UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5364
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN J. HENAO,

Defendant-Appellant.

****

No. 93-5408
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL RAMIREZ,

Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of Texas
(1:92-CR-153-1 and 1:92-CR-153-2)

(May 12, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

---

[1] 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."

John Henao and Michael Ramirez, having entered conditional guilty pleas to conspiracy to possess with the intent to distribute cocaine, appeal the denial of their motions to suppress. Ramirez contends also that his plea agreement was breached. We **AFFIRM**.

I.

On November 12, 1992, Henao and Ramirez were traveling in a Toyota U-Haul truck on Interstate 10 in Beaumont, Texas, when they were pulled over by Beaumont Police Officers Froman and LaChance for speeding and following too closely (violations of Texas traffic laws). Officer LaChance walked to the back of the truck, motioned for Henao to get out of the truck, and asked Henao for his driver's license. He noticed that Henao was nervous, would not look at him, and "couldn't stay still". Officer Froman approached the passenger side of the truck, asked Ramirez to retrieve the truck's rental papers, and noticed that Ramirez's hands were "shaking rather badly". The officers questioned Henao and Ramirez individually about their travel plans to, and recent stay in, Houston. Henao and Ramirez gave conflicting answers. When Officer LaChance speculated that the truck must contain furniture if Henao was moving to Connecticut, Henao replied, "Yeah ... do you want to see"? LaChance replied that he would, Henao opened the back of the truck, and LaChance saw "a truck full of furniture, and at the same time [he] smelled a very strong odor of some type of solvent ... a strong glue-type smell".

Pursuant to that rule, the court has determined that this opinion should not be published.

LaChance asked Froman to run a license and warrant check on Henao. Based upon Henao's and Ramirez's conflicting answers to questions, their nervous behavior, and the odor coming from the back of the truck, the officers decided to seek consent to search the truck. Froman testified at the suppression hearing that after Henao had given him verbal permission to search the truck, he completed a consent to search form, read and explained it to Henao, and allowed Henao to read it. Froman also testified that the initial stop took place at 10:10 a.m., he presented the consent form to Henao at 10:15 a.m. and, as of 10:15 a.m., the officers had not received the results of the license/warrant check. After Henao signed the consent form, the officers asked him if "he would have a problem with [them] moving the vehicle from the highway to [the police] maintenance facility [approximately 1.2 miles away] ... so that [they] could remove a partial load of the furniture so that [they] could examine it". Henao gave oral permission, the truck was moved, and during the subsequent search approximately 150 kilograms of cocaine were discovered.

Henao and Ramirez were indicted for conspiracy and possession with the intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. They entered conditional plea agreements on the conspiracy count, reserving their rights to withdraw the pleas if their motions to suppress were granted.[2]

[2] Ramirez also pleaded guilty to a money laundering conspiracy charge from the Southern District of Florida, with the sentence to be imposed by the United States District Court for the Eastern District of Texas in conjunction with sentencing on the cocaine conspiracy charge.

After an evidentiary hearing, at which Froman, LaChance, Henao, and Ramirez testified, the district court held that the search and seizure were lawful and denied the motions to suppress. ***United States v. Henao***, 835 F. Supp. 926 (E.D. Tex. 1993). Henao was sentenced, *inter alia*, to 168 months imprisonment; Ramirez, 210 months.[3]

II.

Henao and Ramirez maintain that the district court erred in denying their motions to suppress because (1) the officers stopped them on the pretext of a traffic violation, but the real purpose was drug interdiction; (2) the detention was illegal because the officers questioned them about matters unrelated to the traffic violations; (3) Henao's consent to search the truck was not voluntary; and (4) the search exceeded the scope of the consent given. Ramirez also contends that the Government breached the plea agreement by refusing to move for a downward departure, and that the district court erred by failing to find that his willingness to testify in the Florida action constituted "substantial assistance".

A.

"On appeal, we review the district court's findings of fact for clear error; conclusions of law are examined *de novo*". ***United States v. Shabazz***, 993 F.2d 431, 434 (5th Cir. 1993). "The evidence is viewed most favorably to the party prevailing below, except where such a view is inconsistent with the trial court's

[3] Ramirez was sentenced also to 60 months imprisonment on the money laundering conspiracy conviction, to run concurrently with his sentence on the cocaine conspiracy conviction.

findings or is clearly erroneous considering the evidence as a whole". ***Id***.

