

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 92-8507  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ELIZANDRO BENEVIDES-CORRALES and  
JOSE ANTONIO GALINDO-VILLA,

Defendants-Appellants.

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Appeal from the United States District Court  
for the Western District of Texas  
P 92 CR 52 3

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July 2, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:<sup>1</sup>

Elizandro Benevides-Corrales (Benevides) was convicted following a bench trial of conspiracy to possess with intent to distribute marijuana, possession with intent to distribute marijuana, and two counts of transportation of illegal aliens. Jose Antonio Galindo-Villa (Galindo) was convicted following a bench trial of conspiracy to possess with intent to distribute

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<sup>1</sup>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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

marijuana, and possession with intent to distribute marijuana. Both Benevides and Galindo challenge the investigatory stop which culminated in their arrest. We find no error and affirm.

I.

Border Patrol Agent Wayne Wiemers testified that he received a telephone call from a confidential informant at 11:30 p.m. on April 14, 1992, advising him that illegal alien "backpackers" would be carrying marijuana over the border to the Alpine area. The informant told Wiemers that the backpackers would circumvent the Border Patrol checkpoint and would be picked up near the U.S. Highway 90-Highway 67 intersection by a brown sedan-type vehicle with Texas registration. Wiemers testified that this informant had previously provided him with reliable information.

Wiemers met with several other agents at the Alpine Border Patrol Office at about 12:15 a.m. and they split up into three surveillance teams. At about 4:00 a.m., Agents Wiemers and Rodriguez saw two Chevrolet-type cars traveling together on Highway 67 and heading south. Before that time, they had seen only four vehicles on Highway 67: three large trucks and a pickup truck. Wiemers radioed the description of the cars to agents Cauble and Garcia, who were parked at a roadside park at the intersection of Highways 90 and 67. Cauble verified that one of the cars turned east onto Highway 90 and the other car turned into the roadside park. The second car stayed at the park for a short period and then attempted to catch up with the first car. Agents Newberry and Durant saw the two cars traveling in tandem east on Highway 90.

About fifteen minutes later, Agents Newberry and Durant saw the two vehicles traveling together west on Highway 90. The vehicles then turned north on Highway 67 traveling at a high rate of speed and passed Wiemers's surveillance point.

About that same time, Agents Garcia and Cauble watched a Lincoln Continental stop near the roadside park on the southbound side at Highway 67. This aroused their suspicions because, earlier that night, Agent Wiemers had noticed a culvert in that area marked by a coke can with a rock sitting on it. At the suppression hearing, Wiemers testified that, based on his experience, such a marker commonly serves as an indicator of the pick-up point for aliens or narcotics. However, the Lincoln Continental merely stopped for five minutes and left, doing nothing further to arouse suspicion.

When the Lincoln Continental left, Agents Wiemers and Rodriguez went in pursuit of the two Chevrolet-type vehicles. But the agents stopped four miles later, after learning over the radio that a pickup had stopped at the culvert marked by the coke can with the rock on top. When the truck continued north on Highway 67, Agents Wiemers and Rodriguez stopped it and ascertained that it carried no marijuana or illegal aliens.

In the meantime, Agents Newberry and Durant looked for the place on Highway 90 where the two Chevrolet-type cars had turned around. Based on the approximate speed that the vehicles had been traveling and the fifteen-minute period that the vehicles had traveled east on Highway 90, Agents Newberry and Durant drove the

distance they believed the cars had traveled east on Highway 90, looking for a pick-up point. They stopped at a large culvert on the highway because they believed it was a suitable spot to harbor individuals. The agents discovered fresh tennis shoe tracks in the sand around the culvert, which indicated to them that a pick-up had occurred at that location.

The agents then instructed a dispatcher to radio the Department of Public Safety (DPS) and Border Parol agents in Fort Stockton to advise them to intercept the two vehicles at the Highway 67-Interstate 10 intersection. Wiemers testified that he believed the vehicles were heading toward Odessa and that the safest route to smuggle drugs would be Highway 1053. Wiemers received a radio communication from a DPS unit traveling south on Highway 67 that indicated to Wiemers that the two vehicles had already passed the Highway 67-Interstate 10 intersection. The agents agreed the vehicles were heading north on Highway 1053 or 1776.

