IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-9116
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DOLORES PERU,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
5:92 CR 107

August 17, 1993

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Drug Enforcement Agency ("DEA") agents arrested Dolores Peru at the Lubbock, Texas, airport after they discovered over five kilograms of cocaine in her suitcase. Shortly after her arrest, Peru signed a statement admitting guilt. After the district court denied her motion to suppress the cocaine and the confession, Peru

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 Pursuant to that rule, the court has determined that this opinion should not be published.

pleaded guilty of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(ii), on the condition that she could appeal the denial of the motion to suppress. Finding no error, we affirm.

I.

The following evidence from the suppression hearing is relevant to Peru's appeal. Peru attracted the suspicions of a Border Patrol agent when she arrived at the El Paso airport. She had with her an old maroon suitcase and a new, larger, hard-sided, gray Sampsonite suitcase that is a type commonly used by drug couriers. Peru filled out luggage tags, placed one on each suitcase, and checked the bags.

Agent Grandy and his partner determined that the tag on the maroon suitcase was marked with the name "Delores Peru," while the gray one bore the name "Lolita Gomez." The maroon bag was unlocked, but the gray bag was locked. The agents did not think the gray bag contained clothing, because they could hear a "thud or thump at the bottom" when they shook the bag. They were under the impression that the gray bag contained drugs, but they could not locate a trained narcotics detection dog to sniff the suitcase.

The El Paso agents observed Peru while she waited to board a flight to Lubbock. Peru appeared to be extremely nervous. After she boarded the plane and they saw her luggage loaded on board, the agents checked the tickets, learned Peru's name, and informed the

Lubbock airport police of their suspicions.

In Lubbock, DEA Special Agent Oetjen intercepted Peru's suitcases and determined that the gray suitcase contained something hard and that it smelled like baby powder, a common masking agent for narcotics. The suitcases were placed on the baggage carousel with the rest of the luggage from the flight.

After Peru had retrieved both bags and started to leave the baggage claim area, Oetjen approached Peru and asked her to accompany him to a nearby office. Oetjen testified that he did not touch Peru or take her identification or her plane ticket and that Peru indicated she was willing to talk to him and that she carried the suitcases into the office.

There, Peru allowed Oetjen to examine her ticket. He asked whether both suitcases belonged to her; she responded that the red one was hers but the other belonged to someone else. When Oetjen asked who owned the gray bag, Peru became visibly upset and shrugged her shoulders to indicate she did not know. Oetjen informed Peru that he believed he had probable cause to seize the gray suitcase if she did not claim it.

Oetjen gave Peru the Miranda warnings and asked her whether she was willing to answer questions, and she agreed. After they had discussed the possibility that Peru would cooperate with the government, Oetjen asked whether she would be willing to open the suitcases. Peru asked whether she "had to," and Oetjen told her "no; but then you wouldn't be cooperating." Peru then "shook her head yes," removed keys from a make-up bag, and opened the gray

suitcase, which contained over five kilograms of cocaine wrapped in a quilt. Lieutenant Calhoon and Officer Hudson confirmed Oetjen's testimony that he did not coerce Peru in any way.

Peru testified that Oetjen had informed her that he was a DEA agent and that he knew she had drugs in the bag. She stated that he instructed her to accompany him to the office and that she felt she had no choice but to obey. According to Peru, she agreed to open the bag only after Oetjen informed her that he would obtain a search warrant if she did not open it. She also testified that she was not given Miranda warnings until after the cocaine was discovered; however, she agreed that she did receive the warnings before she signed a confession.

II.

The district court found that the law enforcement officers had a reasonable suspicion that Peru was a drug courier and that the gray suitcase contained drugs. The court further found that, based upon their suspicion, the officers had temporarily detained Peru for questioning. During the detention, Peru consented to a search of the gray bag. The court also determined that Peru's written statement, made at the DEA offices in Lubbock, was voluntary.

III.

Peru concedes that the officers would have been justified in temporarily detaining her for questioning. She argues, however, that the circumstances of her detention constituted an arrest

without probable cause, which invalidated her consent to the search and tainted her confession.