"A routine traffic stop is a limited seizure that closely resembles an investigative detention". ***Id***. at 435. Accordingly, cases in which motorists have been stopped for violating traffic laws are analyzed under the framework established in ***Terry v. Ohio***, 392 U.S. 1 (1968). ***Shabazz***, 993 F.2d at 435. "Under ***Terry***, the judicial inquiry into the reasonableness of a search or seizure `is a dual one -- whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place". ***Id***. (quoting ***Terry***, 392 U.S. at 19).

1.

The district court held correctly that the initial stop was justified by the officers' observing Henao commit two traffic violations. Ramirez's claim that the stop was a pretext for the officers' primary purpose of drug interdiction is foreclosed by our court's decision in ***United States v. Causey***, 834 F.2d 1179, 1185 (5th Cir. 1987) (en banc) ("where the officers have taken no action except what the law objectively allows[,] their subjective motives in doing so are not even relevant to the suppression inquiry").

2.

The district court also concluded correctly that the questioning and detention did not exceed the scope of the original purpose of the stop. Our court has rejected the proposition that a "police officer's questioning, even on a subject unrelated to the

purpose of the stop, is itself a Fourth Amendment violation". ***Shabazz***, 993 F.2d at 436. Questioning that takes place during the pendency of a warrant or license check incident to a valid traffic stop does not exceed the scope of the stop. ***Id***. at 437. The district court credited implicitly the testimony of the officers that the questioning took place, and the consent to search was received, while the officers were awaiting the results of the computer check on Henao's license. These findings are supported by the evidence, viewed in the light most favorable to the Government. Accordingly, the district court did not clearly err in finding that the detention was not unreasonably lengthy and that it did not extend beyond the period justified by the valid traffic stop.

3.

Our court set forth the standards for assessing the voluntariness of consent in ***United States v. Kelley***, 981 F.2d 1464 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2427 (1993):

> To be valid, consent to search must be free and voluntary. The government has the burden of proving, by a preponderance of the evidence, that the consent was voluntary.... The voluntariness of consent is a question of fact to be determined from the totality of all the circumstances. We will not reverse the district court's finding that consent was voluntary unless it is clearly erroneous. Where the judge bases a finding of consent on the oral testimony at a suppression hearing, the clearly erroneous standard is particularly strong since the judge had the opportunity to observe the demeanor of the witnesses.
>
> In evaluating the voluntariness of consent, we have considered six factors:
>
> (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 to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.
>
> All six factors are relevant, but no single one is dispositive or controlling.

Id. at 1470 (internal quotation marks and citations omitted).

The district court made specific findings on all six factors: (1) Henao was not free to leave while the computer check was pending; (2) the officers did not use any coercive tactics; (3) Henao cooperated fully, did not display any antagonism during the stop, and offered to let the officers look into the back of the truck; (4) Henao read the standardized consent form which contained a clause informing him of his right to refuse to consent; (5) Henao is a high school graduate and has studied civil engineering at a technical college; and (6) the record is unclear whether Henao believed incriminating evidence would be found. The district court concluded that the factors "as a whole clearly demonstrate that Henao's consent to the search was voluntary". The district court did not clearly err in finding that Henao voluntarily consented to the search. *See* ***Kelley***, 981 F.2d at 1470-71.

4.

Henao's contention that the search of the truck at the police facility exceeds the scope of his consent is also unavailing. The evidence, viewed in a light most favorable to the Government, supports the conclusion that Henao gave oral and written permission to the officers to search the truck and its contents. Although it

is true, as Henao asserts, that the consent form described the truck where it was stopped along the interstate highway, nothing in the consent form limited the search to the location of the stop. Moreover, testimony at the suppression hearing established that (1) Henao made an unsolicited offer to the officers to allow them to look in the back of the truck, (2) he then gave oral permission for the truck to be searched, (3) he read and signed a consent form which explained that he had the right to refuse consent, (4) he orally consented to moving the truck to a different location to be searched, and (5) at no time did he protest the move or the search or otherwise attempt to withdraw his consent. *See* ***United States v. Ponce***, 8 F.3d 989, 998 (5th Cir. 1993) (citing ***United States v. Gonzalez-Basulto***, 898 F.2d 1011, 1013 (5th Cir. 1990)) (a defendant's failure to protest may be considered as evidence that the search did not exceed the scope of consent).

