

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7627

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JOSE ANDRES GARZA-TIJERINA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
CR M92 011 08

(June 3, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Defendant appeals his conviction and sentence for possession with intent to distribute heroin. Finding that the evidence was sufficient to support the conviction and that the district court's upward departure was reasonable, we affirm.

I.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Jose Andres Garza-Tijerina was indicted in four of seven counts charging eight men with various offenses involving heroin. After a jury trial, Garza was found not guilty on three of the counts and guilty on one, Count 7. Count 7 charged that, on or about August 26, 1991, Garza and Carlos Cordero-Gutierrez possessed with intent to distribute approximately 23.8 grams of heroin in violation of 21 U.S.C. § 841(a)(1), which criminalizes possession with intent to distribute a controlled substance, and 18 U.S.C. § 2, which identifies an aider and abettor as a principal.

Before sentencing Garza, the district court gave notice that it was considering an upward departure and gave Garza time to object. Garza objected. Upwardly departing, the district court sentenced Garza to serve 41 months in prison and three years on supervised release.

II.

A.

Garza argues that the evidence was insufficient to support his conviction. He asserts that the government failed to show that he was directly involved in the transfer of any heroin or that he owned or possessed heroin. He also mentions, but does not argue, that the evidence was insufficient because he was under the influence of cocaine.

When the sufficiency of the evidence is challenged, this court reviews the evidence in the light most favorable to the government, making all reasonable inferences and credibility choices in favor of the verdict. Glasser v. United States, 315 U.S. 60, 80, 62 S.

Ct. 457, 86 L. Ed. 680 (1942). The conviction must be affirmed if any rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt. Every reasonable hypothesis of innocence need not have been excluded, nor need the evidence be entirely inconsistent with innocent conduct. United States v. Vasquez, 953 F.2d 176, 181 (5th Cir.), cert. denied, 112 S. Ct. 2288 (1992).

The government has the burden of proving beyond a reasonable doubt that the defendant knowingly possessed the controlled substance and intended to distribute it. United States v. Valdiosera-Godinez, 932 F.2d 1093, 1095 (5th Cir. 1991). The evidence, which may be direct or circumstantial, may show actual or constructive possession by one defendant or by several defendants jointly. Id. The evidence of aiding and abetting is sufficient if the government showed that the defendant associated with the criminal venture, participated in the venture, and sought by his actions to make the venture succeed. United States v. Menesses, 962 F.2d 420, 427 (5th Cir. 1992).

B.

The participants in the incident on April 26, 1991, were Cordero, who, by agreement, testified for the government; DEA agent Jose Aguilar; and Garza. DEA agent Rodney Alvarez conducted surveillance.

Cordero's testimony.¹ Cordero testified that, on that date, he sold 12 grams of heroin to Aguilar. Cordero had obtained the heroin from Garza. The sale to Aguilar took place in Cordero's bedroom. Garza was present for the sale. The sales price was \$1600. Cordero kept \$100 and gave the remainder to Garza. Cordero testified that Garza was also his supplier of prior amounts delivered before the 26th.

Alvarez's testimony. Stationed outside, Alvarez saw a heavy-set man wearing a pink or peach-colored guayabera shirt enter the house. Alvarez could not identify the man from that observation. Shortly thereafter, Aguilar arrived and entered the house. About 15 minutes later, Aguilar left. About five minutes after Aguilar's departure, the man in the guayabera shirt left. Alvarez followed him and got a close look at him. Alvarez identified him at trial as Garza.

Aguilar's testimony. Aguilar testified that he met Cordero at the latter's home. They went into the bedroom, where Garza, wearing a peach-colored guayabera shirt, was sitting on the bed. Aguilar accepted the heroin from Cordero, negotiated briefly because the quantity was one ounce less than agreed upon, and paid Cordero \$1600. Aguilar told Cordero that he needed to buy larger quantities in the future. Garza joined the conversation at that point, telling Aguilar that his organization could supply whatever

¹Several times during the cross-examination of Cordero, the court interjected its own questions to clarify the testimony. The transcribed exchanges between the court and Cordero erroneously identify the witness as "THE DEFENDANT." Cordero was the witness at that time; Garza never testified.

quantities Aguilar could want. Garza explained that his supplier was his uncle in Mexico. Garza said that he would have to go to Mexico to make arrangements with his uncle. No later sales to Aguilar occurred, though.

Throughout the transaction in the bedroom, Garza was "snorting" cocaine. Aguilar thought that Garza, nevertheless, understood the conversation and was very coherent.

The gross weight of the heroin that Aguilar received from Cordero at that time was 53.8 grams. A DEA chemist testified that it was 13% heroin. The amount is not at issue in this appeal.

