UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7779
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTURO MENDOZA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas (CR-B92-149-02)

August 25, 1993

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Arturo Mendoza appeals from his conviction for importation of, and possession with the intent to distribute more than, 50 kilograms of marijuana, challenging the denial of his motion to suppress. We **AFFIRM**.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

On the evening of May 26, 1992, United States Border Patrol agents discovered several bundles of marijuana in a field near the Rio Grande River in Texas. Mendoza and Ernesto Morales were apprehended when they approached the bundles. Between 9:00 and 10:00 p.m., Mendoza and Morales were taken into custody, advised (in Spanish) of their ***Miranda***[2] rights, and transported to the Border Patrol station in Harlingen, Texas. Mendoza indicated that he understood his rights. At the Border Patrol station, Mendoza was again advised of his rights, and signed a waiver of rights form (in Spanish).

About four hours later, between 1:00 and 2:00 a.m. on May 27, Harlingen police officer Silva (who was assigned to the Drug Enforcement Administration) transported Mendoza from the Border Patrol station to the Harlingen police station. En route, Silva questioned Mendoza about his involvement with the transportation of the marijuana. Mendoza told Silva that he transported the marijuana along with other individuals, but that he did not know to whom or where he was supposed to deliver it. Later that same day, Mendoza was transported to Brownsville for processing and was taken before a magistrate judge.

Mendoza and Morales were indicted for conspiracy to import into the United States in excess of 50 kilograms of marijuana, in violation of 21 U.S.C. §§ 963, 952(a), and 960(b)(3) (count one); importation of more than 50 kilograms of marijuana, in violation of

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[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

21 U.S.C. §§ 952(a) and 960(b)(3) (count two); conspiracy to possess with the intent to distribute more than 50 kilograms of marijuana, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(C) (count three); and possession with the intent to distribute more than 50 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), and 18 U.S.C. § 2 (count four).

On August 14, 1992, three days prior to trial, Mendoza filed a motion to suppress the statements he had made while in the custody of Officer Silva. He asserted that the statements were made before he was taken before a magistrate judge, and were not voluntary because (1) he was without the assistance of counsel; (2) he had not been advised prior to questioning of his right to the assistance of counsel; (3) he did not know the nature of the offense with which he was charged; and (4) he was not advised that he was not required to make any statements and that any such statements could be used against him. Pursuant to an agreement between the parties, the district court did not conduct a separate suppression hearing, but carried the motion until that point in the trial when the Government sought to introduce the statements. At the appropriate time, defense counsel objected on the ground that the statements were made "well after six hours from the initial apprehension." The district court overruled the objection, implicitly denying the motion to suppress.

The jury found Mendoza guilty on counts two and four, but acquitted him of the conspiracy charges (counts one and three).

The district court imposed, *inter alia*, concurrent terms of imprisonment of 41 months for each count.

II.

Mendoza contends that the district court erred in denying his motion to suppress, asserting that his statements were involuntary because of the delay between his arrest and appearance before the magistrate judge, and because he did not have the assistance of counsel.

"A confession is voluntary if, under the `totality of the circumstances,' the statement is the product of the accused's `free and rational choice.'" ***United States v. Doucette***, 979 F.2d 1042, 1045 (5th Cir. 1992) (citations omitted). In reviewing the ruling on a motion to suppress, we will not disturb the district court's credibility choices and findings of fact unless they are clearly erroneous. ***Id***. "The ultimate issue of voluntariness, however, is a legal question, subject to *de novo* review". ***Id***. The burden is on the Government to prove by a preponderance of the evidence that the defendant's statements were voluntary. ***United States v. Rojas-Martinez***, 968 F.2d 415, 417 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 828 (1992) and *cert. denied*, ___ U.S. ___, 113 S. Ct. 995 (1993).

In determining voluntariness, the trial judge is to consider all of the circumstances surrounding the giving of the confession, including the following factors:

> (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the

> offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness.

United States v. Perez-Bustamante, 963 F.2d 48, 51 (5th Cir.) (quoting 18 U.S.C. § 3501(b)) (emphasis omitted), *cert. denied*, ___ U.S. ___, 113 S. Ct. 663 (1992).

A.

Asserting that a minimum of 11-12 hours elapsed between his arrest and arraignment before the magistrate judge, Mendoza contends that this delay is one of the factors demonstrating that his statements were involuntary.[3]

"Once a defendant has been tried and convicted, delay in bringing him before a magistrate is not reason to set aside the conviction unless the defendant can show that he was prejudiced by the delay." ***Perez-Bustamante***, 963 F.2d at 52 (internal quotation and citation omitted). "[W]here there is no evidence to support a

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[3] Confessions made within six hours of arrest, but prior to arraignment, are not "inadmissible solely because of delay in bringing a person before a magistrate", if the district court finds the confession to have been voluntarily made and if the weight to be given to the confession is committed to the jury. 18 U.S.C. § 3501(c). An arrestee must be brought before the nearest available magistrate judge "without unnecessary delay". Fed. R. Crim. P. 5(a).

finding that the delay was for the purpose of obtaining a confession, there is no evidence that the delay had a coercive effect on the confession, there is no causal connection between the delay and the confession, and the confession was otherwise voluntarily given, ... the defendant has not shown prejudice by the delay." ***Id***. at 53 (internal quotation and citation omitted).

Silva transported Mendoza and Morales from the Border Patrol station to the Harlingen police department at approximately one or two o'clock in the morning. The statements in question were made during that journey. Between eight and nine o'clock in the morning, Silva took Mendoza to the DEA office at Brownsville for processing; later that day, Mendoza was taken before a magistrate judge.

There is no evidence that the delay in bringing Mendoza before a magistrate judge was unreasonable or that such delay caused him to confess. Accordingly, Mendoza was not prejudiced by the delay.

B.

Mendoza also asserts that he was not represented by counsel when he made the statements to Officer Silva. Therefore, he contends that his statements were not voluntary and violated his privilege not to incriminate himself and his right to counsel.

In an attempt to determine the destination of the shipment of marijuana, Officer Silva asked Mendoza if there was anyone else involved in transporting the marijuana. Mendoza answered that he did not know the destination, but that it had been shipped by "some kind of a jefe [chief] on the other side." On cross-examination,

Silva testified that, prior to questioning Mendoza, he asked him if his ***Miranda*** rights had been read to him and if he understood those rights. According to Silva, he continued the questioning, because Mendoza answered in the affirmative.

At trial, Mendoza testified that, when he was arrested, he was informed of his rights to remain silent and to have an attorney present, he understood those rights, and he signed a form waiving those rights. In his brief on appeal, Mendoza does not assert that he was not informed of his rights or that he invoked those rights. Accordingly, he has not shown that he was questioned in violation of his right to have counsel present or that his statements to the officer were involuntary.

III.

Considering the totality of the circumstances, we hold that the Government met its burden of proving that Mendoza's statements were voluntary. Accordingly, the district court did not err in denying the motion to suppress. The judgment is, therefore,

AFFIRMED.