IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7722
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

OSCAR HERRERA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR B 92 133 2)

August 18, 1993

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

A two-count indictment charged Oscar Herrera, along with Juan Ramos and Joaquin Gutierrez-Garcia, with (1) conspiracy to possess with intent to distribute more than 100 kilograms of marihuana in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) and 846 and (2) aiding and abetting the underlying substantive possession with

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[*] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

intent to distribute more than 100 kilograms of marihuana in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). The jury found Herrera guilty on the conspiracy count and not guilty on the possession count. Finding no error, we affirm.

I.

On November 14, 1991, Cameron County, Texas, sheriff's department officers went to a house in Brownsville that they had been informed was a "stash house" containing a large quantity of marihuana. Two officers went to the front door, and others were stationed elsewhere. The two officers knocked on the door, and a voice asked who was there. The officers identified themselves and then heard a commotion of people running and yelling inside. Herrera, Ramos, and Gutierrez-Garcia fled the house through a window and immediately were apprehended.

Ramos claimed possession of the house and consented to a search of it. Upon entering, the officers saw in the living room bundles of marihuana, one apparently in the process of being wrapped and others already wrapped; more marihuana was found in the bedroom. Boxes containing marihuana residue were found in the garage. The total weight of the marihuana seized from the house was 550 pounds.

When the officers entered the house, it smelled of marihuana. All three occupants appeared to the officers to have red eyes, as if they had been smoking marihuana. One officer testified that his understanding from another defendant was that Herrera was helping

to package the marihuana. There was no objection to, or cross-examination about, either the testimony regarding Herrera's eyes or the hearsay about the co-defendant's comment.

A Toyota truck parked in the driveway belonged to Herrera. Underneath the seat was a pistol of a type commonly used by drug traffickers. An informant previously had told police that unidentified residents of the house were storing marihuana there and had a gun.

Herrera testified that his presence at the house was entirely innocent. He was a twenty-one-year-old college student who worked forty hours a week at a warehouse. He said that he never had been inside Ramos's house until that night and did not know that marihuana was there.

Herrera said that he had gone to a mall earlier that night with some friends and ran into Ramos, whom he had not seen for two or three years. During their conversation, Herrera said he was hungry; Ramos said that he was, too. As Herrera was ready to go home, he told Ramos that he would go to his own home, pick up some food, and take it to Ramos's house. Ramos gave him directions to his house. Herrera went home, had some chicken, and took a plate to the house.

When Herrera arrived, Ramos and Gutierrez-Garcia admitted him only to the entry hall, where they stayed for ten or fifteen minutes. The house smelled of something unpleasant. In Hereara's words, "The whole house stunk."

The three men stood just inside the front door. Herrera felt

that the others did not want him to be there; he did not go into any other room. Herrera testified that he had no idea that Ramos was involved with drugs and would not have gone to the house had he known.

Herrera was about to leave when the officers knocked. He asked who was there. When the officers identified themselves, Herrera turned around and saw Ramos and Gutierrez-Garcia fleeing through an open window. Herrera testified, "I didn't know what to do. They were going to leave me alone there. I went after Juan."

Herrara claims that the gun in his car belonged to a friend of a friend. Herrera's friend Ruben Peña was taking care of it for Peña's friend, who was out of town and did not want to leave the gun at home with his children.

II.

Herrera argues that the district court should have granted him a new trial, for which he moved on the ground of newly discovered evidence. Between trial and sentencing, Herrera moved for a new trial, claiming that Ramos had evidence exculpating him.

A.

Motions for new trial based upon newly discovered evidence are disfavored, and denials of such motions are reversed only for abuse of discretion. United States v. Peña, 949 F.2d 751, 758 (5th Cir. 1991). The movant must show (1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the

failure to detect the evidence was not caused by his lack of due diligence; (3) the evidence is material, not merely cumulative or impeaching; and (4) the evidence must probably produce an acquittal. The movant must satisfy all four elements.

B.

The court ordered Herrera to submit affidavits in support of the motion, warning that "[f]ailure to submit the affidavits will result in Denial of the Motion." The court heard the motion at sentencing. The court stated that it had received no affidavits from Herrera; counsel explained that he had advised Ramos not to give an affidavit.

