

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2872
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

NORBERTO ALVAREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 93 130 1)

(August 5, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Challenging the sufficiency of the evidence, Norberto Alvarez appeals his conviction of possession of, and conspiracy with intent to distribute, cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846. Finding the evidence sufficient, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

Following a jury trial, Alvarez was convicted of possession with intent to distribute greater than five kilos of cocaine and conspiracy to commit the same. The district court sentenced him to 121 months' imprisonment as to each offense, to be served concurrently, followed by concurrent five-year terms of supervised release.

Alvarez contends that the government did not prove the issues of knowledge, agreement, and participation regarding the conspiracy charge. He also contends that because of the insufficient evidence regarding the conspiracy charge, there is insufficient evidence to support his conviction for the substantive possession offense.

On a sufficiency of the evidence claim, we examine the evidence in the light most favorable to the government, making all reasonable inferences and credibility choices in favor of the verdict. The evidence is sufficient if a reasonable trier of fact could have found guilt beyond a reasonable doubt. Every reasonable hypothesis of innocence need not have been excluded, nor need the evidence be entirely inconsistent with innocent conduct. United States v. Vasquez, 953 F.2d 176, 181 (5th Cir.), cert. denied, 112 S. Ct. 2288 (1992). "If the `evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged,' this court must reverse the conviction." United States v. Menesses, 962 F.2d 420, 426 (5th Cir. 1992) (quoting Clark v. Proconier, 755 F.2d 394, 396 (5th Cir. 1985) (further citations omitted)).

To convict a defendant of possession of cocaine with intent to distribute, the government must prove that he (1) knowingly (2) possessed cocaine (3) with intent to distribute it. See United States v. Gallo, 927 F.2d 815, 821-22 (5th Cir. 1991). To establish guilt of a drug conspiracy, the government must prove beyond a reasonable doubt the existence of an agreement to possess with intent to distribute an illicit substance, the defendant's knowledge of the agreement, and his voluntary participation in it. United States v. Lewis, 902 F.2d 1176, 1180-81 (5th Cir. 1990).

On March 24, 1993, Jose A. Hernandez, a U.S. customs agent in Laredo, Texas, was notified by Overnight Transportation (OT) that it had received a shipment of five metal barrels destined for Houston that the company employees suspected contained illegal drugs. After obtaining a search warrant, the barrels were opened. Brick-like bundles, later determined to be cocaine with a cumulative net weight of approximately 507 kilograms, were discovered inside. The shipment was to be delivered to a fictitious address to a Mr. George Worlen. The scheduled Houston arrival time was the following day at 3:00 p.m.

On March 25, 1993, customs agents flew the barrels to Houston. A tracking device and detector were installed on the barrels. Agents placed the Houston OT terminal under surveillance. At approximately 4:30 p.m., a Houston police officer assisting in the investigation observed three Hispanic males traveling in a U-Haul truck in the direction of OT. The occupants of the truck appeared nervous and looked as if they were scanning the area for something.

Law enforcement officers later determined that the driver of the U-Haul was Reyes Gutierrez and that he had rented the truck at around 3:00 p.m. that afternoon.

The U-Haul entered the OT terminal, and two of the men waited with the truck while the third man, later identified only as Garza, went inside. Garza presented OT employee Scott Hagenkord with what appeared to be a torn piece of a brown paper grocery sack containing handwritten numbers corresponding to the freight number for the cocaine shipment. Hagenkord informed him that the shipment had not yet arrived and that it would probably be there within an hour if he wanted to come back.

The U-Haul dropped off Garza at a local Popeye's restaurant. He was later joined there by several men. They stayed there for about 2 1/2 hours, and during that time one or more of them was on the telephone every five minutes. Law enforcement officials believed these people were involved in attempting to collect the cocaine, in addition to Alvarez.

Customs agents brought the barrels of cocaine to the OT terminal around 6:30 p.m. on March 25, 1993. On March 30, Alvarez arrived at the OT terminal with another Hispanic male. They entered the office area of the business together, and Alvarez's companion handed to OT employee Scott Sanderback a piece of paper with the freight bill number on the cocaine shipment written on it. Alvarez's companion signed the delivery receipt using the name George Worlen. Both men appeared to be in a hurry and, after the paperwork was signed, they went out the door very quickly.

Once outside, Alvarez's companion showed another OT employee, Steven Hannah, his receipt and asked where his freight was located. Hannah told him to drive their pickup truck around the side of the building and to leave it at the end of the ramp. While Hannah was loading the barrels into the truck, the men were asking the whereabouts of Hannah's superiors.

As Hannah loaded the cocaine, a car containing one of the surveillance officers pulled into the terminal. Alvarez's companion asked Hannah who the person in the car was. Hannah told him he was one of their salesmen. After the cocaine was loaded, the two men gave Hannah \$20 and left.

As the barrels of cocaine were being loaded, Houston police officer L.A. Trumps notified federal agents of the license number and the description of the vehicle and suspects. Trumps observed the barrels being loaded and noted that Alvarez and his companion were nervous and were thoroughly checking out the parking lot.

Customs special agent William Nulliwig followed the vehicle. Houston police officer Daniel Fern passed the vehicle and noticed that the occupants appeared very nervous and were constantly looking at all the vehicles in the street. Nulliwig saw the vehicle travel north and then suddenly turn onto another street. As he was reporting the name of the street onto which the pickup had turned, he saw that the pickup was stopped with its doors open, and the two suspects were fleeing.

