UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8236
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CRUZ ESQUIVEL-PIZANO,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(EP-91-CR-171(H))

(March 23, 1993)

Before POLITZ, Chief Judge, JOLLY and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge:[*]

Cruz Esquivel-Pizano appeals convictions for importation and possession with intent to distribute marihuana, and two related counts of conspiracy. She assigns as error the district court's

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

refusal to suppress certain statements made before and after she was informed of her **Miranda** rights. Finding no reversible error, we affirm.

Background

In the morning hours of April 18, 1991, Esquivel-Pizano, accompanied by a male companion, George Shiber, and her four-year-old son, attempted to enter the United States at the Paso Del Norte bridge in El Paso, Texas. Shiber drove; Esquivel-Pizano was in the passenger seat. During an initial inspection, the customs agent became suspicious when he noticed that both Shiber and Esquivel-Pizano were residents of California but the car had Texas license plates. The agent instructed Shiber to proceed to a secondary inspection station which Shiber attempted to evade. After the car was forcibly stopped, a drug-sniffing dog alerted on its left rear panel. A closer search revealed 80 pounds of marihuana hidden there.

Esquivel-Pizano was taken to a small room without windows where a female customs agent searched her. During this pat-down, Esquivel-Pizano was asked "who owns the car?" She responded that she did not know and that she was in the car only because Shiber offered to drive her to Juarez so that she could visit her husband who was in the hospital there.

According to Esquivel-Pizano, customs officials then

interrogated her after advising of her rights under **Miranda**,[1] but without obtaining her signature on a waiver form. The agent conducting the examination testified that Esquivel-Pizano expressed a desire to speak despite her refusal to sign a written waiver.

During the course of the interrogation Esquivel-Pizano detailed this scenario. She met Shiber the evening before at a friend's house and, as she had mentioned during the pat-down, he offered to give her a ride into Juarez to visit her husband in the hospital. Her husband was injured while working in a body shop in Juarez. She then stated that she went to Juarez, visited her husband, and spent the night in a Juarez hotel. She could not recall either the name of the hotel or the hospital. She denied any knowledge of the marihuana.

After giving this statement, in reply to questions concerning her personal history she stated that her husband was living in Morelia, Michoacan, Mexico. When confronted with the apparent conflict with her earlier statement regarding her husband's local employment, injury, and convalescence, she admitted that the first story was fabricated. She then claimed that she and her husband had been separated and that she had not seen him for four years. She was again advised of her rights and re-interviewed. Again, she verbally waived her rights and proceeded to explain that she had been offered $500 by Samuel Gonzalez to accompany a man named "Johnny" from Los Angeles to Texas. She stated that Samuel and

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

Johnny picked her up at her apartment in Los Angeles and that the trio drove to El Paso and then directly to the Central Bus Station in Juarez.

Once in Juarez, Samuel called a man named "Efrain" who brought the marihuana-laden car. At this point, Esquivel-Pizano once again changed her story, claiming that Samuel had dropped her and Shiber off at a Juarez hotel from which they took a taxi to the bus station.

At trial, she moved without avail to suppress the several conflicting statements. She also moved unsuccessfully for acquittal before and after the jury returned a verdict of guilty on all counts. She was sentenced to 15 months imprisonment and three years of supervised release. She timely appealed.

Analysis

Esquivel-Pizano urges three bases for the suppression of her statements: (1) her initial statements to the customs agent were the product of custodial interrogation before the giving of the **Miranda** warnings; (2) the scenario given during the post-**Miranda** interrogation was inadmissible because she had not signed a waiver; and (3) the post-**Miranda** statements were the product of coercive pressure in violation of the fifth amendment. We consider each in turn.

1. The "pat-down" statements

These statements were given to the customs agent in response to a question about ownership of the automobile. They were

repeated in post-**Miranda** interrogation. The government appropriately concedes this questioning preceded the administration of the **Miranda** advisory. The government contends, however, that the warnings were not then required because Esquivel-Pizano was not yet in custody.[2] The trial court so found. While we accord such findings great deference,[3] we entertain serious reservations that she was not then in custody.[4] We pretermit that question, however,

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[2] **Illinois v. Perkins**, 496 U.S. 292 (1990). Of course, routine questioning at an international border is not custodial interrogation for the purposes of advising a traveler of her **Miranda** rights. **United States v. Mejia**, 720 F.2d 1378 (5th Cir. 1983). But, after that routine investigation yields probable cause that a crime has been committed and that a particular suspect has committed it, the situation ripens into one requiring such warnings before custodial interrogation of the suspect commences. **Id.**

[3] **United States v. Simmons**, 918 F.2d 476 (5th Cir. 1990).

