

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8541

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANA MARIA ALVAREZ,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(EP 91 CR 378 H(2))

(July 9, 1993)

Before JOHNSON, JOLLY, and JONES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

In this case, we review a district court's refusal to suppress evidence a Border Patrol agent found in Ana Alvarez's luggage. Ana had released her luggage to an airline when, against her express refusal to grant the Border Patrol agent permission to search it, the agent removed the luggage from the conveyor belt, compressed it, and smelled marijuana. The agent arrested Ana and her husband, Angel Alvarez. Ana contends that the agent violated her Fourth

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Amendment rights when he seized her luggage from the conveyor belt because he had no probable cause and because she had denied him permission to conduct a search. After thorough consideration, we hold that the seizure was reasonable under the Fourth Amendment, notwithstanding her refusal to grant permission to search, because Ana had released physical possession of the luggage to the airline and because the seizure was brief and non-intrusive of her contemporaneous possessory interests. We, therefore, affirm the district court's ruling.

I

On November 7, 1991, Border Patrol agents Frank Banuelos and Carlos Lopez were working at the El Paso International Airport attempting to interdict narcotics. They observed Ana Maria Alvarez and her husband, Angel Alvarez, approach the Delta ticket counter. Angel appeared nervous, and he kept looking over his shoulder at the agents. The couple purchased their tickets, and checked two pieces of luggage. As they walked away, Angel tried to hide his face from the agent's view. The agents became suspicious. Agent Banuelos thought that Angel resembled a man suspected of carrying cocaine in the El Paso Area.

While Ana was in the restroom, the agents approached Angel and asked him about his citizenship. Angel said that he was a Mexican citizen, but that he was a lawfully admitted resident alien. When asked to show his green card, Angel said that he had left it at home.

At this point, Ana came out of the restroom. The agents asked her about her citizenship. She said that she was a United States citizen, and handed the agents a Texas I.D. card and a birth certificate. While Ana was getting out her identification, the agents noticed that she had several other birth certificates, which they asked to inspect. Ana gave the birth certificates to the agents and explained that they belonged to her children. Suspicious that Ana was an alien smuggler, Agent Lopez asked her if she would consent to a search of her luggage for immigration documents. Ana became nervous and denied the agents permission.

Apparently, the agents' suspicions grew. While Agent Banuelos continued talking to Ana, Agent Lopez went behind the Delta ticket counter looking for her luggage. Lopez quickly found the luggage, removed it from the conveyor belt, felt the outside of the luggage, and compressed it. Lopez felt a rectangular object and detected the odor of marijuana. The agents then arrested Ana and Angel Alvarez for possession of marijuana and read them their rights. Ana later consented to a search of the luggage in which the agents found marijuana.

II

In December of 1991, the government indicted Ana and Angel Alvarez for 1) conspiracy to possess marijuana with intent to distribute, and 2) possession of marijuana with intent to distribute. Ana moved to suppress the marijuana, but the district court denied her motion. Ana then pleaded guilty to count one,

conditioned on this appeal. The district court sentenced Ana to twenty-one months of imprisonment, three years of supervised release, and a special assessment of \$50. Ana now brings this appeal.

III

Ana Alvarez contends that Agent Lopez violated her Fourth Amendment rights to be free of "unreasonable searches and seizures" when he removed her luggage from the conveyor belt and compressed it.¹ On appeal, we must accept the district court's factual findings unless they are clearly erroneous. United States v. Muniz-Melchor, 894 F.2d 1430, 1433-1434 (5th Cir. 1990). The district court's legal conclusions, however, are subject to de novo review. United States v. Harrison, 918 F.2d 469, 473 (5th Cir. 1990); United States v. Basey, 816 F.2d 980, 988 (5th Cir. 1987).

The case before us is very similar to several of our prior decisions. For example, in United States v. Lovell, 849 F.2d 910 (5th Cir. 1988), a Border Patrol agent observed a nervous traveler checking his luggage. After the traveler walked away from the ticket counter, the Border Patrol agent went to the baggage area

¹Just to refresh our minds with first principles, the Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

looking for the traveler's luggage. The agent found the luggage, removed it from the conveyor belt, and squeezed it to force air out. The agent smelled marijuana, and the traveller was arrested. We found that the agent's actions did not amount to an unconstitutional search or seizure. See also United States v. Garcia, 849 F.2d 917 (5th Cir. 1988) (holding that moving and squeezing checked luggage did not violate the Fourth Amendment); United States v. Viera, 644 F.2d 509 (5th Cir. 1981) (holding that squeezing checked luggage to produce a scent did not violate the Fourth Amendment); United States v. Goldstein, 635 F.2d 356 (5th Cir. 1981) (holding that federal agents could remove checked luggage from a baggage cart and allow a narcotics detection dog to sniff the luggage for illegal drugs).