Fern heard the suspects were fleeing on foot. He was a block south of their reported location when he saw two Hispanic males

running. He followed them into a backyard and saw that customs agent Gerald Garren was detaining Alvarez. Garren attempted to speak to Alvarez, but Alvarez indicated that he did not speak English.

Garren searched Alvarez and found a copy of the OT bill of lading for the barrels of cocaine and a handwritten map of the area where OT was located, along with a telephone number and something written in Spanish. It appeared as though the paper with the map on it had been torn from the other piece of paper with the freight bill number on it that Alvarez's companion had brought to OT. Garren also found in Alvarez's possession a birth certificate of Norberto Alvarez showing his birth in Chicago, Illinois, a social security card, and other supporting identification for Norberto Alvarez. Alvarez also possessed a Mexican passport issued to Jesus Carmaco on March 29, 1993.

Although Alvarez discounts the weight of the circumstantial evidence, the elements of conspiracy may be established by circumstantial evidence. Lewis, 902 F.2d at 1181. Although mere presence at the scene, or association with those in control of illegal drugs, is insufficient alone to support a conviction for conspiracy, these facts are relevant factors that the jury may consider. United States v. Simmons, 918 F.2d 476, 484 (5th Cir. 1990). It is not necessary for the government to prove an express, explicit agreement; a tacit, mutual agreement will suffice to prove a conspiracy. United States v. Prieto-Tejas, 779 F.2d 1098, 1103 (5th Cir. 1986). The government sustains its burden by showing

that the defendant was aware of the unlawful agreement and was somehow associated with the plan. United States v. Fernandez-Rogue, 703 F.2d 808, 814-15 (5th Cir. 1983). Associating with those in the conspiracy and being "in a climate of activity that reeks of something foul" are not enough to prove a conspiracy, however. United States v. Sacerio, 952 F.2d 860, 863 (5th Cir. 1992) (internal quotation omitted).

Possession may be actual or constructive, may be joint among several defendants, and may be proved by direct and circumstantial evidence. United States v. Vergara, 687 F.2d 57, 61 (5th Cir. 1982). Constructive possession is ownership, dominion, or control over the contraband itself, or dominion or control over the premises or vehicle in which the contraband was concealed. United States v. Posner, 868 F.2d 720, 722-23 (5th Cir. 1989). Constructive possession is the ability to reduce an object to actual possession. Id. at 723. Intent to distribute may be inferred from the possession of a large quantity of narcotics. United States v. Martinez-Mercado, 888 F.2d 1484, 1491 (5th Cir. 1989).

Nervousness constitutes persuasive evidence of guilty knowledge. United States v. Diaz-Carreon, 915 F.2d 951, 954 (5th Cir. 1990). However, "nervousness is a normal reaction to circumstances which one does not understand." Id. (internal quotation omitted). "In the absence of facts which suggest that the defendant's nervousness or anxiety derives from an underlying consciousness of criminal behavior, evidence of nervousness is insufficient to support a finding of guilty knowledge." Id.

When customs agent John Wooley interviewed Alvarez in Spanish, Alvarez identified himself as Norberto Alvarez and as a United States citizen. He said that his companion's name was Carcamo and that he had crossed the border the night before with Carcamo, and the two of them had driven to Houston in the pickup. He said that Carcamo had asked him to go to Houston to pick up Carcamo's wife and to help move her. Alvarez said that they did not have an address or telephone number for Carcamo's wife and that they had hung around an intersection waiting for his wife, hoping she would arrive. Alvarez did not know where the intersection was or how big Houston was.

Alvarez then told Wooley that after they did not find Carcamo's wife, Carcamo informed him that he had to pick up some barrels at a trucking company. Alvarez stated that after they picked up the barrels, Carcamo told him that the police were following, that there was dope in the barrels, and that he should run. Alvarez also stated that Carcamo had given him the documents that they had found in his possession and told Alvarez to hold them for him.

Alvarez later admitted to Wooley that he was a Mexican national and that he had used false identification to cross the border. At trial, Alvarez stated that his true name was Damian Martinez. He admitted taking Norberto Alvarez's identification without his permission. He also admitted lying to his mother about his destination on the evening of March 29, 1993, and telling her that he was going to Monterrey, Mexico. Alvarez denied telling the

interviewing officer that they had looked for Carcamo's wife before going to pick up the barrels. He stated that Carcamo decided to pick up the barrels for his brother first and then pick up his wife.

U.S. customs agent Nigel Brooks testified as an expert witness that the wholesale price of the cocaine was approximately \$14,500 per kilogram; there were 507 kilograms of cocaine in the barrels. Brooks also testified that in his experience, traffickers in multi-kilo quantities of cocaine did not allow outsiders without knowledge of the conspiracy access to the cocaine. The adverse consequences were far too great for the members of the conspiracy to allow in unknowing participants.

The circumstantial evidence above, including the large amount of cocaine, the documents that Alvarez possessed, his initial concealment of his true identity, and the expert testimony regarding the habits of large-scale drug traffickers were sufficient to demonstrate Alvarez's intent to distribute an illicit substance, his constructive possession of the cocaine, and his knowledge of an agreement and voluntary participation in it. To the extent that Alvarez denied his knowledge of the cocaine in the barrels and his participation in a conspiracy, the jury was free to reject that testimony as self-serving and find that he knowingly possessed cocaine with the intent to distribute it and participated in a conspiracy to commit the same. See United States v. O'Banion, 943 F.2d 1422, 1427 (5th Cir. 1991). Therefore, a reasonable trier

of fact could have found that the evidence established guilt beyond a reasonable doubt.

AFFIRMED.