The court then recited an event from trial, to-wit: The government called Ramos, who thereupon advised the court that he would invoke his right against self-incrimination and did not wish to testify for the government. Upon Ramos's invocation of his Fifth Amendment right, the court would not allow the government to examine him. For whatever reason, defense counsel, who was not counsel at the time of the motion for new trial, did not call Ramos, who, in the court's words, "was available on the spot." In response to the court's further observation that "there was no effort, none whatsoever, made by the defense to call the defendant to testify . . . for the defendant," Herrera's attorney responded, "That was [Herrara's former] counsel's error, Judge, at the trial level."

Counsel also responded that Ramos could not have been forced

to testify, even if the defense had called him. The court responded, "You don't know because he was never asked . . . . [T]he Court took up the matter exclusively from the standpoint of being called by the Government."

Counsel unsuccessfully urged the court to grant the motion because Ramos had asserted Herrera's innocence at the former's sentencing hearing. Herrera argues that Ramos, at his rearraignment, "ambiguously implicated Herrera as having knowledge of and active participation in the drug smuggling operation . . . . However, during his sentencing hearing set on 16 Oct 1992, Ramos stated that Herrera was not involved and was innocent." Herrera asserts, "The basic premise of the motion being that the co-defendant Ramos previously attempted to exonerate Herrera, but such information was not known to Herrera until after trial."

At trial, outside the presence of the jury, the government told the court that it wanted to call Ramos but that Ramos was going to change his story. The prosecutor said that Ramos could face possible perjury charges "because of what he said in front of the court earlier."

Ramos's attorney then invoked the Fifth Amendment on his client's behalf, and Ramos agreed that such was his wish. The court allowed Ramos to invoke the Fifth Amendment; Herrara's counsel said nothing.

C.

When a defendant does not attempt to call a witness at trial

)) even one who is likely to invoke his Fifth Amendment right not to testify)) the defendant fails in his duty of due diligence. In the face of such a failing, the court does not abuse its discretion by denying a new trial. United States v. Munoz, 957 F.2d 171, 173 (5th Cir.), cert. denied, 113 S. Ct. 332 (1992).

The government's announcement at trial that Ramos was going to change his story certainly put Herrera on notice that Ramos might be a favorable witness. Herrera may not claim now that he was duly diligent when he stood silent then.

III.

Herrera argues that he should have been granted a judgment of acquittal. He moved for acquittal at the conclusion of the government's case on the ground of insufficient evidence. The denial of such a motion will not be disturbed if a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd, 462 U.S. 356 (1983).

The elements of a conspiracy to possess drugs are, first, the existence of an agreement to possess; second, knowledge of the agreement; and third, voluntary participation in the agreement. The conspiracy may be established by circumstantial evidence. Discrete circumstances that, standing alone, would be inconclusive may prove a conspiracy when taken together and corroborated by moral coincidence. United States v. Rodriguez-Mireles, 896 F.2d 890, 892 (5th Cir. 1990) (internal quotation marks deleted).

Circumstantial evidence may prove guilt beyond a reasonable doubt without excluding every reasonable hypothesis of innocence. Bell, 678 F.2d at 549.

Herrera was present in the "stash house." Without more, mere presence does not establish guilt. United States v. Maltos, 985 F.2d 743, 746 (5th Cir. 1992). Presence, though, is one factor that may be considered along with other evidence. Id. Herrera did flee when the police officers identified themselves. "While flight alone is insufficient to support a guilty verdict, it is relevant and admissible, and the jury could take into account [the defendant's] flight." United States v. Lopez, 979 F.2d 1024, 1030 (5th Cir. 1992), cert. denied, 113 S. Ct. 2349 (1993).

Herrera also had a pistol in his truck. An informant had previously told police that the residents of the house had a gun. The only gun found at the scene was found in Herrera's truck. "Weapons and violence are frequently associated with drug transactions, of course." United States v. Coleman, 969 F.2d 126, 132 n.20 (5th Cir. 1992).

Herrera gave an unlikely story of how the gun came to be under the seat of his truck and produced no evidence to corroborate that story. "This court has recognized that an `implausible account of the events provides persuasive circumstantial evidence of the defendant's consciousness of guilt.'" United States v. Rodriguez, 993 F.2d 1170, 1176 (5th Cir. 1993) (quoting United States v. Diaz-Carreon, 915 F.2d 951, 955 (5th Cir. 1990)).

An officer testified that his understanding from another

defendant was that Herrera was helping to pack the marihuana. There also was testimony that Herrera appeared to have been smoking marihuana and that a co-defendant said that Herrera was involved in the packaging operations. This testimony, when combined with rational inferences that can be drawn from the informant's tip about the gun, provides sufficient evidence to affirm the verdict.

AFFIRMED.