

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8564
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN POMPA GUERRA,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
EP 92 CR 228 1

(June 23, 1993)

Before JOLLY, BARKSDALE, and E. GARZA, Circuit Judges.

PER CURIAM:*

Juan Pompa Guerra (Pompa) was convicted of conspiring to possess (count one) and possessing cocaine with intent to distribute (count two). He was sentenced to two concurrent 90 month terms, two concurrent five year periods of supervised release, and ordered to pay a \$100 special assessment.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Testimony at Pompa's trial established the following facts. Officer Clifford Gongaware, an El Paso police officer, his partner, and two U.S. Border Patrol Agents were called to an airport metal detector checkpoint after a female passenger repeatedly set the detector off. The woman initially identified herself as Alheli Alvarado Carrera but was subsequently identified as Berta Alicia Reyes-Alvarado (Reyes). A hand-held detector used on Reyes also alerted. After searching Reyes by hand, a large lump was detected "running from side to side." The lump near her stomach was described as "elongated packages" wrapped in something that made a "crinkling noise" when touched. Reyes was said to be accompanied by a man who was later identified as Pompa.

As the two uniformed officers and two plain clothes detectives approached the couple seated near a boarding area, "they looked over in our direction, and it was almost like a pure panic . . . set into them." According to Gongaware, the man "right away . . . started rubber necking, looking, becoming nervous, shifting from side to side." Reyes "froze up on us." Pompa started to walk away from where they were sitting, as if he wanted to get away from her, but Reyes followed him. After the officers separated Pompa from Reyes, he continued acting extremely nervous, "kept going around in circles," and refused to answer questions about his name and travel plans. Gongaware's partner, Officer Roberto Jauregui, observed that Pompa looked at Reyes "in a very intimidating way" and "kept

staring at her and shaking his head." Later Pompa asked why he was being stopped and said he was not with the woman.

U.S. Border Patrol Agent Cary Hunt, a member of the Airport Narcotics Task Force, asked Reyes if she was carrying drugs or contraband. She indicated that she had packages of something, but did not know what was in them. Reyes started to lift up her shirt to show the officers that she was carrying two packages. One of the police officers handed Pompa's airplane ticket to Hunt and he noticed that it was in a different name from the one on his identification card. Pompa was also carrying a ticket in the name of Marta Jimenez. As Pompa and Reyes were being taken to the Task Force Narcotic's office at the airport, Hunt heard Pompa tell her, "Don't worry, they can't do anything to us." Hunt testified that after the couple were inside separate offices he had a difficult time keeping them apart because Pompa kept moving his chair to the doorway to look at Reyes. According to Hunt, Reyes was carrying packages taped to a T-shirt near her stomach. A DEA chemist testified that the packages contained cocaine. The cocaine weighed over 900 grams.

Reyes, Pompa's co-defendant, pleaded guilty and testified for the Government. According to Reyes, Pompa was known to her and members of her family. Pompa offered to take Reyes from El Paso to Chicago for free if she would perform an "errand" for him. Pompa first took Reyes to his apartment and retrieved the packages from the bath. At the apartment, a woman gave her a man's T-shirt to

wear and taped the packages to it. The woman told her the packages contained photographs, but in response to Reyes's questions stated that they contained marijuana. Before Reyes and Pompa left for the airport, Pompa checked to make sure the packages were secure. Based on information supplied by Reyes, the police visited Pompa's apartment. Police found a woman there fitting the description of the woman who taped the drugs to Reyes's shirt as well as plastic wrapping and tape consistent with the packages Reyes was carrying. The apartment was leased to Pompa and the woman. The police also located the car that a friend of Pompa's used to drive them to the bus station from which they took a taxi to the airport.

At the airport, while Reyes was setting off the metal detector, Pompa proceeded to the boarding area and "peek[ed] out from time to time" to observe her. When she joined him, Pompa wanted to know what questions she had been asked and appeared nervous. Reyes testified that Pompa instructed her that if the police stopped them, she was to tell them that the drugs were hers. Reyes told the officers at the airport that the packages belonged to Pompa. Reyes also testified that she told Pompa at the airport that she wanted to go home and that he refused to allow her to do so. She stated that he had threatened her and her family since their arrest. At the conclusion of the government's case, Pompa moved for a judgment of acquittal that was denied. Pompa appeals.

II

Pompa argues that the district court committed reversible error because there was insufficient evidence to convict him on either count.

To prove possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a), the government must show (1) knowing, (2) possession, (3) with intent to distribute. U.S. v. Munoz, 957 F.2d 171, 174 (5th Cir.), cert. denied, 113 S.Ct. 332 (1992). Pompa argues that there was insufficient evidence to prove that he knowingly and intentionally possessed the cocaine.

The testimony at trial and other evidence supports the conviction on the possession with intent to distribute count. Under § 841(a), "the government is not required to prove that a defendant knew the exact nature of a substance with which he was dealing; it is sufficient that he was aware that he possessed some controlled substance." U.S. v. Fragoso, 978 F.2d 896, 902 (5th Cir. 1992), cert. denied, 113 S.Ct. 1664 (1993) (citation omitted). The government must demonstrate either actual or constructive possession. U.S. v. Ivy, 973 F.2d 1184, 1188 (5th Cir. 1992), cert. denied, 123 L.Ed.2d 455 (1993). "Constructive possession" has been defined as ownership, dominion, or control over the contraband itself, or dominion or control over the premises in which the contraband is concealed." U.S. v. Smith, 930 F.2d 1081, 1085 (5th Cir. 1991). The government may prove that contraband is possessed knowingly with circumstantial evidence. U.S. v.

McKnight, 953 F.2d 898, 901 (5th Cir.), cert. denied, 112 S.Ct. 2975 (1992). Constructive possession need not be exclusive; it may be joint with others. Id. Evidence proving constructive possession must amount to more than mere physical proximity. Id.

The jury was entitled to credit the testimony of Reyes and the law enforcement officers. Reyes's testimony established that Pompa offered to take her to Chicago for free if she would transport drugs for him. After Reyes came to his apartment, Pompa retrieved the cocaine from the bathroom. Pompa checked to make sure that the packages were securely wrapped around Reyes's waist and told her to tell the police that the drugs were hers if they were stopped. The evidence thus clearly demonstrated that Pompa exercised constructive possession of the cocaine. A DEA special agent testified that the quantity of drugs carried by Reyes was consistent with distribution. Intent to distribute may be inferred from possession of a large amount of drugs. U.S. v. Prieto-Tejas, 779 F.2d 1098, 1101 (5th Cir. 1986). In this case there were over 900 grams of cocaine.

To prove a drug conspiracy under 21 U.S.C. § 846, the government must establish: (1) the existence of an agreement between two or more persons to possess with intent to distribute drugs in violation of the narcotics laws; (2) knowledge of that agreement by each of the conspirators; and (3) Pompa's voluntary intent to participate in the scheme. Martinez, 975 F.2d at 161; Ivy, 973 F.2d at 1188. According to Pompa, the government failed

to establish all three of these elements. We disagree. The evidence adduced at trial was more than adequate to convict Pompa of the conspiracy count. Reyes testified that she knew that the packages contained a controlled substance. Pompa and Reyes had at the very least a tacit agreement that she was to transport the drugs for him. The evidence established that Pompa knowingly, intentionally, and voluntarily engaged in the conspiracy. The large amount of drugs demonstrated the intent to distribute. There was sufficient evidence such that a reasonable jury could infer Pompa's guilt on both the conspiracy and possession counts, and his judgment of conviction is

A F F I R M E D.