Ana contends that, despite these earlier cases, Lopez's actions amounted to an unconstitutional seizure of her luggage because she had denied him permission to conduct a search and thereby reasserted her possessory interest in the luggage.² Under

²It is clear that agent Lopez did not conduct an unconstitutional search of Ana's bags. In general, a warrantless search offends the Constitution if it violates a person's objectively reasonable expectations of privacy. California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1652 (1988). A traveler's reasonable expectations of privacy, however, do not extend to the airspace surrounding his luggage. See United States v. Goldstein, 635 F.2d 356 (5th Cir. 1981); United States v. Lovell, 849 F.2d 910 (5th Cir. 1988). Moreover, the Supreme Court has held that a canine sniff, by a well-trained narcotics detection dog, does "not constitute a `search' within the meaning of the Fourth Amendment." United States v. Place, 462 U.S. 696, 707, 103 S.Ct. 2637, 2645 (1983). The Court reasoned that sniffing a traveler's bags is inherently "less intrusive" than a typical

the Fourth Amendment, a "'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in the property." United States v. Jacobson, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656 (1984); see also Soldal v. Cook County, Ill., ___ U.S. ___, 113 S.Ct. 538, 543 (1992). Ordinarily, a seizure of personal property violates the Fourth Amendment unless the law enforcement officers have obtained a warrant based upon probable cause. See, e.g., Marron v. United States, 275 U.S. 192, 48 S.Ct. 74 (1927). The Supreme Court has found, however, that some limited seizures "are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity." Michigan v. Summers, 452 U.S. 692, 699, 101 S.Ct. 2587, 2592 (1981); see also Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968).

In United States v. Place, 462 U.S. 696, 707, 103 S.Ct. 2637, 2645 (1983), the Supreme Court examined the reasonableness of a warrantless seizure of a traveler's luggage. In that case, Raymond J. Place was leaving the airport when federal drug enforcement agents asked for permission to search his bags. He refused, and the federal agents took his luggage to allow a

search because the traveler's bags are not opened and the traveler's possessions are not exposed to public view. Because Agent Lopez's inspection of Ana's luggage was no more intrusive than in these other cases, we must conclude that Lopez did not unconstitutionally search Ana's bags.

narcotics dog to sniff it. Approximately ninety minutes later, the narcotics dog sniffed the luggage and indicated that it probably contained illegal drugs. The Supreme Court found that the federal agents involved unconstitutionally seized Place's luggage because they detained his luggage for ninety minutes, an unreasonably long period of time. Id. at 2645. The Court reasoned that the seizure could "effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return." Id. The Court further held that the federal agents exacerbated the constitutional violation by failing to inform Place where they were taking his luggage, how long they would detain the luggage, and how he could regain possession of the luggage. Id. at 2646.

The Supreme Court noted, however, that the government has a "substantial" interest in detecting drug traffickers. Id., at 2642. The Supreme Court then held that:

when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of Terry [392 U.S. 1, 88 S.Ct. 1868], and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigation is properly limited in scope. Id., at 2644.

The Supreme Court's decision in Place makes it clear that a federal agent can briefly detain a traveler's luggage if he has reasonable grounds to believe "that the luggage contains contraband or evidence or a crime," provided the investigation is limited in scope. Id., at 2642.

Comparing the detention of Ana's luggage to the detention of Place's luggage, we find that Agent Lopez did not unconstitutionally seize Ana's luggage.³ As a threshold matter, Ana and Angel Alvarez's behavior made the Border Patrol officers reasonably suspicious. Similarly, Agent Lopez limited the scope of his investigation; he did not open Ana's luggage or expose its contents. More importantly, the case before us differs from Place in two significant ways. First, Ana had released her luggage to the airline thereby diminishing her possessory interest in the luggage. See, e.g., Maryland v. Macon, 472 U.S. 463, 105 S.Ct. 2778 (1978). Second, Agent Lopez seized Ana's luggage for only a few minutes, a short period of time. Obviously, the shorter the seizure, the less it interferes with a traveler's possessory interests.⁴ An extremely brief seizure of luggage a traveler has

³Ana also argues that the Lopez's actions unconstitutionally penalized her for exercising her constitutional right to deny the Border Patrol agents permission to search her bags. See, e.g., Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) (prosecution cannot use a defendant's silence against him). Like Ana, Raymond Place refused to allow federal agents permission to search his bags. Nevertheless, the Supreme Court found that the federal agents could have conducted a limited examination of his luggage. Place, 103 S.Ct. at 2644. We, therefore, must reject Ana's argument that Lopez's actions penalized her for exercising her constitutional rights.

⁴As noted above, in Place the Supreme Court found that a long seizure of luggage from the traveler's custody could restrain the traveler and disrupt his journey. The Supreme Court then analogized the seizure of the luggage to a seizure of the person. This reasoning does not apply to the case before us. A short seizure of checked luggage does not prevent the traveler from continuing his journey. See, e.g., Lovell, 849 F.2d at 916.

released to an airline does not meaningfully interfere with the traveler's possessory interest in his bags. See also Lovell, 849 F.2d at 916. Finally, the fact that Ana denied the officer's request to search the luggage is not determinative. Although consent to search can obviate the need for probable cause, refusal to grant consent cannot override an officer's right to conduct an otherwise constitutional investigation. We, therefore, conclude that Agent Lopez did not violate Ana's Fourth Amendment rights when he removed her luggage from the conveyor belt, compressed it, and detected marijuana.

IV

For all of the foregoing reasons, the district court's ruling on Ana's motion to suppress and its judgment of conviction is

A F F I R M E D.