In reviewing a district court's denial of a motion to suppress, we review the district court's findings of fact for clear error, but the ultimate determination whether the search or seizure was reasonable under the Fourth Amendment is reviewed de novo. United States v. Seals, 987 F.2d 1102, 1106 (5th Cir. 1993), petition for cert. filed, No. 92-9137 (Jun. 18, 1993). The evidence is viewed most favorably to the party prevailing in the district court, unless such a view is inconsistent with the trial court's findings or is clearly erroneous considering the evidence as a whole. United States v. Shabazz, 993 F.2d 431, 434 (5th Cir. 1993).

We accept the trial court's credibility choices and factual findings based upon live testimony at a suppression hearing, unless the findings are clearly erroneous or influenced by an incorrect view of the law. United States v. Muniz-Melchor, 894 F.2d 1430, 1433-34 (5th Cir.), cert. denied, 495 U.S. 923 (1990) (citation omitted). Where, as in this case, a finding of consent was based upon oral testimony at a suppression hearing, the "clearly erroneous standard is particularly strong" because of the district court's "opportunity to observe the demeanor of the witnesses." United States v. Lopez, 911 F.2d 1006, 1010 (5th Cir. 1990) (quotation and citation omitted).

IV.

A.

There are three levels of police-citizen encounters. The Fourth Amendment does not apply to brief informational encounters where the police communicate with a citizen and there is no detention or coercion. The Fourth Amendment does apply as the intensity of the encounter escalates: Brief seizures must be supported by reasonable suspicion, and full-scale arrests must be supported by probable cause. United States v. Simmons, 918 F.2d 476, 479-80 (5th Cir. 1990); see Florida v. Royer, 460 U.S. 491, 497-99 (1983).

No bright-line rule distinguishes a seizure from an arrest. See United States v. Fernandez, 887 F.2d 564, 567 (5th Cir. 1989). Oetjen's request that Peru accompany him to the baggage claim office elevated the encounter toward the level of an arrest. See id.; see also United States v. Berry, 670 F.2d 583, 602 (5th Cir. 1982). Nevertheless, a person who has not been formally arrested "is deemed in custody if, but only if, a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." United States v. Corral-Franco, 848 F.2d 536, 540 (5th Cir. 1988) (internal quotation and citation omitted). A "reasonable person" is one who is "neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances." Id. (quotation and citation omitted).

The office where Oetjen interviewed Peru was within ten to twelve feet of the baggage carousel. Oetjen did not touch Peru or confiscate her identification or her plane ticket. Under these circumstances, we conclude that Peru was not under arrest, as a reasonable person in her position would not have perceived herself to be in custody. Corral-Franco, 848 F.2d 536, 540.

B.

The government has the burden of proving, by a preponderance of the evidence, that Peru voluntarily opened the suitcase. United States v. Kelley, 981 F.2d 1464, 1470 (5th Cir.), cert. denied, 113 S. Ct. 2427 (1993). Whether her consent was voluntary is a question of fact determined by the totality of the circumstances. Id.

We consider six factors to determine whether a consent was voluntary:

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

Id. (citation omitted). All six factors are relevant, but no one factor is dispositive. Id. Encouraging a defendant to tell the truth or indicating that his cooperation will be made known to the court does not render a subsequent confession involuntary. See United States v. Paden, 908 F.2d 1229, 1235 (5th Cir. 1990), cert. denied, 498 U.S. 1039 (1991); United States v. Ballard, 586 F.2d

1060, 1063 (5th Cir. 1978).

Based upon the testimony at the suppression hearing, the district court could have concluded that Peru voluntarily accompanied Oetjen to the baggage claim office, that no coercive tactics were used, that Peru indicated that she wanted to cooperate with the police, and that Oetjen gave Peru Miranda warnings and informed her that she did not have to open the suitcases. Therefore, we conclude that the district court's determination that Peru voluntarily consented to the search of her bag was not clearly erroneous. See Lopez, 911 F.2d at 1010.

C.

Peru's challenge to the admissibility of her confession is premised entirely on her claim that she was illegally detained and that she did not voluntarily open the suitcase. For the reasons discussed above, we conclude that the confession was properly admitted into evidence.

AFFIRMED.