

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8233
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SERGIO MANUEL ACOSTA-ALVARADO,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP 92 CR 51 4)

(December 2, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Following an adverse jury verdict, Sergio Acosta-Alvarado ("Acosta") challenges the sufficiency of the evidence regarding his conviction of possession with intent to distribute cocaine and conspiracy to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Finding the evidence sufficient, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

Acosta asserts that the evidence fails to establish, beyond a reasonable doubt, his requisite knowledge of the presence of the contraband to sustain his conviction on either count. On a sufficiency of the evidence claim, we examine the evidence in the light most favorable to the government, making all reasonable inferences and credibility choices in favor of the verdict. The evidence is sufficient if a reasonable trier of fact could have found that it 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).

To convict of possession of cocaine with intent to distribute, the government must prove that the defendant (1) knowingly (2) possessed cocaine (3) with intent to distribute it. United States v. Gallo, 927 F.2d 815, 821-22 (5th Cir. 1991). To establish guilt of a drug conspiracy, the government must prove beyond a reasonable doubt the existence of an agreement to possess with intent to distribute an illicit substance, the defendant's knowledge of the agreement, and his voluntary participation in it. United States v. Lewis, 902 F.2d 1176, 1180-81 (5th Cir. 1990).

The elements of conspiracy may be established by circumstantial evidence. Id. at 1181. Although mere presence at the scene, or association with those in control of illegal drugs, is insufficient alone, these facts are relevant factors that the jury may consider. United States v. Simmons, 918 F.2d 476, 484 (5th Cir.

1990). It is not necessary for the government to prove an express, explicit agreement; a tacit, mutual agreement will suffice. United States v. Prieto-Tejas, 779 F.2d 1098, 1103 (5th Cir. 1986). Further, a defendant is not required to know all the details of the conspiracy; the government sustains its burden by showing that he was aware of the unlawful agreement and somehow was associated with the plan. United States v. Fernandez-Roque, 703 F.2d 808, 814-15 (5th Cir. 1983).

On January 24, 1992, Carmen Rodriguez, a detective with the El Paso County Sheriff's Department, was working in an undercover capacity when she met with Mario Pelayo-Ortiz at Festival Motors in El Paso, Texas, to negotiate a purchase of ten kilograms of cocaine. Ortiz told Rodriguez that they would be dealing with a woman whose husband was out of town, and they agreed to consummate the deal at her residence. Rodriguez was to follow a Ford Mustang that was parked across the street and would be driven by the woman's son-in-law, Caesar Torres. All three drove in the two cars to the residence. Upon entering, they were greeted by Aida Gandara.

Gandara told Rodriguez that she would use a beeper to notify the man with the cocaine, and he would arrive with the contraband shortly thereafter. Gandara beeped her source several times. During one of these times, she entered the code "911," which meant to call back quickly. After waiting for a while, Rodriguez decided to leave, as she was afraid the battery in her voice monitor was

dying. She gave them a cellular telephone number through which they could reach her if the cocaine arrived.

Shortly thereafter, Ortiz called and stated that the cocaine was there. Upon arriving back at the residence, Rodriguez was shown a kilogram of cocaine in the kitchen area and was told that the additional nine kilograms were in the trunk of the Mustang. After inspecting the cocaine in the kitchen and being shown the nine kilograms in the trunk of the Mustang, Rodriguez called the arrest team; everyone was arrested.

While waiting for her source to bring the cocaine, Gandara had told Rodriguez that the source would arrive in a blue Grand Marquis. After Rodriguez had left the residence, Mario Garcia, one of the surveillance officers located at the residence, watched Acosta arrive in a blue Grand Marquis and enter the residence. Garcia then watched Torres leave the residence, take a package from the back seat of the Marquis and replace it in the trunk of the Mustang, and re-enter the house.

After a few minutes, Acosta left the house, got in the Marquis, and left. Marcos Valero, another member of the surveillance team, followed the Marquis to a car dealership. Upon arriving there, Acosta exited the vehicle and began using a cellular phone, whereupon Valero and several other officers arrested him.

Torres identified Acosta as the man who arrived with the cocaine, and he testified that after Rodriguez left, Acosta arrived, handed Torres the keys to the Marquis, and told him to

move the packages from the Marquis to the Mustang. Torres related that the packages in the Marquis were two plastic bags containing ten kilograms of cocaine. Torres placed the packages in the Mustang and kept one kilogram to take into the house to show to Rodriguez upon her return. Acosta then left.

Additionally, Ortiz testified that Gandara hid him in the washroom when her source arrived, so Ortiz did not see him. He did testify, however, that he could hear the conversation between Gandara and her source and recognized Acosta's voice as the one he had heard. Finally, officers retrieved a beeper from Acosta that had Gandara's telephone number entered on it a couple of times, one entry of which had the code "911" appended on the phone number.

Although he argues that there was no evidence that he knew his car contained contraband, a jury could find otherwise beyond a reasonable doubt. Acosta was identified as the source by Gandara; he responded to her beeper signals; he told Torres to transfer the "packages" from the Marquis to the Mustang. The evidence above shows that Acosta not only knew he was carrying cocaine but actively participated in selling it. There being sufficient evidence, the judgment of conviction is AFFIRMED.