B.

Ramirez contends that his willingness to testify in the Florida case should be considered as "substantial assistance" to the Government, warranting a downward departure. He asserts that the government breached the plea agreement by failing to move for a downward departure, and that he "must be allowed the opportunity to withdraw his plea or move for vacation of the sentence and resentencing by a different judge".

At his sentencing hearing, Ramirez brought to the district court's attention that information he provided to the United States Attorney for the Southern District of Florida and his agreement to

testify against other defendants in Florida enabled the Government to obtain guilty pleas in a pending case. But, Ramirez did not contend at sentencing that the Government had breached the plea agreement, did not object to the imposition of sentence on the ground that the Government had failed to file a motion for downward departure, and did not ask to withdraw his plea. The district court did not make any findings as to whether Ramirez's willingness to testify constituted substantial assistance and declined to depart downward from the guideline sentence because the Government had not filed a motion for downward departure.

Because Ramirez did not object concerning a departure and did not move to withdraw his plea, we review his plea agreement breach contentions only for plain error. ***United States v. Palomo***, 998 F.2d 253, 256 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 358 (1993). "Because the failure of the Government to fulfill its promise ... affects the fairness, integrity, and public reputation of judicial proceedings, ... a prosecutor's breach of a plea agreement can amount to plain error". ***Id***. (brackets, internal quotation marks, and citation omitted).

> In determining whether there has been a breach of the plea agreement, we must determine whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement. Whether the government's conduct violated the terms of the plea agreement is a question of law. [The defendant] bore the burden of proving the underlying facts establishing a breach by a preponderance of the evidence.

Id. (internal quotation marks and citations omitted).

A district court cannot depart downward under U.S.S.G. § 5K1.1 unless the Government makes a motion to that effect. ***Wade v. United States***, ___ U.S. ___, 112 S. Ct. 1840 (1992). Section 5K1.1, and its statutory counterpart, 18 U.S.C. § 3553(e), give the government "a power, not a duty" to file such a motion. ***Id***. at ___, 112 S. Ct. at 1843. But, the Government may bargain away its discretion in a plea agreement. ***United States v. Hernandez***, 17 F.3d 78, 82 (5th Cir. 1994).

Ramirez's plea agreement provides:

> If the Government determines that the Defendant has provided substantial assistance in the investigation and prosecution of other federal law offenders, pursuant to his cooperation agreement, including but not limited to that if the Defendant is called upon to testify in a District Court and the Court is impressed with the truthfulness of his testimony, the United States will move that the sentencing Court depart from the guidelines in a downward manner pursuant to Section 5K1.1 or in the alternative, move that the Sentencing Court reduce the Defendant's sentence pursuant to the provisions of Rule 35(b) of the Federal Rules of Criminal Procedure. *The decision on whether or not to file such a motion will be jointly agreed upon by the respective United States Attorneys for the Southern District of Florida and the Eastern District of Texas.* The defendant understands that even if such a request is made by the Government, that the Court has the sole discretion to grant or deny such a request.

(Emphasis added.) The terms of Ramirez's plea agreement reflect that the Government retained its discretion to make the decision whether to file a downward departure motion. Because the agreement imposes no obligation on the Government to file such a motion, Ramirez failed to prove a breach, and the district court did not commit plain error by refusing to consider whether Ramirez's

willingness to testify in Florida constituted substantial assistance.[4]

III.

For the foregoing reasons, Henao's conviction, Ramirez's conviction and sentence, and the order denying the motions to suppress are

AFFIRMED.

---

[4] In his summary of the argument, Ramirez asserts that the district court erred in denying his request for a four-level or two-level decrease in his offense level for his minimal or minor participation in the offense. *See* U.S.S.G. § 3B1.2. However, the argument section of his brief contains only one sentence relevant to this contention, which seems to be a concession that he did not meet his burden of proving his entitlement to the reduction: "The Court found that there was no information provided by the Defendant or the Government to show that Appellant was an organizer, leader or supervisor or that he was a minor or minimal participant". In any event, Ramirez failed to comply with Fed. R. App. P. 28(a)(5), which provides that an appellant's argument "must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on". We refuse to consider issues not properly briefed. *See, e.g.*, ***Abbott v. Equity Group, Inc.***, 2 F.3d 613, 627 n.50 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1219 (1994).