IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4400
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REGINALD THADDEUS GILBERT-BEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(6:92-CR-24(2))

(December 3, 1993)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

A jury found Defendant-Appellant Reginald Thaddeus Gilbert-Bey guilty of conspiracy to possess with intent to distribute cocaine, possession with intent to distribute cocaine, and interstate travel

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to facilitate distribution of cocaine. On appeal Gilbert-Bey complains that the district court erred in failing to suppress evidence of cocaine found in the rental car he was driving; in failing to grant a mistrial; and in making an impermissible comment on the evidence in response to a question from the jury regarding the verdict form. Gilbert-Bey also claims that he received ineffective assistance from his trial counsel. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Panola County (Texas) Deputy Sheriff Paul Beatty testified that he and Panola County Detention Officer Brian Murph were on duty in and around Carthage, Texas, on the night of April 27-28, 1992. Beatty and Murph headed for a convenience store at about midnight to purchase soft drinks when they noticed a Lincoln Continental sedan on the road. Beatty could not see a license plate on the Lincoln. As the police neared the Lincoln, Beatty saw a paper license plate in the rear window of the car. He also noticed that the passenger in the Lincoln was not wearing a safety belt. According to Beatty, it is a violation of Texas law for an automobile passenger to ride without wearing a safety belt. Beatty decided to stop the Lincoln.

Gilbert-Bey, who was behind the wheel of the Lincoln, produced a Michigan driver's license. When Beatty explained Texas' safety-belt law to the occupants of the Lincoln, the passenger began to put on her safety belt. Failing to make eye contact with Beatty,

the passenger said something about going to visit her sister's house near Texarkana. Beatty asked where near Texarkana; the passenger said only "around Texarkana."

Gilbert-Bey told Beatty that the car was rented. Beatty asked to see the rental contract and also asked Gilbert-Bey to step out of the car and walk to the rear, and Gilbert-Bey complied. Beatty noticed that Gilbert-Bey was not listed on the rental contract, which struck Beatty as odd. The car was rented to a Norma Cisneros (Cisneros), and only Rosie Delapaz (Delapaz) was listed as an additional driver. When Beatty asked Gilbert-Bey where he and his passenger were traveling, he responded that they were traveling to the Texarkana area. He identified the passenger as his aunt, but did not give Beatty her name. Beatty then approached the passenger, intending to obtain her identity.

The passenger produced for Beatty a Michigan driver's license that identified her as Rosie Delapaz. She fumbled in her billfold and produced the license only after Beatty pointed it out to her. Delapaz still did not make eye contact with Beatty, who again asked her where around Texarkana she and Gilbert-Bey were traveling. She responded, "just around Texarkana," adding that she and Gilbert-Bey would be in Texarkana "until Friday." Delapaz told Beatty that Gilbert-Bey worked for her, but she did not identify Gilbert-Bey as her nephew.

Beatty returned to Gilbert-Bey who had remained at the rear of the Lincoln. Beatty was told by Gilbert-Bey that he worked at a firm named AdCom and that he needed to be back at work the

following Monday. Gilbert-Bey did not identify Delapaz as his employer. He explained to Beatty that Cisneros had rented the car because at the airport Delapaz had discovered that she had no credit cards. As he had seen two credit cards in Delapaz's billfold when he watched her search for her driver's license, Gilbert-Bey's explanation made Beatty suspicious.

When Beatty asked Gilbert-Bey if he had any luggage, he responded that he had a bag in the back seat of the car. Beatty then asked if Delapaz had any luggage, to which Gilbert-Bey responded in the negative. Beatty thought it odd that Delapaz would travel without clothing from Michigan to Houston to Texarkana for a four-day stay.

Beatty then asked Gilbert-Bey whether he and Delapaz were carrying any alcohol or weapons in the Lincoln, and Gilbert-Bey again responded in the negative. When Beatty inquired whether there was anything in the trunk, Gilbert-Bey responded that Delapaz had purchased some toys for her nieces and nephews.

According to Beatty, "[t]he hesitated responses in the questioning, the loss of eye contact, the actual totality of the stop made be believe that something was occurring that wasn't right." Beatty therefore asked for permission to search the Lincoln. Gilbert-Bey responded "sure," and walked to the driver's side of the car. Beatty then asked specifically whether he could look in the trunk. Gilbert-Bey again assented, sticking his head into the driver's window and telling Delapaz, "[h]e wants to look in the trunk." Delapaz opened the glove compartment and pushed the

trunk-release button.