The evidence is sufficient to support Garza's convictions. First, Cordero testified that Garza was his supplier of the amount delivered to Aguilar on the 26th. A reasonable juror could have inferred that Garza possessed it with the intent to distribute. Garza's role as an aider and abettor requires even less inference. His presence at the sale of the cocaine that he had supplied shows his association with the venture. His volunteering to supply more heroin after Aguilar stated that he wanted to buy larger amounts shows both his participation and his interest in making the venture succeed.

Garza's two fleeting references to his snorting cocaine make no legal arguments. Furthermore, the only evidence of his snorting cocaine was Aguilar's description, and the only evidence of his capacity was Aguilar's description of his coherence. Therefore, even if he made a legal argument regarding capacity, the record would not support it.

III.

Garza argues that the district court improperly increased his criminal history category from II to III. He argues that the resulting upward departure from a range of 30-37 months to 33-41 months was unlawful.

A sentencing court may depart when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); United States v. Lambert, 984 F.2d 658, 660 (5th Cir. 1993) (en banc). An upward departure "is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes." U.S.S.G. § 4A1.3, policy statement; Lambert, 984 F.2d at 660. A departure that is based on aggravating or mitigating circumstances that the Sentencing Commission fully considered is an incorrect application of the Guidelines. Williams v. United States, ___ U.S. ___, 112 S. Ct. 1112, 1119, 117 L. Ed. 2d 341 (1992). The same is true of a departure based on a ground that the Sentencing Commission expressly rejected. Id. In upwardly departing, the sentencing court must explain why the Guidelines calculation is inadequate and why the chosen sentence is appropriate. Lambert, 984 F.2d at 663. This court affirms reasonable departures that are based on acceptable reasons. Id.

The probation officer recommended a criminal history category of II, based on one prior conviction for possession of a firearm by a convicted felon. The district court stated that category II does not adequately predict the likelihood that Garza will commit further crimes. A better predictor, the district court determined, was criminal history category III, which considered a pattern of involvement with illegal activity and criminals. The court thought that four events formed the pattern. They occurred in 1973, 1977, 1985, and 1992.

1973. In 1973, Garza and three others were arrested for importing and possessing cocaine. The substance turned out not to be cocaine but a white crystalline substance that was not controlled. This arrest was not considered in the PSR's calculation of Garza's criminal history because there was no illegal activity.

The district court considered that incident not for its criminal nature; importing and possessing a non-controlled substance was not unlawful. Rather, the court stated that the incident indicates that even an arrest did not keep Garza from engaging in later drug trafficking. The incident, in combination with the later incidents, shows a pattern of Garza associating with people involved in the drug trade. The court stated that, even without considering the 1973 incident, the remainder of the pattern indicates a high likelihood of recidivism.

1978. In 1978, Garza was convicted of possessing marihuana. He had assisted others in loading a vehicle with approximately 500

pounds of marihuana. He was given a probated sentence. This 1978 conviction was not considered in the PSR's criminal history calculation because it occurred more than ten years before the instant offense. U.S.S.G. § 4A1.2(e)(2), (3).

In the district court's opinion, this conviction is another part of the pattern of drug trafficking and associating with drug traffickers. The court believed that, as such, it is a predictor of the likelihood of future drug trafficking and should be considered. This is the conviction upon which the court primarily relied in upwardly departing. Even though Garza received a probated sentence more than ten years earlier, the court considered it because of its similarity to the instant offense.

1985. Garza's 1985 conviction was for possession of a firearm by a convicted felon, and the probation officer did consider it in arriving at a criminal history category of II. In the incident that gave rise to the conviction, another person arrived on the scene carrying more than 100 grams of cocaine for delivery to Garza. Garza was not charged with a drug offense.

The district court stated that this incident was part of the pattern, not because of the firearm conviction or because Garza was the intended transferee of the cocaine, but because it indicates that drug traffickers "are the kind of people he hangs around with." It shows continued association with people involved in the drug trade.

1992. The instant offense, of course, is not a prior offense ordinarily includable in the criminal history calculation. See

U.S.S.G. § 4A1.2(a)(1). The district court cited it, though, as indicative of the continuation of Garza's well-established pattern of involvement with drug traffickers. A criminal history calculation that ignored such a pattern, the district court believed, under-represented the likelihood that Garza will commit more crimes.

Limiting the criminal history calculation to the one conviction in 1985 prevented consideration of a continuing 15-year pattern of conduct. The district court's explanation that the pattern is predictive of Garza's future conduct is reasonable. A one-level increase in criminal history category is the smallest possible departure. See Lambert, 984 F.2d at 662 (in departing, court must consider each successive criminal history category).

AFFIRMED.