After failing to intercept the vehicles on Highway 1776, Wiemers contacted Deputy Sheriff Grigry by radio and asked him to go to Highway 1053 and Interstate 20 to intercept the vehicles. Wiemers described the two vehicles that the agents were pursuing to Grigry and reported that the agents suspected that one of the vehicles contained illegal aliens and narcotics. He told Deputy Grigry what had transpired near Alpine, and that he believed the vehicles would arrive in 10 or 15 minutes.

Deputy Ben Grigry testified that he understood that the agents

were pursuing two mid-to-late 1980 Caprice Classic style model cars and that one of the vehicles would be medium to light brown in color and would be carrying illegal aliens and narcotics. The vehicles had horizontal tail lights similar to Wiemers' Border Patrol vehicle. Grigry was told that the cars would be traveling north on Highway 1053. Grigry arrived at the intersection of Interstate 20 and Highway 1053 within two minutes of the time frame Wiemers had given him. As he turned on Highway 1053 from Interstate 20, a medium-brown car similar to the Border Patrol vehicle passed him. Grigry radioed to see if any other units were in the area and was told that it could not be a Border Patrol vehicle. Grigry followed the vehicle as it exited Highway 1053 and proceeded eastward on Interstate 20. Agent Scott, who was traveling about a mile behind Grigry, directed Grigry to follow the vehicle. Grigry testified that the vehicle was traveling 72 to 73 miles per hour and that there was approximately eight inches of red cloth strap and a piece of black garbage bag hanging out of the closed trunk. Grigry testified that the condition of the trunk indicated that someone was in a hurry and closed the trunk without checking it. Grigry told Agent Scott that the individuals in the car appeared to be nervous and that the driver slowed down considerably after noticing Grigry.

Border Patrol Agent Scott caught up with Grigry and observed a large sedan with straps and a portion of a black plastic trash bag hanging out of the back of the closed trunk. Scott testified that, in his experience as a Border Patrol Agent, such the straps

were used on homemade backpacks to carry marijuana, and the black plastic bags were used to keep the marijuana dry. Scott also observed that the passenger in the rear seat was "squatted down or scrunched real low in the seat." Scott determined at that point that they had spotted the vehicle the agents were pursuing or another vehicle carrying illegal aliens. Scott admitted on cross-examination that he did not realize that the straps were part of a homemade backpack until the car was stopped. Scott testified that he asked Grigry to stop the vehicle because his vehicle did not have overhead lights.

Grigry turned on his lights and pulled the vehicle over to the side of the road in accord with Scott's instructions. Scott arrived at the scene as Grigry was exiting the car. The driver, Benevides, exited the car on request, and denied having a driver's license. Grigry observed that the passenger in the rear seat had some gray sweat clothes in his lap, that he wadded the clothes into a ball and put them on the car floor under the front seat. Grigry feared that the passenger was concealing a weapon and called Agent Scott over to the car for assistance. The passenger stepped out of the car on request, and, as he stepped out, the smell of marijuana overwhelmed the officer.

Agent Scott obtained the clothing under the seat and felt something hard wrapped inside the clothes that proved to be a brick of marijuana. The officers opened the front door to remove the other passenger, who was identified at trial as Jose Galindo. There was a plastic bag in front of Galindo containing another

brick of marijuana and a black garbage bag which had been cut-out, apparently to be used as a poncho. The smell of marijuana remained in the car after the passengers and two bricks of marijuana were removed. The driver of the vehicle consented to a search of the trunk but contended that he was unable to locate the key to the trunk. The officers ultimately opened the trunk with a crowbar and discovered four large containers packed with marijuana.

## II.

In reviewing a ruling on a motion to suppress this Court accepts the district court's findings of fact unless clearly erroneous, but reviews **de novo** the ultimate determination as to the constitutionality of the police action. **United States v. Diaz**, 977 F.2d 163, 164 (5th Cir. 1992).

