UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2951
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAVIER GUERRERO, AMADOR ARZOLA,
and AMERICA CARLOS,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR-H-93-77-3-2)

(June 20, 1995)

Before POLITZ, Chief Judge, DAVIS and DeMoss, Circuit Judges.

POLITZ, Chief Judge:[*]

Javier Guerrero, Amador Arzola, and America Carlos appeal their convictions and sentences for conspiracy to possess with intent to distribute cocaine[1] and for aiding and abetting

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

[1]21 U.S.C. §§ 841(a)(1), (b)(1)(a), and 846.

possession of cocaine with intent to distribute.[2] We affirm.

Background

Customs officials in Laredo, Texas were informed that a local shipping company had received a suspicious crate, labeled "water pumps," which was en route to Houston. A narcotics detection dog alerted on the crate and a resulting search pursuant to a warrant revealed that the crate contained 938 pounds of cocaine.

Agents substituted sand for most of the drugs, inserted a combination tracking device/opening alarm, resealed the crate, and had it delivered to the carrier's Houston facility. Arzola and his accomplice, Fernando Medrano, took delivery of the crate and were followed to Carlos' home where they met Carlos, Guerrero, and Reymundo Hernandez. Under Carlos' direction they attempted to take the crate inside, triggering the opening alarm while doing so, and agents appeared and arrested them.

A search warrant was obtained and executed and a narcotics detection dog alerted on a bag in Carlos' bedroom containing over $1000 in cash. Agents also found four empty 55-gallon steel drums containing a residue of baking soda, known for its use in masking the odor of drugs. Arzola and Medrano were indicted on drug-related charges and, after Medrano entered into a plea agreement with the government, the instant superseding indictment was handed up.

The government gave *in limine* notice of its intent to offer evidence of other narcotics shipments: specifically, four barrels

[2]21 U.S.C. § 841(a)(1), (b)(1)(a), and 18 U.S.C. § 2.

labeled "grease," picked up on January 29, 1993 by Medrano and delivered to Guerrero at Carlos' home; two shipments labeled "water pumps" on February 11 and 15, 1993, containing 300 and 1000 pounds of narcotics; and a March 30, 1993 shipment consisting of five barrels labeled "grease" and containing cocaine. This evidence was admitted into evidence and the defendants were convicted on all charges.[3] Arzola was sentenced to jail for 188 months, Guerrero received a 292-month sentence, and Carlos was ordered imprisoned for 360 months. All appealed their convictions and sentences.

Analysis

Appellants first contend that the district court erred by admitting extrinsic evidence of other narcotics shipments, invoking Federal Rule of Evidence 404(b) and our *en banc* holding in **United States v. Beechum**.[4] Appellants misperceive the true import of this evidence. It was not proof of extrinsic acts subject to the strictures of Rule 404(b) but, rather, it was intrinsic evidence admissible to prove the charged conspiracy.

To pass the admissibility test, intrinsic evidence must be relevant and its probative value must exceed any attendant prejudice.[5] In the case at bar the contested evidence was patently relevant. The several other deliveries had sufficient similarity to each other and the delivery subject to the indictment to be

[3]Although indicted, Hernandez was a fugitive at time of trial.

[4]582 F.2d 898 (5th Cir. 1978) (*en banc*), cert. denied, 440 U.S. 920 (1979).

[5]Fed.R.Evid. 403.

considered part of the same scheme and attributable to all conspirators under controlling precedents.[6]

Appellants also challenge the sufficiency of the evidence. The record discloses no motion for judgment of acquittal asserting an evidentiary insufficiency at the close of the case in chief and at the close of the evidence; we therefore review under the manifest miscarriage of justice standard.[7] Such a miscarriage exists only if the record is devoid of evidence pointing to guilt or if the evidence on a key element is so tenuous that a conviction is viewed as shocking.[8] In making this evaluation we view all evidence in the light most favorable to the verdict, giving deference to the jury's credibility choices and upholding its perogative to choose among reasonable constructions of the evidence.[9]

To convict on a drug conspiracy charge the government must prove the existence of an agreement to violate federal drug laws, and that the defendant knew of, intended to join, and voluntarily participated in the scheme.[10] To convict for aiding and abetting the prosecution must show that the accused intended to aid the

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[6]**Pinkerton v. United States**, 328 U.S. 640 (1946).

[7]**United States v. Thomas**, 12 F.3d 1350 (5th Cir.), cert. denied, 114 S.Ct. 1861 (1994).

[8]**United States v. Vaquero**, 997 F.2d 78 (5th Cir.), cert. denied, 114 S.Ct. 614 (1993).

[9]**United States v. Pigrum**, 922 F.2d 249 (5th Cir.), cert. denied, 500 U.S. 936 (1991).

[10]**United States v. Gallo**, 927 F.2d 815 (5th Cir. 1991).

criminal activity and did something which contributed to its fruition.[11] The same evidence may be used to convict on both offenses and a defendant may be convicted of both even though his role be minor and his knowledge of details incomplete.

The evidence in the record, when examined in the light most favorable to the government, establishes the existence of a drug-trafficking conspiracy. There is evidence of multiple shipments with manifold similarities. The parties met and discussed the narcotics shipments. They were together for at least the January and February drug deliveries. They were present at or lived in the Houston stash house. We perceive no error in the inference that there was an agreement to convey the illegal drugs from Laredo to Houston for distribution. We find no merit in the claim of lack of knowledge by any defendant. The record, in short, abundantly supports the convictions of all defendants. Further, the complaints of error in the admission of evidence are not persuasive and are rejected.

We find no reversible error in any of the sentences imposed. We briefly note Guerrero's complaint about attributing an additional 400 kilos of cocaine to the quantity of drugs used in his sentencing guidelines calculation. The March 30 shipment contained over 400 kilos of cocaine. To this the court added 400 kilos as the amount estimated to have been shipped on January 29, basing the estimate on the similarity of size and number of barrels as used on March 30. Under U.S.S.G. § 2D1.1(a)(3), the offense

[11] **United States v. Sandoval**, 847 F.2d 179 (5th Cir. 1988).

level is determined by the quantity of drugs attributable to the defendant's conduct, including both drugs with which the defendant was directly involved, and drugs that can be attributed to a defendant in a conspiracy as part of his relevant conduct.[12] Factual findings in this are subject to review under the clearly erroneous standard,[13] and need only be supported by a preponderance of the relevant and sufficiently reliable evidence.[14]

The record reflects that Guerrero unloaded and guarded the January 29 shipment. It contains adequate evidence, by inference and otherwise, that he knew the contents of the barrels. We perceive no error in his sentence.

The convictions and sentences appealed are AFFIRMED.

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[12]**United States v. Puig-Infante**, 19 F.3d 929 (5th Cir. 1994).

[13]**United States v. Maseratti**, 1 F.3d 330 (5th Cir. 1993).

[14]**United States v. Alfaro**, 919 F.2d 962 (5th Cir. 1990).