UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-5581

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARY A. AGUIRRE, a/k/a Mary A. Aguire,

Defendant-Appellant.

No. 93-5582

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD LEON CRAIN, a/k/a Richard Leon Crain-Beth,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(CR-91-20031-02 (2:92-CR-20031-01)

(July 6, 1994)

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

PER CURIAM:*

Mary Aguirre and Richard Crain were convicted of possession with intent to distribute 168 kilograms of marijuana in violation of 21 U.S.C. § 841(a)(1) (1988), and were each sentenced to a sixty-month term of imprisonment. Aguirre and Crain appeal their convictions,[1] contending that the district court erred in denying their motions to suppress. Aguirre also appeals her sentence, contending that the district court erred in failing to depart downward from the sixty-month statutory minimum. Finding no error, we affirm.

I

On July 24, 1990, Deputy William Curet and his brother-in-law David Houssiere, an uncommissioned volunteer deputy, stopped a van with Florida license plates on Interstate 10 in Jefferson Davis Parish, Louisiana. Crain, the owner of the van, was also the driver. Aguirre was a passenger.

After Deputy Curet stopped the van, Crain got out and walked to the front of Curet's vehicle. Curet informed Crain that he had stopped him for improper lane usage and speeding. Curet, after walking up to the van, then smelled the uncommonly strong odor of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] Aguirre and Crain filed separate appeals which we consolidated for purposes of this opinion.

air freshener, which is often used as a masking agent by drug couriers. Suspecting that the van might be carrying contraband, Curet asked Crain for permission to search the vehicle. After Crain signed a consent-to-search form, authorities searched the vehicle and found approximately 370 pounds of marijuana.

Following guilty pleas, Aguirre and Crain were convicted of possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) (1988). Their pleas were conditioned on their right to appeal the denial of their motion to suppress evidence. The district court sentenced Aguirre and Crain to 60-month terms of imprisonment. The district court then entered a final judgment evidencing the defendants' convictions and sentences, from which the defendants timely appealed.

II

A

Aguirre first contends that the district court erred in ruling that she lacked standing to contest Deputy Curet's stop of Crain's van. The district court appears to have relied on *United States v. Harrison,* 918 F.2d 469, 472 (5th Cir. 1990), which supports the proposition that a non-owner passenger of a vehicle lacks standing to contest the legality of a search of that vehicle. This proposition, however, has no relevance to the issue before us. Aguirre argues, as she did at the suppression hearing below, that the initial stop of the vehicle was illegal. Although a non-owner passenger in a vehicle lacks standing to contest the *search* of the

vehicle, she does not lack standing to contest the reasonableness or legality of the *stop*. *See United States v. Roberson,* 6 F.3d 1088, 1091 (5th Cir. 1993), *cert. denied,* 114 S.Ct. 1322 (1994) ("Whereas the search of an automobile does not implicate a passenger's fourth amendment rights, a stop results in the seizure of the passenger and driver alike. Thus, a passenger of a stopped automobile does have standing to challenge the seizure as unconstitutional." (footnote omitted)). We thus conclude that Aguirre has standing to challenge the stop of the van, as the government correctly concedes.

B

Aguirre and Crain also contend that the district court committed reversible error in denying their motions to suppress the marijuana seized from the van. The gist of their argument is that Deputy Curet lacked legal justification to stop the van. They also assert that the district court improperly shifted the burden of proof from the government to the defendants at the suppression hearing.

We view the evidence presented at the hearing on a motion to suppress in the light most favorable to the prevailing party. *United States v. Lopez,* 911 F.2d 1006, 1008 (5th Cir. 1990). A district court's factual findings on a motion to suppress are reviewed under the clearly erroneous standard; questions of law are reviewed de novo. *United States v. Kelley,* 981 F.2d 1464, 1467 (5th Cir.), *cert. denied,* 113 S.Ct. 2427 (1993). "A finding is `clearly erroneous' when although there is evidence to support it,

the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 68 S. Ct. 525, 542 (1948). "Clear error is especially rigorous when applied to credibility determinations because the trier of fact has seen and judged the witnesses." *United States v. Casteneda,* 951 F.2d 44, 48 (5th Cir. 1992). Consequently, "[o]nly when testimony is so unbelievable on its face that it defies physical laws should the court intervene and declare it incredible as a matter of law." *United States v. Lindell,* 881 F.2d 1313, 1322 (5th Cir. 1989), *cert. denied,* 110 S. Ct. 2621 (1990).

