UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-7694
Summary Calendar

United States of America,

Plaintiff-Appellee,

VERSUS

Andres Rodriguez and
Anthony De Ponce,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas
(CR-B-92-54(03)(04))

(January 4, 1994)

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge:[*]

Anthony De Ponce was convicted on four drug counts: two counts of conspiracy to possess with intent to distribute marihuana in violation of 21 U.S.C. §§ 841(a)(1), 846 and two counts of possession of marihuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B), 18 U.S.C. § 2. Andres Rodriguez

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

was convicted on two drug counts: one count of conspiracy to possess with intent to distribute marihuana in violation of 21 U.S.C. §§ 841(a)(1), 846 and one count of possession of marihuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B), 18 U.S.C. § 2. Appellant De Ponce argues that his convictions on the two conspiracy counts and on two substantive counts violate the double jeopardy clause of the Fifth Amendment; that the district court improperly admitted hearsay testimony; and that the district court's finding that he was an organizer or leader of the criminal activity is clearly erroneous. Both appellants argue that there is insufficient evidence to support their convictions. We find merit in only De Ponce's first contention challenging his conviction of two conspiracies and therefore remand for correction of De Ponce's sentence based on only one conspiracy. Otherwise, we affirm the convictions and sentences of both appellants.

Facts and Prior Proceedings

To analyze appellants' claims of insufficient evidence, it is necessary to review the facts leading to their arrest. De Ponce approached a paid informant working with the United States Customs Service between June 1990 and November 1990 in Brownsville, Texas to participate in the transportation of cocaine to New York. De Ponce sought to recruit the informant because the informant drove a refrigerated truck and frequently hauled perishable foods through border patrol checkpoints in South Texas. The informant immediately notified agents with the Customs Service. De Ponce did

not immediately pursue delivery of the cocaine, but told the informant to keep in touch with him while he organized the smuggling operation.

In February 1991, Luis Garza and Carmelo Cavazos approached the informant on De Ponce's behalf to haul 500 pounds of marihuana to Miami, Florida.[1] The trio drove to De Ponce's place of business and Cavazos met with De Ponce while the informant and Garza remained in the vehicle. Several other organizational meetings were held between March 1991 and September 1991. On October 14, 1991, the informant, Garza and Luis Arispe obtained a load of 446 pounds of marihuana from a "stash" house and brought it to a location where undercover officer Ernie Espindola was waiting. Officer Espindola had been introduced as the informant's driving partner. All of the men then loaded the marihuana in the Customs Service-supplied tractor-trailer. On October 16, the informant and Officer Espindola departed for Miami. Upon arrival in Miami, the informant phoned a number supplied by Cavazos. The telephone number was for a portable phone rented by Yolanda Cuni at De Ponce's request.[2] The informant spoke to appellant Rodriguez. The next day, Rodriguez and Cavazos met the undercover officer and the informant and led them to the house where the marihuana was

[1] Cavazos told the informant that De Ponce had drug conspirator contacts in Miami. According to Cavazos, this marihuana was to be delivered and sold to an attorney in Miami.

[2] Phone tolls from De Ponce's phone to several members of the conspiracy substantiated that De Ponce was in communication with his co-conspirators in Florida, including appellant Rodriguez and the stash houses in Florida and Brownsville.

unloaded by Rodriguez, the undercover officer and three other men. The officer and the informant returned to their hotel room to await further instructions.

Later, a search warrant was executed on the premises in Florida where the marihuana was unloaded. Law enforcement officers seized 446 pounds of marihuana. Appellant Rodriguez was apprehended at the scene, and he confessed that the marihuana had been transported to Miami from Texas.[3]

On November 25, 1991, Cavazos and Garza met with the informant at a car wash in Brownsville, and told him that the second load of marihuana was ready for transportation that evening. Cavazos also told the informant that he would soon receive payment for the delivery of the first load. Cavazos and Garza left the carwash and drove to the same stash house. De Ponce's Ford Bronco was observed in the driveway. The next day, the informant, Garza and Cavazos attempted to transport the marihuana to the 18-wheeler, but customs agents stopped them and seized the second load of 587 pounds of marihuana.

Appellant Rodriguez was charged with one count of conspiracy to possess marihuana with intent to distribute and one count of possession of marihuana with intent to deliver and aiding and abetting in the possession of marihuana with intent to deliver. He

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[3] A Florida Sheriff's Deputy testified that he stopped a vehicle driven by Rodriguez prior to the execution of the search warrant and that Rodriguez was in the company of Basulto and Cavazos. The officer also recalled that Basulto and Cavazos had airline tickets indicating that they flew from Harlingen to Miami on October 17, 1991.

was convicted of both counts and sentenced to concurrent terms of 60 months imprisonment on each count, five years supervised release, and a $100 special assessment.

