments made by DEA Agent Jung were properly qualified by "noting the discretion of the judge and the prosecutor" and did not constitute threats or promises, Zuniga-Amaro made his confession voluntarily and under circumstances that were not coercive.

The district court held further that Agent Jung's remarks about the sentencing guidelines and the seriousness of the evidence

against Zuniga-Amaro were the "only circumstances tending to show coercion," and that those comments were "substantially correct." The district court made a fact finding that "Zuniga-Amaro's decision to speak was not a result of the statements made by the agent, but of his reasoned choice that cooperation was in his best interest."

The agent's comment that acceptance of responsibility would put Zuniga-Amaro on the low rather than the high end of the range was not technically correct; it simply lowers the overall range. The agent's comment however was still "substantially correct" because acceptance of responsibility does tend to lower the range of punishment.

The district court found that the agent described "two ways" Zuniga-Amaro might get a reduced sentence: acceptance of responsibility and substantial assistance. The district court also found that this did not amount to saying that "there were no others." On that basis, the district court found that the agent was essentially telling Zuniga-Amaro and Moreno "what the law says unless the court exercises discretion at the end of a trial and decides to award acceptance of responsibility anyway, or there's some other factors of departure." The district court's ruling that the comments made by the agent were "substantially correct" was not error. The agent stated in effect that he could not guarantee any reduced sentence; but that the district court, as well as the prosecutor, would be involved in any ultimate decision. Assuming that Zuniga-Amaro relied on these representations, they do not

undermine the ultimate finding that Zuniga-Amaro made a "reasoned choice that cooperation was in his best interest."

This is not a case, as Zuniga-Amaro suggests, where a DEA agent makes "certain promises, [that] if not kept, are so attractive that they render a resulting confession involuntary." **Streetman v. Lynaugh**, 812 F.2d 950, 957 (5th Cir. 1987). In light of the record as a whole, the finding that Zuniga-Amaro's confession resulted from his informed choice after the agent provided substantially correct information is not clearly erroneous. The district court did not err in declining to suppress Zuniga-Amaro's statements.

AFFIRMED.