Beatty and Gilbert-Bey returned to the rear of the Lincoln where Beatty looked in the trunk. He saw a box and some white plastic bags, which contained T-shirts and toys. He also saw two duffel bags in the front of the trunk, which bags appeared to be full. Gilbert-Bey explained the contents of the boxes and the white bags but not the contents of the duffel bags. In light of Gilbert-Bey's previous responses that his luggage was in the back seat and that Delapaz had no luggage, Beatty was curious about the contents of the duffel bags. Beatty asked Gilbert-Bey to whom the bags belonged, and without responding he raised his hands and stepped back about one foot. Beatty then reached for one of the duffel bags, and it felt heavy. As Beatty pulled the bag forward, he noticed a hard object inside. He unzipped the bag and discovered a brick-like package wrapped with yellow cellophane.

Beatty directed Gilbert-Bey to place his hands on the hood of Beatty's patrol car. Beatty and Murph then handcuffed Gilbert-Bey. Murph remained with Gilbert-Bey as Beatty went to place Delapaz under arrest. Beatty informed Gilbert-Bey and Delapaz of their Miranda rights, then returned to the duffel bags in which he found ten brick-like packages (when the packages were examined they weighed 2.2 pounds each and tested positive for cocaine hydrochloride). Even though Beatty wrote no traffic tickets, he had been carrying a ticket book when he got out of his police car.

Beatty testified that a note was left for him by Gilbert-Bey in the booking room of the Panola County Jail, indicating that

Gilbert-Bey wished to speak with Beatty. Shortly thereafter, Gilbert-Bey conversed with Beatty. Gilbert-Bey did not want Delapaz to know that he was conversing with the deputy; he wanted to help himself by providing information to the authorities. He told Beatty that he and Delapaz had met a Colombian in Houston, and that the twosome "fronted" $30,000 to the Colombian in exchange for ten kilograms of cocaine. Gilbert-Bey and Delapaz planned to make a profit of $4,000 per kilogram delivered.

Tyler (Texas) Police Officer Paul Black, who was assigned to the Drug Enforcement Task Force, testified that he too had conversed with Gilbert-Bey at the Panola County Jail. Black advised Gilbert-Bey of his Miranda rights, which Gilbert-Bey waived. He related that he and Delapaz had flown from Detroit to Houston, where they were supposed to meet with two Colombians, one named Rosando and another named Angel. The purpose of the trip was to purchase cocaine. Once in Texas, Gilbert-Bey and Delapaz obtained a rental car and checked into a motel. They held meetings with Rosando and Angel. Gilbert-Bey was informed that Rosando and Angel obtained cocaine and marijuana from a candle-store owner in McAllen, Texas. The Colombians represented that they possessed 200 kilograms of cocaine and 5,000 pounds of marijuana. Gilbert-Bey and Delapaz were to take a quantity of drugs to Michigan for distribution. According to Gilbert-Bey, Delapaz handled the negotiations for both of them. Gilbert-Bey's role was limited to the transportation and distribution of the drugs which he expected to sell in Michigan for $500,000. He and Delapaz were to retain

their share and return the rest of the proceeds to Houston.

Gilbert-Bey agreed to attempt a controlled sale to his Michigan contacts and a controlled delivery of funds to his Houston contacts. For reasons beyond Gilbert-Bey's control, however, the authorities were unable to arrange the proposed transactions.

Gilbert-Bey moved for acquittal after the government rested its case. The district court denied his motion. Gilbert-Bey renewed his motion for acquittal after the defense rested its case. The district court again denied his motion. Gilbert-Bey timely appealed.

II

ANALYSIS

A. Suppression of Evidence

Gilbert-Bey contends that the district court erroneously denied his pretrial motion to suppress the physical evidence taken from the Lincoln. He argues that he had standing to challenge the search of the Lincoln directly; that his detention and the search of the car were unreasonable; that his and Delapaz's consent to the search was involuntary; that the search exceeded the scope of consent; and that Delapaz's consent was the fruit of Beatty's illegal detention of Gilbert-Bey.

Beatty offered the same version of the facts at the suppression hearing that he later offered at trial. He was the only witness to testify at the suppression hearing. The district court denied Gilbert-Bey's motion. The court found that Gilbert-Bey lacked standing to challenge the search; that Delapaz

voluntarily consented to open the trunk; and that the search of the trunk and its contents was within the scope of Delapaz's consent.