"An investigatory stop is proper if based on reasonable suspicion that criminal activity is afoot." **United States v. Wangler**, 987 F.2d 228, 230 (5th Cir. 1993) (internal quotation and citation omitted). Reasonable suspicion must be supported by specific and articulable facts which, taken together with rational inferences from those facts, would reasonably warrant an intrusion. **United States v. Holloway**, 962 F.2d 451, 459 (5th Cir. 1992). "[T]here must be some minimal level of objective justification for the officer's actions, measured in light of the totality of the circumstances." **Wangler**, 987 F.2d at 230. (internal quotation and citation omitted). The suspicion need not be based on personal observation, but if based on other information, such information must have "indicia of reliability." **Id.** (citation omitted).

A tip from a reliable confidential informant which is sufficiently corroborated may furnish the basis for reasonable suspicion to make an investigatory stop. **Holloway**, 962 F.2d at 459-60. The evidence reflected that the confidential informant had proved himself to be reliable in the past. The informant's tip was corroborated by the fact that a brown sedan-type vehicle traveled east to the area of Highway 90-Highway 67 intersection and then returned within fifteen minutes. The agents found fresh tennis shoe tracks in a culvert along the road that the vehicle had traveled.

Agent Scott and Grigry agreed that the vehicle conformed with the description of the vehicle that was allegedly carrying the aliens. Moreover, the car arrived at the intersection of Interstate 20 and Highway 1053 within the time frame estimated by Agent Wiemers. Furthermore, even though the description of the car was somewhat general, Agent Scott and Detective Grigry learned facts that independently supplied reasonable suspicion for an investigatory stop. Agent Scott testified that he suspected the vehicle was being used for illegal activity because of the conduct of the car occupants and because the straps and garbage bags hanging out of the trunk were often employed by illegal aliens in transporting narcotics. Scott was certain once the vehicle stopped that the straps were part of a homemade backpack used in transporting drugs. "The existence of reasonable suspicion depends on the facts known to the agent at the time the stop is made, not



at the moment the agent decides to make the stop." **United States v. Boruff**, 909 F.2d 111, 117 (5th Cir. 1990), **cert. denied**, 111 S.Ct. 1620 (1991). The agent was in possession of sufficient facts to justify the investigatory stop.

Once the vehicle was lawfully stopped, the officers were justified in making a limited search to determine if any weapons were within the reach of the passengers. **Wangler**, 987 F.2d at 230. During this limited search, the officers obtained probable cause to search the vehicle without a warrant because they discovered two bricks of marijuana and the remaining marijuana smell in the car indicated the presence of further drugs in the vehicle. **United States v. Seals**, 987 F.2d 1102, 1107, n.9. Because the investigatory stop was reasonable and the search of the vehicle was made pursuant to probable cause, the district court did not err in denying the motion to suppress.

The district court made some factual findings based on evidence that was not presented at the hearing. The district court found that the confidential informant told agent Wiemers that a Chevrolet-type vehicle would be picking up the aliens. Wiemers testified that the informant did not tell him the make of the vehicle. The district court gave a detailed description of the roadways near the intersection of Highways 90 and 67 that was not contained in the record. The district court found that at the time that the lead vehicle pulled into the roadside park on Highway 90, the driver got out of the car and urinated. We find no such testimony in the record. The district court found that Grigry

arrived at the intersection of Highway 1053 and Interstate 20 at a specific time and noticed a vehicle carrying three males who appeared to be Mexican. The record does not reflect the specific time that Grigry arrived at the intersection, and Grigry did not testify that he observed that the occupants of the vehicle were Mexican at that time. The district court found that Officer Grigry ran a registration check on the vehicle's license plate and determined that the owner was Manuel Arzate prior to making the stop. The district court found Grigry advised Scott of the information prior to the stop. Grigry testified that he received the information over the radio after stopping the vehicle. The district court found that Scott testified that the vehicle had come from the Alpine area. Scott testified that he could not state as a fact that the car came from Alpine.

However, these erroneous findings are not central to the court's conclusion that the investigatory stop was based on a reasonable suspicion. These erroneous findings are harmless and the court's core findings are amply supported by the record evidence.

AFFIRMED.