

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2192
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILSON VIDES CASTILLO and
HECTOR MARTIN ROCERO,

Defendants-Appellants.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CR-H-92-255-1
- - - - -
(January 6, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Wilson Castillo and Hector Rocero challenge their convictions on the basis of insufficiency of evidence. They moved for judgment of acquittal after the Government rested but failed to renew their motion at the close of all the evidence. This failure waived any objection to the earlier denial of their motion. United States v. Daniel, 957 F.2d 162, 164 (5th Cir. 1992); Fed. R. Crim. P. 29. Consequently, review is "limited to the determination of whether there was a manifest miscarriage of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

justice." United States v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988) (internal quotation omitted). Such a miscarriage exists only if the record is "devoid of evidence pointing to guilt" or "because the evidence on a key element of the offense was so tenuous that a conviction would be shocking." Id. (internal quotations omitted). In making this determination, the evidence must be considered in the light most favorable to the Government, giving the Government the benefit of all reasonable credibility choices and inferences. Id.

To prove the offense of conspiracy to possess with intent to distribute, the Government was required to prove beyond a reasonable doubt 1) the existence of an agreement between two or more persons to violate the narcotics laws and 2) the defendants' knowledge of, 3) intention to join, and 4) voluntary participation in the conspiracy. See United States v. Arzola-Amaya, 867 F.2d 1504, 1511 (5th Cir.) (citations omitted), cert. denied, 493 U.S. 933 (1989). "No element need be proved by direct evidence, but may be inferred from circumstantial evidence. An agreement may be inferred from 'concert of action.' Voluntary participation may be inferred from 'a collocation of circumstances.'" Id. (citations omitted).

To prove the offense of aiding and abetting, the Government was required to establish beyond a reasonable doubt that the defendants 1) became associated with, 2) participated in, and 3) in some way acted to further the criminal venture. See United States v. Singh, 922 F.2d 1169, 1173 (5th Cir.), cert. denied, 111 S.Ct. 2066 (1991). "Typically, the same evidence will

support both a conspiracy and an aiding and abetting conviction." Id.

To prove the substantive count of possession with intent to distribute cocaine, the Government was required to prove beyond a reasonable doubt the 1) knowing, 2) possession of cocaine, 3) with intent to distribute. See United States v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992), cert denied, 113 S.Ct. 1291 (1993). The necessary knowledge and intent can be proved by circumstantial knowledge. Id.

Though the defendants allege that the Government failed to prove that they voluntarily joined in a conspiracy to possess cocaine with intent to distribute, the jury was presented with sufficient evidence to convict. Lieutenant Driskell testified that he observed two unidentified men carry a large, heavy, cardboard box into the townhouse he was surveilling. Later, that evening, Lieutenant Driskell watched Castillo and Rocero emerge from the house carrying a box that looked like the one that had been brought inside earlier. They placed the box in the trunk of the Mitsubishi and drove off, accompanied by a female companion. When Officer Cane searched the trunk of the vehicle he found two cardboard boxes containing cocaine. The smaller box was open and in both boxes, wrapping used to cover the cocaine was visible. The larger box contained approximately 46 kilos of cocaine and the smaller box contained about eight kilos. A subsequent search of the townhouse uncovered cocaine wrappers which tested positive for cocaine residue and which were similar to the wrappers in the

boxes. Officer Garcia testified that both defendants admitted to living in the townhouse.

Castillo and Rocero, in denying any knowledge of the cocaine, told officer Garcia that an unknown female caller had offered them \$500 each to transport the boxes to a designated location. The jury could reasonably have disbelieved this explanation as inherently implausible. "[A] less than credible explanation is part of the overall circumstantial evidence from which knowledge may be inferred." Arzola-Amaya, 867 F.2d at 1512 (internal quotations omitted). Thus, based on the evidence as a whole, a reasonable jury could have inferred the knowing and intentional conspiratorial participation of Castillo and Rocero in these crimes. As the jury's verdict is supported by the evidence, there is no manifest miscarriage of justice.

AFFIRMED