

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1196
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SAUL SANCHEZ-BALTAZAR
and
MIGUEL FLORES-DELEON,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(6:93 CR 002)

October 1, 1993

Before SMITH, BARKSDALE, and DeMOSS, Circuit Judges.

PER CURIAM:*

Saul Sanchez-Baltazar ("Sanchez") and Miguel Flores-DeLeon ("Flores") appeal their convictions, following conditional pleas of guilty, of possession with intent to distribute fifty kilograms or more of a mixture and substance containing a detectable amount of

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 Pursuant to that rule, the court has determined that this opinion should not be published.

marihuana, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Finding no fourth amendment violation, we affirm.

I.

Sanchez and Flores argue that the district court erred in denying their motions to suppress because, they contend, the immigration stop was illegal. This court reviews Fourth Amendment determinations de novo. United States v. Seals, 987 F.2d 1102, 1106 (5th Cir. 1993), petition for cert. filed (U.S. Jun. 18, 1993) (No. 92-9137). The evidence must be viewed most favorably to the party prevailing in the district court unless such a view is inconsistent with the 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).

A Border Patrol agent conducting a roving patrol in a border area may make a temporary investigative stop of a vehicle if specific, articulable facts and the rational inferences drawn from those facts reasonably warrant suspicion that the vehicle contains illegal aliens. United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975). Factors to be considered include known characteristics of a particular area; the proximity of the area to the border; the usual traffic patterns on a particular road; the agent's previous experience with alien traffic; information about recent illegal border crossings in the area; characteristics of the vehicle stopped; and the behavior of the driver. Although any single factor taken alone may be insufficient, under a "totality of the

circumstances" analysis, the absence of a particular factor will not control a court's conclusions. United States v. Cardona, 955 F.2d 976, 980 (5th Cir. 1992), cert. denied, 113 S. Ct. 381 (1992). In addition, the officer "is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling." Brignoni-Ponce, 422 U.S. at 885.

On the evening of January 3, 1993, agents Alan Stewart, René Garcia, and Carl Hofacker were performing their Border Patrol duties approximately seventy miles south of San Angelo, Texas, and eighty-eight miles north of Del Rio, Texas, and the United States-Mexico border. The agents, riding in two separate vehicles, observed traffic as it came northward on "Highway 277," a state highway known for illegal-alien smuggling. Because Highway 277's immigration checkpoint was closed, no one leaving the Del Rio area was being checked on that particular evening.

Besides the moon, nothing lighted the road. As the car in question passed the agents, they turned on their vehicles' headlights and observed that the car, a Ford Mustang, contained two occupants and rode extremely low in the rear. The driver did not even glance at the headlights. Because of the way the car rode and the driver's failure to respond to the headlights shining on him, Stewart and Garcia decided to follow the Mustang. Hofacker also followed in his car.

Based upon the agents' experience, cars on Highway 277 that appear to be riding low or that are heavily loaded often carry illegal aliens. The Mustang, moreover, was large enough to contain

illegal aliens, and it did not look as though it had come from one of the ranches in the area. As the agents followed the Mustang, the occupants never seemed to acknowledge their close presence.

After following the Mustang about two miles, the agents activated their vehicles' emergency lights to conduct an immigration stop. The vehicle slowed but did not stop immediately. This delay led the agents to believe that the illegal aliens in the car were preparing to bail out, run, and elude capture.

Stewart articulated several specific facts supporting the agents' decision to make an immigration stop: The vehicle was riding extremely low to the ground; it was dark; the car was traveling northbound from the border area; the agents had received prior information that the Border Patrol checkpoint on that highway was closed; the car was not of the type usually driven by ranch hands and ranchers in the area; Highway 277 is commonly used by illegal-alien smugglers; and the defendants did not acknowledge headlights being shined directly at them. Viewing the evidence favorably to the government, we conclude that the district court's decision that the immigration stop was proper was not error.

III.

Flores argues that the search following the stop was unreasonable because (1) it resulted from the allegedly illegal immigration stop and (2) Stewart detected the smell of marihuana from Flores's car after reaching into the car to retrieve an identification card. As explained under the first issue, the immigration stop was not

improper. Under this issue, therefore, we merely need to determine whether the insertion of Stewart's hand into Flores's car amounted to an unreasonable search.

After the Mustang halted, Stewart exited his vehicle, approached the Mustang, identified himself as a Border Patrol agent, and explained that he was conducting an immigration stop. Neither the driver nor the passenger looked at Stewart as he spoke. After a query regarding his citizenship, the driver, Flores, identified himself as a resident alien. Stewart then asked to see Flores's resident-alien card. The passenger, Sanchez, identified himself as an American citizen. During this verbal exchange, both Flores and Sanchez acted nervous.

After Flores retrieved his resident-alien card from his wallet, he held it in his hand. Stewart reached inside to take hold of the card. As Stewart reached in, he noticed a strong odor of marihuana. Stewart then asked Flores whether he would open the trunk of the car. Flores acquiesced. Inside the trunk were numerous rectangular-shaped bundles wrapped in tape containing marihuana. The arrests followed.

"The Fourth Amendment bars only unreasonable searches and seizures." United States v. Pierre, 958 F.2d 1304, 1308 (5th Cir.) (en banc), cert. denied, 113 S. Ct. 280 (1992). As part of an immigration stop, Border Patrol agents may ask motorists about their citizenship and may require the production of documents. Agents have the right to question motorists in an effective way. Id. In this case, Stewart had the right to retrieve the identifi-

cation card that Flores held in his hand. As in Pierre, the agent's actions "were no more intrusive than necessary to accomplish his objective." Id. at 1310. This intrusion, therefore, did not amount to a search, as Flores had no expectation of privacy when he declined to hand the card to the agent. Once Stewart smelled marihuana, he had probable cause to search, with or without Flores's consent. See id. (agent was lawfully within car when he smelled burned marihuana).

The district court found, and Flores does not contest, that the subsequent search of the trunk was consented to by Flores. The search of the trunk, therefore, was not unreasonable. Accordingly, the evidence obtained as a result of the search was admissible.

IV.

The government argued that Sanchez had no standing to complain of the search of the car. The government, however, did not distinguish between the stop of the car and the subsequent search. The district court did not resolve the issue in its order. On appeal, the government again raises the issue of Sanchez's standing to complain of the search.

Sanchez has no standing to complain of the search of the car. See United States v. Elwood, 993 F.2d 1146, 1151 (5th Cir. 1993) (non-owning passenger of a vehicle has no standing to challenge the search of a vehicle). It is uncertain, however, whether he has standing to complain of the stop. This circuit has not held whether a passenger in a vehicle has standing to complain of an

allegedly illegal stop. In this case, the law enforcement officials had reasonable suspicion to make the stop, and the driver consented to the search. We need not address the standing issue.

AFFIRMED.