Gilbert-Bey later moved to reopen the suppression hearing, contending that he had been unaware that standing would be at issue and that he wished to present evidence establishing his standing. The court reopened the hearing and heard testimony from Delapaz, Budget Rent-a-Car officer John Adams (Adams), and Gilbert-Bey. The district court denied Gilbert-Bey's motion, again finding that Gilbert-Bey lacked standing.

> In reviewing [a] district court's denial of [a] motion to suppress, this court must accept the district court's factual findings unless they are clearly erroneous or influenced by an incorrect view of law. The evidence is viewed in the light most favorable to the prevailing party, in this instance the government. Nevertheless, the ultimate question of the legality of the search or seizure of [the defendant's] car is a question of law alone and thus subject to de novo review.

United States v. Cooper, 949 F.2d 737, 744 (5th Cir. 1991) (footnotes omitted), cert. denied, 112 S.Ct. 2945 (1992).

We have twice discussed the standing of a defendant to challenge the search of a car that was rented to another person. In United States v. Kye Soo Lee, 898 F.2d 1034 (5th Cir. 1990), we held that two defendants had standing to challenge the search of a truck rented by another person but loaned to them by that person. Id. at 1037-38. The discussion in Kye Soo Lee does not indicate whether either defendant was contractually authorized to drive the truck. Id. at 1036-38. In United States v. Boruff, 909 F.2d 111 (5th Cir. 1990), cert. denied, 111 S.Ct. 1620 (1991), we held that

a defendant had no standing to challenge the search of a car rented by another person but loaned to the defendant. In Boruff, the rental agreement authorized only the renter to operate the car, and gave the renter no authority to give control of the car to the defendant. Additionally, the agreement prohibited using the car for illegal purposes, and the defendant was aware of the contractual restrictions when he obtained the car. Id. at 113-14, 117. We found that under such circumstances the defendant had no reasonable expectation of privacy in the car. Id. at 117.

The rental contract for the Lincoln listed Cisneros as the renter. Delapaz was listed as the only other authorized driver. Cisneros and Delapaz signed both the contract and a notice regarding additional drivers. That notice bound both to the terms of the contract and made them jointly and severally liable for damage to the car. The contract explicitly prohibited Cisneros and Delapaz from allowing an unauthorized driver to drive the car and prohibited them from using the car for illegal activity, expressly including drug trafficking. The contract allowed for employers or co-workers of the renter to drive the car if engaged in business with the renter. Adams testified about the contents of the agreement.

The district court made no findings about Gilbert-Bey's knowledge of the restrictions in the rental contract. The strongest evidence of Gilbert-Bey's knowledge was Delapaz's testimony at the suppression hearing that Gilbert-Bey had arranged the rental and was with her when the agreement was executed.

Gilbert-Bey denied having made the rental arrangements, however, and testified that he was passing the time in the airport mall while Cisneros and Delapaz completed the rental arrangements.

The record does not indicate that Gilbert-Bey actually knew about the restrictions in the rental contract that barred Cisneros and Delapaz from allowing him to drive the car. The record does show, however, that Gilbert-Bey knew that the car was rented. Boruff, on its facts, addresses only the reasonable expectation of privacy of a defendant who knows that he is not authorized to drive a car rented to another person. It is arguable that no individual reasonably could harbor an expectation of privacy in a car that he knows is rented and that he is not authorized to drive. Kye Soo Lee, however, indicates that such an individual may harbor a reasonable expectation of privacy in such a vehicle. The vehicle in Kye Soo Lee was a truck rented from a major rental fleet. Kye Soo Lee, 898 F.2d 1037-38.

We need not determine whether Gilbert-Bey had standing to challenge the search of the car. As the district court found that Gilbert-Bey lacked an expectation of privacy in the Lincoln, it made no finding regarding Gilbert-Bey's consent to search the trunk. The district court found, however, that by opening the trunk while being legally detained, DelapazSQwho clearly had authority under the contractSQvoluntarily consented to the search.

Police may rely on the voluntary consent of a person holding common authority over the place to be searched. Illinois v. Rodriguez, 497 U.S. 177, 181, 110 S.Ct. 2793, 111 L.Ed.2d 148

(1990).