De Ponce was charged with two counts of conspiracy to possesss marihuana with intent to deliver (counts 1, 3) and two counts of possession of marihuana with intent to deliver and aiding and abetting the possession of marihuana with intent to deliver (counts 2, 4). He was convicted on all four counts. The probation officer recommended increasing De Ponce's base offense level four levels because he was an organizer or leader of the criminal activity. The district court overruled De Ponce's objection to this adjustment and sentenced him to concurrent terms of 121 months imprisonment and five years supervised release on each count, a $17,500 fine, and a $200 special assessment.[4] Both Rodriguez and De Ponce timely appeal to this Court.

Discussion

I. Double Jeopardy Claims

A. Conspiracy Counts

De Ponce argues that the multiple convictions on counts one and three violate the Double Jeopardy Clause because the proof adduced at trial established only one conspiracy.[5] Count one

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[4] Specifically, De Ponce was specially assessed $50 per count as required by law.

[5] Although the indictment contained multiple conspiracy counts, De Ponce has never complained about the indictment. This is of no moment as a criminal defendant may complain of nonconcurrent multiple sentences on appeal despite a failure to complain of the multiple indictments. **United States v. Berry,** 977 F.2d 915, 920 (5th Cir. 1992). A sentence is not concurrent if

charged Cavazos, Basulto, Rodriguez, De Ponce, and Fructoso Garza with conspiracy to possess marihuana with intent to distribute from October 14 through 18, 1991. Count three charged Cavazos, De Ponce, and Fructoso Garza with conspiracy to possess marihuana with intent to distribute from November 1 through 25, 1991.

De Ponce raised the double jeopardy issue in his objections to the PSI. The issue was also raised by the trial court at the close of the Government's case, and the Government conceded that the evidence could be viewed as proving a single conspiracy. The trial court submited the two conspiracy charges to the jury but indicated that the issue of multiple conspiracies could be resolved at sentencing. The sentencing judge, however, was not the same trial judge, and although De Ponce urged the dismissal of one of the two conspiracy counts at sentencing, the request for relief was denied.[6]

To support separate conspiracy convictions the Government must prove separate agreements. **United States v. Bazan**, 807 F.2d 1200,

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multiple mandatory special assessments are imposed for each conviction. **Id.** De Ponce's sentences were not concurrent because he received a mandatory $50 assessment for each count in the indictment for which he received conviction. Therefore, he may raise this claim on appeal.

[6] Specifically, defense counsel called the court's attention to the **Bazan** case, cited herein. Defense counsel reminded the sentencing judge that the **Bazan** case arose out of his court and that the Fifth Circuit, "...sent it back to you....It is my contention that the law as set out in the case of **United States v. Bazan**...that I just called the court's attention to would prohibit the court in the double jeopardy clause of the Fifth Amendment...from sentencing on both counts." The sentencing judge disagreed. "[S]ince they adopted the sentencing guidelines, everything is taken together. And I don't remember the case because basically I was affirmed."

1206 (5th Cir. 1986), **cert. denied**, 481 U.S. 1038 (1987). To determine whether more than one agreement exists, this Court considers:

> 1) [t]he time period alleged, 2) [t]he co-conspirators involved, 3) [t]he statutory offenses charged, 4) the overt acts or description of the offense charged which indicates the nature and scope of the activity which the Government alleged was illegal, and 5) the location of the events which allegedly took place.

United States v. Rena, 981 F.2d 765, 770 (5th Cir. 1993) (internal citations omitted). As the Government readily concedes, the evidence establishes only one conspiracy. Both conspiracy counts involve a core group of individuals who agreed to transport marihuana between Texas and Florida. Therefore, we reverse De Ponce's convictions on counts one and three and remand this case to the district court to enter judgment of conviction for only one conspiracy and accordingly, for resentencing. **See United States v. Rena**, 981 F.2d 765, 770 (5th Cir. 1993) (one agreement to conspire); **United States v. Bryan**, 896 F.2d 68, 71 (5th Cir.), **cert. denied**, 498 U.S. 847 (1990) (one agreement to conspire); **Bazan**, 807 F.2d at 1206 (no separate agreement proven).

B. Substantive Counts

De Ponce argues that his convictions on the two substantive counts also violate double jeopardy. Count two charged De Ponce with possession of 207.1 kilograms of marihuana with intent to distribute on October 18, 1991, and count four charged him with possession of 267 kilograms of marihuana with intent to distribute on November 26, 1991. De Ponce's argument is without merit.

The Double Jeopardy Clause protects against multiple punishments for the same offense. **Berry**, 977 F.2d at 918. De Ponce, however, participated in two separate criminal acts. Count two involves the first load of 446 pounds of marihuana which reached Miami. Count four involves the second load of 587 pounds of marihuana which was confiscated en route to the delivery vehicle in Texas. Therefore, the Double Jeopardy Clause is not implicated on the substantive counts. **Berry**, 977 F.2d at 920 (multiple convictions and sentences for firearms obtained at different times and stored in different locations do not violate double jeopardy).