[4] There is no bright-line rule for determining when a detention short of formal arrest constitutes "custody." The relevant inquiry is "how a reasonable man in the suspect's position would have understood his situation." **Berkemer v. McCarty**, 468 U.S. 420, 442 (1984). We focus on the reasonably perceived restrictions on freedom of movement and ask whether they are such that they ordinarily would be associated with formal arrest. **United States v. Bengivenga**, 845 F.2d 593 (5th Cir.) (*en banc*), cert. denied, 488 U.S. 924 (1988).

In **Bengivenga** we outlined a number of relevant factors in the context of routine citizenship checks. We stressed that such checks bear much in common with the roadside traffic stops considered in **Berkemer**; both are brief and, because they are public in nature, the atmosphere is not one completely dominated by the police. We since have noted that the defendant's awareness *vel non* that he is suspected of committing a crime is also probative. **United States v. Harrell**, 894 F.2d 120, 125 (5th Cir.), cert. denied, 111 S.Ct. 101 (1990). In the instant case, Esquivel-Pizano was aware that she was suspected of importing drugs, and perhaps attempting to evade detection, and had been removed to an isolated 8' x 8' windowless room where she and her belongings were searched prior to the interrogation. These are relevant, telling factors.

in light of the harmless nature of the claimed error.

Assuming *arguendo* that Agent Bernal-Wood's question to Esquivel-Pizano and Esquivel-Pizano's response were introduced at trial in violation of **Miranda**, the error does not warrant reversal if it was harmless beyond a reasonable doubt. Agent Bernal-Wood asked Esquivel-Pizano if she owend the car. Esquivel-Pizano's negative answer was not incriminating.[5] Her gratuitous statements that she had met Shiber only once before and that she had come to Mexico to visit her injured husband, even if fairly attributed to Agent Bernal-Wood's question, were cumulative when viewed in light of the answers she gave during later interrogation.[6]

2. Post-**Miranda** interrogation

After the initial pat-down Esquivel-Pizano received **Miranda** warnings and was asked a number of questions concerning how she had come to be in a car containing 80 pounds of marihuana. She contends that her refusal to sign a written waiver constituted a passive invocation of her right to remain silent and that she expressed a desire to consult with an attorney. The immigration agents present at this interrogation maintained that after being informed of her **Miranda** rights, Esquivel-Pizano agreed orally to

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[5] **Charles v. Smith**, 894 F.2d 718 (5th Cir.), cert. denied, 111 S.Ct. 384 (1990).

[6] We need not consider whether the later questioning was attributable to Agent Bernal-Wood's question. The "fruit of the poisonous tree" doctrine does not apply to information obtained after initial violations of **Miranda**. **Oregon v. Elstad**, 470 U.S. 298 (1985); **Harrell**, 894 F.2d at 125.

speak to them and never sought counsel. One agent also testified that Esquivel-Pizano appeared as though she had trouble reading. We find no clear error in the court's preference for the agent's story over Esquivel-Pizano's.[7] That credibility assessment will not be disturbed.

3. Post-arrest coercion and duress

Esquivel-Pizano's final point of error concerns the volitional nature of her statements. Specifically, she contends that while in custody, the government employed "psychological coercion" tactics: telling her that her child would be taken away for 10 years if she did not cooperate. She also points, not without considerable force, to a number of personal characteristics which made her peculiarly susceptible to strong-arm tactics. Customs agents countered by stating that they simply told Esquivel-Pizano that her child would be looked after by the state while she was held unless she immediately made other arrangements. While evidence of Esquivel-Pizano's timidity is abundant, the record lacks any credible indication of official coercion.[8] The district court

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[7] Obviously, no written waiver is required; it is merely very probative proof of the waiver. In the absence of a writing, the government must prove waiver by other means. We have frequently noted that an affirmative refusal to sign the waiver, while relevant, is not in itself conclusive of whether the accused has invoked **Miranda** rights. E.g., **United States v. McKinney**, 758 F.2d 1036 (5th Cir. 1985).

[8] **Colorado v. Connelly**, 479 U.S. 157 (1986) (holding that official coercion is a necessary prerequisite to a finding that a statement is not voluntary within the meaning of the due process clause).

concluded that Esquivel-Pizano's ability to spin stories throughout the period of her apprehension and detention demonstrated a will that had not been overborne. Viewing the circumstances in their totality,[9] we find no error in this conclusion.

AFFIRMED.

[9] **Haynes v. Washington**, 373 U.S. 503 (1963).