> The voluntariness of [a] consent to . . . search is a question of fact determined by examining the totality of the circumstances. Six primary factors guide the district court in making this determination: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

United States v. Gonzalez-Basulto, 898 F.2d 1011, 1012-13 (5th Cir. 1990) (citations omitted). Being a question of fact, a finding of consent is reversible error only if clearly erroneous. Id. The district court's finding that Delapaz consented to the search is not clearly erroneous. Delapaz's custodial status was not voluntary. Beatty had pulled the Lincoln over for a traffic violation and could have written Delapaz a ticket; something he did not do.

The record reflects no coercive police procedures. First, Beatty did not detain Gilbert-Bey and Delapaz illegally. "`[W]here police officers are doing what they are legally authorized to do . . . the results of their investigations are not to be called into question on the basis of any subjective intent with which they acted.'" United States v. Gallo, 927 F.2d 815, 818 (5th Cir. 1991) (quoting United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc)). Texas requires car passengers to wear safety belts and imposes a fine of between $25 and $50 on violators. Tex. Rev. Civ. Stat. Ann. art 6701d. § 107C(b),(e) (West Supp.

1993). Beatty saw that Delapaz was not wearing her safety belt so he had a legitimate reason to stop the Lincoln.

A routine traffic stop may escalate into a situation in which a police officer develops a reasonable suspicion, based on articulable facts, that a crime is being committed. In such a situation, the police officer may detain the occupants and even search the vehicle, not withstanding that probable cause for a search may not exist. Kye Soo Lee, 898 F.2d at 1039-40.

> The two part test . . . to determine whether the less rigorous "reasonable suspicion" standard has been met, is as follows: First, the search and seizure must be justified by reasonable suspicion at the inception of the intrusion. Second, the search and seizure must be reasonably related in scope to the circumstances justifying the intrusion in the first instance.

Id. at 1039. Gilbert-Bey and Delapaz provided Beatty with facts from which he could have inferred that criminal activity was afoot.

Gilbert-Bey and Delapaz were from another state, traveling late at night in a large rental car. Beatty's initial questions about the occupants' identities, their destination, and the rental car were legitimate inquiries during a routine traffic stop. Delapaz and Gilbert-Bey gave vague and seemingly inconsistent answers to those questions. Beatty therefore was justified in asking Gilbert-Bey whether he and Delapaz had any luggage. Beatty further was justified in asking Gilbert-Bey about the contents of the trunk after Gilbert-Bey raised the police officer's suspicions

by stating that he had one bag but Delapaz had no luggage.[1]

Additionally, Beatty asked Gilbert-Bey for permission to look in the trunk. Gilbert-Bey agreed and told Delapaz that Beatty wished to look in the trunk. The record does not indicate that Beatty's request was coercive in nature.

Beatty evidently did not inform Gilbert-Bey and Delapaz that they could refuse his request to search the trunk. The record contains no evidence about Delapaz's education. The record does, however, indicate that Delapaz was sufficiently intelligent to respond appropriately to Betty's request. Delapaz operated a business at the time of the search, and understood Beatty's request for her driver's license.

Gilbert-Bey and Delapaz may have believed that Beatty would not find the cocaine. The contraband was contained in bags placed in the front of the trunk, behind bags and boxes of children's paraphernalia. Gonzalez-Basulto, 898 F.2d at 1013.

Finally, Beatty's search did not go beyond the scope of Delapaz's consent. A general consent to search includes "consent to search containers within that car which might bear drugs." Florida v. Jimeno, _____ U.S. _____, 111 S.Ct. 1801, 1804, 114 L.Ed.2d 297 (1991).

B. Mistrial

Gilbert-Bey contends that the district court erred by denying his motion for a mistrial following Agent Black's statement that

[1] Because the detention was legal, Gilbert-Bey's contention that Delapaz's consent was the fruit of his illegal detention is unavailing.

Gilbert-Bey was known as a drug distributor. His contention is unconvincing.

During cross-examination, defense counsel attempted to elicit testimony from Black that the terminology employed by Gilbert-Bey during a telephone call might not have referred to drugs. Black responded, "[n]o, sir, it is a documented fact that Mr. Walter Harris is a known distributor, as well as Mr. Gilbert-Bey." The district court immediately dismissed the jury. Gilbert-Bey moved for a mistrial. After a brief discussion, the court took the motion under advisement.