II. Sufficiency of the Evidence

Both Rodriguez and De Ponce argue that there is insufficient evidence to support their convictions. Although Rodriguez and De Ponce made motions for acquittal at the close of the prosecution's evidence, neither renewed their motions at the close of all of the evidence. Therefore, the sufficiency arguments are reviewable only to determine whether there was a manifest miscarriage of justice. **United States v. Shaw**, 920 F.2d 1225, 1230 (5th Cir.), **cert. denied**, 111 S.Ct. 2038 (1991). A miscarriage of justice exists if the record is "devoid of evidence pointing to guilt." **United States v. Ruiz**, 860 F.2d 615, 617 (5th Cir. 1988) (internal quotations and citation omitted).

A. Rodriguez

Rodriguez argues that there was insufficient evidence to show that he knew of the conspiracy or voluntarily participated in it.

To establish a drug conspiracy under 21 U.S.C. § 846, the Government must prove the existence of an agreement to violate the narcotics laws; the defendant's knowledge of the agreement and intention to join it; and the defendant's voluntary participation. **United States v. Lopez**, 979 F.2d 1024, 1029 (5th Cir. 1992), **cert. denied**, 113 S.Ct. 2349 (1993). The jury may infer a conspiracy agreement from circumstantial evidence and may rely upon presence and association, along with other evidence, in finding that a conspiracy existed. **United States v. Rojas-Martinez**, 968 F.2d 415, 421 (5th Cir. 1992). "Concert of action can indicate agreement and voluntary participation." **Lopez**, 979 F.2d at 1029. The evidence at trial established that Rodriguez was driving the car rented by Yolanda Cuni at De Ponce's request when he and Cavazos met the informant at the Holiday Inn in Miami. The informant and Officer Espindola delivered the marihuana to Rodriguez's house and Rodriguez helped them to unload the truck. Rodriguez also admitted his involvement in the transaction and told law enforcement officers that the marihuana came from Texas. The telephone records showed that telephone calls were made to and from Rodriguez's Miami residence and the co-conspirators in Texas. This evidence is sufficient to support his conspiracy conviction.

Rodriguez also argues that his substantive possession conviction is insufficient because the evidence is unclear whether he actually helped to unload the boxes in Miami or that he knew that the boxes contained marihuana. Both the informant and Officer Espindola testified that Rodriguez helped to unload the truck.

More importantly, Rodriguez admitted his involvement in the transaction. This argument is meritless.

B. De Ponce

De Ponce also argues that the evidence is insufficient to support his conspiracy conviction because there is insufficient evidence to establish that he knew about the conspiracy or knowingly joined it. He contends that the evidence merely established that he associated with individuals involved in the conspiracy.

The evidence, however, established that De Ponce was a knowing participant in the conspiracy. The informant and Cavazos discussed a potential drug transaction during a series of meetings between March and September 1991. During this same period, Cavazos and Garza told the informant that F. Garza provided the money for the marihuana and De Ponce provided the clients in Miami to purchase the marihuana. In the informant's presence, Cavazos informed De Ponce in August that everything, meaning the marihuana, was ready in Mexico. De Ponce had Cuni rent a car with a portable telephone in Miami on October 17, 1991, and Cuni rented a white Ford Tempo.[7] The portable telephone that the informant called when he arrived in Miami was the telephone rented by Cuni, and Rodriguez and Cavazos

[7] There is no dispute that Cuni rented the car and phone in Florida. Rental agreements for both were found showing Cuni as the renter. Cuni testified, however that she did not rent the automobile in Florida for De Ponce or at his behest, although she conceded that De Ponce rented a Brownsville apartment for her. Her testimony was impeached by a Customs Agent who related Cuni's admission to being asked by De Ponce to rent the automobile used by Rodriguez, Basulto and Cavazos in November 1991.

were driving the rented Tempo when they picked up the informant at the Miami Holiday Inn. After the police confiscated the first load of marihuana, De Ponce accused Garza of tipping off the Miami police.

Additionally, De Ponce rented a house at 304 Pinehurst in the name of Ana Laura Torres, and his Bronco was seen parked in the driveway. The day they intended to transport the second load of marihuana, Cavazos and Garza went to the house at 304 Pinehurst, when De Ponce's Bronco was parked in the driveway, to get the money to pay the informant for hauling the first load. De Ponce was present when Cavazos and Garza got the boxes for the second load and encouraged Cavazos to deliver the second load because the police were getting suspicious. This evidence is sufficient to support De Ponce's knowing and voluntary participation in the conspiracy.

