

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3863

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANNY REYES,

Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Louisiana
(CR-93--32-B-1)

December 30, 1996

Before KING, JOLLY, and DENNIS, Circuit Judges.

PER CURIAM:*

I

In March 1993, two Louisiana police officers stopped a truck driven by Jose Castro for traffic violations. The appellant, Danny Reyes, was a passenger in the vehicle. The officers questioned Castro, who told them he was from Puerto Rico and was vacationing in the United States. Castro said that he was driving from Houston, Texas, to visit his family in Mississippi. He reported

*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

that he had borrowed the truck from a friend. The officer testified that Castro appeared to be extremely nervous during questioning.

The officer then spoke with Reyes. Upon request, Reyes produced a Puerto Rican driver's license. Reyes also reported that he was from Puerto Rico and was driving to meet Castro's family in Mississippi. He commented, however, that he believed the vehicle belonged to Castro. The officer's suspicion was aroused because of the conflicting stories about the ownership of the vehicle, and requested permission to search the vehicle. Castro consented to the search. Nearly fifteen pounds of cocaine and \$17,575.00 were found concealed in the car's rear bumper. Once the drugs were found, both defendants suddenly acted as though they could not speak English.

Castro and Reyes were arrested. Although it was eventually discovered that Reyes was a manual laborer from the Dominican Republic, he had \$1,204.00 in his possession when he was arrested. At trial, the government showed that the identification presented by both Castro and Reyes were fraudulent, and created by the same forger. Reyes was convicted of possession with intent to distribute five or more kilograms of cocaine, 21 U.S.C. § 841(a)(1), and aiding and abetting under 18 U.S.C. § 2. He

appeals, arguing that there was insufficient evidence to support these convictions.

II

Reyes was convicted of possession with intent to distribute cocaine, and aiding and abetting possession with intent to distribute. An aider an abetter is punishable as a principal. 18 U.S.C. § 2. Therefore, Reyes's conviction will be upheld if either his conviction as a principal or his conviction for aiding the offense withstands scrutiny. See, e.g., United States v. Freeze, 707 F.2d 132, 136 (1983). As will be explained, we conclude that Reyes was correctly convicted of aiding and abetting, and therefore his conviction is affirmed.

Possession with intent to distribute cocaine requires proof that each defendant 1) knowingly or intentionally possessed 2) with intent to distribute, 3) five or more kilograms of cocaine. 21 U.S.C. § 841(a)(1); see United States v. Rodriguez, 993 F.2d 1170, 1175 (5th Cir. 1993), cert. denied, Naples v. United States, 114 S.Ct. 1547 (1994). The second and third elements of this test are not in serious question. The large quantity of drugs involved here allows a juror to infer an intent to distribute. See United States v. Petrosa, 78 F.3d 179, 184 (5th Cir. 1996); United States v. Martinez-Marched, 888 F.2d 1484, 1491 (5th Cir. 1989); United States v. Jennings, 726 F.2d 189 (5th Cir. 1984); United States v. Freeze, 707 F.2d at 136. There is no dispute that the nearly fifteen pounds of white powder found in the car was cocaine,

satisfying the third element. There is a substantial question, however, whether Reyes had possession of the drugs. Fortunately, we need not resolve this question because we have no trouble concluding that the government produced sufficient evidence to support Reyes's conviction of aiding and abetting.

A conviction for aiding and abetting the possession of a controlled substance does not require that a defendant have possession of the substance. United States v. Salazar, 958 F.2d 1285, 1292 (5th Cir.), cert. denied, 506 U.S. 863 (1992); United States v. Williams, 985 F.2d 749, 753 (5th Cir.), cert. denied, 510 U.S. 850 (1993); United States v. PeÁa, 949 F.2d 751, 755 (5th Cir. 1991). Instead, aiding and abetting requires a defendant to (a) share the criminal intent of the principle and (b) commit an overt act in aid of the venture. U.S. v. Jaramillo, 42 F.3d 920 (5th Cir. 1995); see also, Williams, 985 F.2d at 753 (noting that the defendant must associate and participate in the venture in a way calculated to facilitate the venture's success); United States v. Salazar, 958 F.2d at 1292(same).¹

¹ Cases sometimes formulate this requirement as a three part test, requiring the defendant to have 1) associated with a criminal venture, 2) participated in the venture, and 3) sought by action to make the venture successful. Petrosa v. United States, 78 F.3d 179, 183 (5th Cir. 1996); United States v. Jaramillo, 42 F.3d at 923; Kitchens v. United States, 116 S.Ct. 486 (1995); see also, State v. Williams, 985 F.2d at 753. Under such a formulation, a defendant associates with the criminal activity when he shares the criminal intent of the principal. The second and third element are

In this case, the government established Reyes's criminal intent by showing that he knowingly or intentionally assisted Castro's possession of the cocaine. See United States v. Jobe, 77 F.3d 1461, 1475 (5th Cir. 1996)(noting "an abettor's criminal intent may be inferred from the attendant facts and circumstances and need not be established by direct evidence."). The evidence was sufficient to show that Reyes knew cocaine was secreted in the car. Reyes became extremely nervous when the car was pulled over. In addition, Reyes's story of who owned the car conflicted with Castro's. Both factors are sufficient, in this case, to allow a reasonable jury to conclude that Reyes knew the drugs were in the car when considered with evidence as a whole: two friends traveling a considerable distance in a car with a substantial amount of drugs and cash, each with similar false identification. See Diaz-Carreon, 915 F.2d at 954 (noting that circumstances such as nervousness, conflicting statements, and an implausible story can establish knowledge of concealed contraband); Rodriguez, 993 F.2d at 1175 (noting that a conflicting statement and an implausible account of events indicate a consciousness of guilt).

The evidence also suggests that Reyes was in the car to help in the transportation of the drugs. He possessed false driver's

satisfied when the defendant commits an overt action advancing the criminal venture. See Petrosa, 78 F.3d at 183. Therefore, in essence, the two tests are identical.

license--produced by the same forger who created the false identification held by Castro--indicating he was prepared to drive the drug-laden automobile. Despite being a manual laborer from a poor country, Reyes inexplicably had a large amount of cash on him when he was arrested. A reasonable deduction from these facts are that Reyes and Castro were involved in the same plan to transport drugs, and Reyes was paid for his participation. Moreover, there is evidence in the record that drug smugglers commonly travel in pairs. A single passenger is able to help protect the stash, while any larger group may attract unwanted attention. Therefore, there is substantial evidence that Reyes intended to aid Castro's possession and transportation of the drugs.

Having established that Reyes intended to aid Castro's possession and transportation of the cocaine, we must determine if the evidence supports an overt act by Reyes. It follows from what we have noted above, that under these circumstances, Reyes's traveling in the car was an overt act in furtherance of the crime. More specifically, however, Reyes actively worked to see the drugs successfully transported: First, he procured false driver's license to facilitate the illegal trip. Second, when stopped by the police, he lied about his identity, and the purpose of this trip. These acts were designed to further the illegal scheme, and either constitutes a specific overt act. Therefore, the evidence

was sufficient for a reasonable jury to have been convinced of Reyes's guilt as an aider and abetter. Under 18 U.S.C. § 2, an aider and abetter is treated as a principal. Therefore, Reyes's conviction is

A F F I R M E D.