UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8635
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GERARDO JIMENEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(P92-CR-62)

June 29, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Gerardo Jimenez appeals his conviction for possession with intent to distribute a quantity of marijuana. We **AFFIRM**.

I.

On June 11, 1992, Jimenez drove a van into the Desert Haven permanent immigration checkpoint, where he was stopped for routine questioning about his citizenship. The border patrol agent

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 Pursuant to that rule, the court has determined that this opinion should not be published.

testified that Jimenez claimed initially to be a United States citizen. The agent became suspicious, however, because Jimenez was shaking, appeared nervous, and was avoiding eye contact. The agent directed him to proceed to the secondary checkpoint. There, Jimenez was asked for identification and produced his resident alien card. He also indicated that he preferred to communicate in Spanish. The agent looked into the van and saw what appeared to be several spare tires in the rear. When asked, Jimenez responded that there was only one spare tire.[2] He explained that the van did not belong to him, that he had borrowed it from a friend and picked it up at an automobile dealership in El Paso (approximately 40 miles from the checkpoint) so that he could drive to Cornudas, Texas, to visit a girlfriend.

The agent called for assistance and directed that a dog inspect the van. After, the dog alerted at the rear of the van, Jimenez was taken inside the checkpoint station house.[3] The van was elevated and the dog inspected again, this time alerting more specifically to the gas tank area. The gas tank was removed and approximately 115 pounds of marijuana were discovered inside.

On July 9, 1992, Jimenez was indicted on one count of possession with intent to distribute marijuana. He waived his right to a jury trial and moved to suppress the marijuana and his

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[2] It is unclear from the agent's testimony whether this exchange took place at the initial or secondary checkpoint.

[3] Another border patrol agent testified that Jimenez was officially taken into custody at this point. His Miranda rights were read to him in Spanish.

statements, alleging that the search was illegal. An evidentiary hearing on the suppression motion was conducted as part of the bench trial, and the motion was denied. Jimenez was convicted and sentenced, *inter alia*, to 36 months in prison.

II.

Jimenez challenges both the admission of the evidence he sought to suppress and the sufficiency of the evidence to support his conviction.

A.

Jimenez asserts that the search of the van at the immigration checkpoint was illegal and, therefore, the marijuana discovered in that search should not have been admitted against him at trial. We review the district court's findings of fact for clear error, but consider *de novo* the ultimate conclusion of whether the Fourth Amendment was violated. ***United States v. Martinez-Perez***, 941 F.2d 295, 297 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1295 (1992).

Jimenez concedes that his initial stop and referral to a secondary checkpoint were proper. He contends, however, that the search of the gas tank exceeded its permissible scope, asserting that absent a warrant, consent or probable cause, any search at the secondary inspection area must be limited to the large compartments of the vehicle which might conceivably hide an illegal alien. Even assuming that Jimenez's statement of the law is correct, the search of the van was well within the legal limits.

This court has squarely held that a "dog sniff", whether at a primary or secondary checkpoint, is not a "search" within the

meaning of the Fourth Amendment, and that a "dog alert" is sufficient to create probable cause. ***United States v. Dovali-Avila***, 895 F.2d 206, 207 (5th Cir. 1990). Here, no search occurred until after the dog first alerted. That alert created probable cause, which even Jimenez concedes justified a further search of the vehicle. The search which unveiled the hidden marijuana was legal; the evidence, properly admitted.

B.

Jimenez asserts next that the evidence was insufficient to establish his guilt beyond a reasonable doubt. We disagree.[4]

We review a finding of guilt in a bench trial under the substantial evidence standard, and affirm if the evidence, viewed in the light most favorable to the Government, "is sufficient to justify the trial judge, as trier of the facts, in concluding beyond a reasonable doubt that the defendant was guilty". ***United States v. Puente***, 982 F.2d 156, 159 (5th Cir.), *cert. denied*, ___ U.S. ___, 61 U.S.L.W. 3790 (1993).[5] Here, the Government was

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[4] We might well have declined to consider this issue, because Jimenez presents only a policy argument against canine searches in general and a summary of his own trial testimony, with no citations to the record or any legal authority. *See* ***Zeno v. Great Atlantic and Pacific Tea Co.***, 803 F.2d 178, 180-81 (5th Cir. 1986). Because the record so clearly supports the conviction, we consider the issue.

[5] The government contends that our review is limited to whether there was a manifest miscarriage of justice, because Jimenez failed to renew his motion for judgment of acquittal at the close of all the evidence. In a bench trial, however, such a motion is not required. We have held that, in such cases, the defendant's "plea of not guilty serves as a motion for acquittal, [and] therefore, error is preserved". ***United States v. Rosas-Fuentes***, 970 F.2d 1379, 1381 (5th Cir. 1992).

required to establish that Jimenez knowingly possessed the marijuana[6] with the intent to distribute it. *See* ***United States v. Rosas-Fuentes***, 970 F.2d 1379, 1382 (5th Cir. 1992).

When the contraband is found in a hidden compartment, control of the vehicle alone is not enough to establish possession. Knowing possession, however, "can be inferred from the defendant's control over the vehicle in which the illicit substance is contained if there exists other circumstantial evidence that is suspicious in nature or demonstrates guilty knowledge". ***United States v. Anchondo-Sandoval***, 910 F.2d 1234, 1236 (5th Cir. 1990). It is clear that Jimenez had complete control over the vehicle when it was stopped. He was its sole occupant. Moreover, the Government submitted additional evidence which casts suspicion upon Jimenez. The border patrol agent testified, as noted, that Jimenez "was very nervous, shaking, and avoiding eye contact". Although Jimenez denied it at trial, the border patrol agent also testified that he claimed to be a United States citizen, a fact later disproved when he offered his identification as a resident alien. Finally, Jimenez said that he had borrowed the van from a friend (whom he hardly knew, and about whom he did not attempt to offer evidence at trial) so that he could visit his girlfriend in Cornudas. But, when asked, he was unable to recall her last name. This "`less-than-credible explanation' for [his] actions" is the type of circumstantial evidence from which possession and knowledge

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[6] The parties stipulated that the substance found in the van was tested and positively identified as marijuana.

can be inferred. ***United States v. Diaz-Carreon***, 915 F.2d 951, 955 (5th Cir. 1990).

Intent to distribute can also be inferred. At trial, the Government offered the testimony of a DEA agent who said that 115 pounds of marijuana is "an amount that's used for distribution". We have held that possession of such large amounts of a controlled substance is enough from which to infer the intent to distribute it. *See* ***United States v. Gonzalez-Lira***, 936 F.2d 184, 192 (5th Cir. 1991).

In sum, there was sufficient evidence in support of both elements of possession with intent to distribute marijuana.

III.

Accordingly, the judgment is

AFFIRMED.