Finally, De Ponce argues that the evidence is insufficient to support his substantive convictions because there was no evidence that he had actual or constructive possession of the marihuana. To establish a violation under 21 U.S.C. § 841(a)(1), the Government must prove knowing possession of marihuana with intent to distribute. **See United States v. Williams**, 985 F.2d 749, 753 (5th Cir.), **cert. denied**, 114 S.Ct. 148 (1993). However, Rodriguez and De Ponce were convicted of aiding and abetting the possession of the marihuana with intent to distribute, and the district court gave an aiding and abetting instruction. To be guilty of aiding and abetting the possession of the marihuana with intent to distribute,

the defendants do not have to have actual or constructive possession of the drugs. Rather, the defendants merely have to have associated with and participated with the venture in a way calculated to bring about the venture's success. **Id.** As discussed above, De Ponce's activities assisted the other co-conspirators in the possession of the marihuana, therefore his substantive convictions are affirmed.

III. Rolando Vasquez's Testimony

De Ponce argues that the district court improperly permitted Officer Vasquez to testify that he recognized De Ponce's Bronco parked at 304 Pinehurst as the same Bronco that he had seen in an unrelated narcotics investigation.[8] De Ponce argues that this testimony was not admissible under Fed. R. Evid. 404(b).[9] Specifically, on direct examination by the Government, Vasquez testified that he lived next door to the house that De Ponce had rented on Pinehurst to serve as the stash house. He testified that he had seen both De Ponce at the Pinehurst house as well as his

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[8] Officer Vasquez is a police officer who works primarily on narcotics investigations.

[9] **Rule 404 (b) Other crimes, wrongs, or acts.**
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Bronco parked in the driveway. Vasquez testified that on one occasion, he detected the odor of marihuana emanating from a car parked in the driveway. On cross-examination, De Ponce's attorney questioned Vasquez's ability to recognize the Bronco as the same Bronco seen at the stash house. He responded that the Bronco seen at the Pinehurst house was the same Bronco he saw involved in another narcotics transaction where he ran the plates on a Bronco that turned out to belong to De Ponce. He testified that he saw this same Bronco at the stash house. Over objection, on redirect examination, Vasquez was permitted to explain that during this prior unrelated investigation he was waiting on a street corner with a suspected drug dealer when a Bronco passed and the suspect told him that the driver was the guy with the money. Vasquez testified that he ran the plates on the Bronco and that the Bronco belonged to De Ponce. On recross-examination Vasquez admitted that he did not know if De Ponce was driving the Bronco at the time or if he was involved in the prior narcotics transaction.

Arguably, the testimony was not admissible under Rule 404(b) because the Government failed to establish that De Ponce was involved in the prior criminal activity. **See United States v. Gonzalez-Lira**, 936 F.2d 184, 189-90 (5th Cir. 1991) (government must provide evidence sufficient to allow jury to find defendant committed the act). This Court, however, may review this error for harmless error. **See United States v. El-Zoubi**, 993 F.2d 442, 446-447 (5th Cir. 1993).

To determine whether the admission of the evidence was harmless, this Court considers the other evidence in the case to decide if the inadmissible evidence actually contributed to the jury's verdict. **Id.** at 446. The inadmissible testimony will require reversal only if it had a "substantial impact" on the jury's verdict. **Id.** (internal citation ommitted). As discussed above, there was significant evidence connecting De Ponce to the conspiracy and the possession of marihuana. Additionally, the informant also identified the Bronco as De Ponce's Bronco, and Officer Vasquez admitted that there was no evidence that De Ponce was actually involved in the earlier drug transaction. Any error was therefore harmless.

IV. Role in the Offense

Finally, De Ponce challenges the district court's finding that he was an organizer or leader of the criminal activity. The district court's finding that De Ponce had an aggravating role in the offense is reviewed under the clearly erroneous standard. **United States v. Watson**, 988 F.2d 544, 550 (5th Cir.), **petition for cert. filed,** (U.S. Jul. 29, 1993)(No. 93-5407). A defendant's base offense level may be increased four levels if the defendant "was an organizer of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a).

The evidence established that the criminal activity involved Garza, Arispe, Cavazos, Basulto, F. Garza, Rodriguez, and De Ponce, more than five participants; that De Ponce arranged for the rental

car and portable telephone in Miami; that De Ponce arranged for the buyers in Miami; that he provided the funds to pay the informant for the first load; and that he had Cavazos move the second load because the police were becoming suspicious. The district court's finding is therefore not clearly erroneous.

Conclusion

Based on the foregoing, we affirm in part and reverse and remand in part. As to Anthony De Ponce, this case is remanded for the district court to correct De Ponce's sentence consistent with this opinion.

AFFIRMED IN PART;
REVERSED AND REMANDED IN PART.