A police officer may conduct a "brief investigatory stop of a vehicle and its occupants, without probable cause, based solely on the `reasonable suspicion' that the person is engaged, or about to be engaged, in criminal activity." *United States v. Garcia,* 942 F.2d 873, 876 (5th Cir. 1991), *cert. denied,* 112 S. Ct. 989 (1992). The district court found that the van had engaged in improper lane changes prior to being stopped. This finding was based on the testimony tendered by Deputy Curet and Deputy Houssiere, who both testified that the van had drifted onto the shoulder twice in a brief span of time prior to being stopped. Louisiana law provides that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." La. Rev. Stat. Ann. § 32:79(1) (West 1963). A first-time violator of the lane-use provision can be fined up to

$175 and imprisoned for up to thirty days. La Rev. Stat. Ann. § 32:57 (West Supp. 1994). Based on its finding that the van had drifted onto the shoulder of the highway, the district court concluded that Deputy Curet had reason to suspect that the occupants of the van had engaged in criminal activity, albeit a minor traffic violation. *See, e.g., United States v. Woodall,* 938 F.2d 834, 837 (8th Cir. 1991) (stating that when an officer observes a traffic offense, however minor, he is justified in stopping the vehicle).

In addition to their own testimony,[2] the defendants presented the testimony of two out-of-state motorists and an expert in data analysis in an attempt to show a scheme or plan by Deputy Curet to stop and search non-Louisianans without reasonable suspicion or probable cause. Although the district court found that the out-of-state motorists were disinterested witnesses and that their testimony was believable, the court found that the testimony offered was not sufficient to establish a scheme or plan. Based on our review of the record, this finding was not clearly erroneous. Furthermore, that Deputy Curet may have had an improper subjective intent when stopping the van has no bearing on the legality of the stop. *See United States v. Causey,* 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc) ("[S]o long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry.").

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[2] The defendants testified that the van did not make improper lane changes prior to being stopped. The district court, however, found their testimony not credible.

Accordingly, viewing the evidence in the light most favorable to the government and acknowledging that the testimony of Curet and Houssiere does not defy physical laws, we hold that Deputy Curet had reasonable suspicion to stop Curet's van.

The defendants also complain that the district court misapplied the burden of proof when it noted that, "Officer Curet is not on trial, however, the defendants are . . . ." This comment by the district court, taken out of context by the defendants, was not evidence of an impermissible burden shift. The court made the challenged comment after speculating that Curet may have been dishonest when he expressly denied the allegations of the out-of-state motorists and immediately before commenting that the testimony of Curet and Houssiere was still more credible than that of the defendants. In the context of the district court's order, the challenged remark was a comment on the weighing of credibility choices, rather than a comment on the burden of proof.

C

Lastly, Aguirre contends that the district court erred in failing to depart downward from the statutory minimum sentence provided by statute. The only statutory basis for departing below a statutory minimum sentence is 18 U.S.C. § 3553(e), which allows for such a departure only when the government moves for a downward departure based on substantial assistance. Here, the government did not move for a downward departure based on substantial assistance. Because Aguirre has not shown that the government's

refusal to move for such a departure breached the plea agreement[3] or was based on an unconstitutional motive, she has not demonstrated reversible error in the district court's refusal to depart downward from the statutory minimum. *See United States v. Garcia-Bonilla,* 11 F.3d 45, 47 (5th Cir. 1993) (holding that in the absence of a contractual obligation to move for a downward departure, a defendant is not entitled to a remedy based on the government's refusal to move for a downward departure, unless the refusal was based on an unconstitutional motive).[4]

III

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[3] The plea agreement provides:

> The United States may, but shall not be required to, make a motion requesting the court to depart from the sentencing range called for by the guidelines in the event the defendant provides "substantial assistance." This decision shall be in the sole and non-reviewable discretion of the United States Attorney.
>
> It is understood and agreed that a motion for departure shall not be made, under any circumstances, unless defendant's cooperation is deemed "substantial" by the United States Attorney.

[4] We further reject Aguirre's specious argument that the district court had to depart downward from the statutory minimum to give effect to the terms of the plea agreement))in particular, the government's promise to recommend that the district court impose a sentence at the bottom of the guideline range deemed applicable to her case by the court. Because the offense of conviction contemplated a statutory minimum sentence, the guideline range applicable to Aguirre started at the statutory minimum. *See* United States Sentencing Commission, *Guidelines Manual,* § 5G1.1(c) (Nov. 1993) (stating that a sentence may be imposed at any point within the applicable guideline range, provided that the sentence is not less than any statutorily required minimum sentence).

For the foregoing reasons, we AFFIRM the judgement of the district court.