The next morning the court denied Gilbert-Bey's mistrial motion. After admonishing Black, the court asked if Gilbert-Bey would like a limiting instruction regarding the comment. Defense counsel accepted the court's offer. Shortly thereafter, the court expressed reservations about the effect of a limiting instruction: The court was concerned that such an instruction might reinforce the comment in the jurors' minds. After consulting with Gilbert-Bey, counsel told the court that a limiting instruction would be unnecessary because counsel would cross-examine Black about the comment.

Counsel then cross-examined Black in the presence of the jury. Black testified that Gilbert-Bey was a self-admitted drug distributor. Black conceded, however, that Gilbert-Bey had no criminal record involving drugs and that Black's testimony about Gilbert-Bey's distribution activities was based on the facts of the case then on trial. Black conceded that the statement that

Gilbert-Bey was a known distributor was false.

> A denial of a motion for mistrial will be reversed only if shown to be an abuse of discretion. To establish an abuse of discretion a defendant must show that the improper material viewed in the context of the whole trial was so prejudicial that it had a substantial impact on the verdict.

United States v. Merida, 765 F.2d 1205, 1220 (5th Cir. 1985) (internal citation omitted). The district court did not abuse its discretion by denying Gilbert-Bey's motion. Defense counsel cured Black's baseless and prejudicial remark through cross-examination. Counsel and the court agreed that under the circumstances a cautionary instruction was unnecessary.

C. Ineffective Assistance of Counsel

Gilbert-Bey next contends that his trial counsel was ineffective for continuing to cross-examine Black after the district court denied the mistrial motion. This contention is without merit.

To prevail on an ineffective-assistance-of-counsel claim, a petitioner must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prove deficient performance, the petitioner must show that counsel's actions "fell below an objective standard of reasonableness." Id. at 688. Defense counsel wished to cure the prejudice resulting from Black's remark. He chose to do so through cross-examination. Counsel's choice was not unreasonable.

D. Comment by the Court

Gilbert-Bey complains that the district court made an impermissible comment on the weight of the evidence in response to a request from the jury. During deliberations, the jury requested the court to instruct it again on the verdict form. In his response, the judge noted:

> For your information, the verdict form requests you to answer as to Count 1, the first paragraph finding the defendant "guilty," or if you find the defendant "not guilty," answer the second paragraph. Then, as to Count 2, you are required to do the same and as to Count 3, you are required to do the same.

The court's response simply does not constitute a comment on the weight of the evidence.

E. Sufficiency of the Evidence

Finally, Gilbert-Bey contends that he was convicted on insufficient evidence. His contention is unavailing.

A reviewing court will affirm a jury verdict if there is evidence sufficient to allow a reasonable jury to find a defendant guilty beyond a reasonable doubt. The reviewing court will view the evidence and all inferences from the evidence in the light most favorable to the verdict. United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd 462 U.S. 356 (1983).

To convict a defendant of conspiracy to possess drugs with intent to distribute, a jury must find beyond a reasonable doubt that an agreement that entails violation of federal narcotics laws exists, that the defendant has knowledge of the agreement, and that the defendant voluntarily participated in the agreement. There is

no overt-act requirement. United States v. Ayala, 887 F.2d 62, 67 (5th Cir. 1989). The jury may infer intent to distribute from proof of possession of a large quantity of drugs. United States v. Hernandez-Palacios, 838 F.2d 1346, 1349 (5th Cir. 1988). To convict a defendant of possession with intent to distribute, a jury must find beyond a reasonable doubt that the defendant knowingly possessed drugs and intended to distribute them. Id. at 1349. To convict a defendant of transportation with intent to commit a crime, the jury must find beyond a reasonable doubt that the defendant traveled in interstate commerce, intending to commit a crime, and then performed, or attempted to perform, an enumerated criminal act. Drug offenses are enumerated in the relevant statute. 18 U.S.C. § 1952.

Gilbert-Bey told Black that he and Delapaz had flown to Houston from Detroit, intending to traffic in cocaine. He outlined their activities in Houston with their suppliers. He also confessed his involvement to Beatty. Additionally, Beatty found over 20 pounds of cocaine in the trunk of the car that Gilbert-Bey was driving. The evidence is more than sufficient to sustain Gilbert-Bey's conviction.

Finding no reversible error, Gilbert-Bey's conviction is in all respects

AFFIRMED.