

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7064
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JULIAN SANDOVAL, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(CR-L-92-221-01)

(December 8, 1993)

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

PER CURIAM:*

The facts underlying this appeal are as follows: Julian Sandoval was arrested at the Interstate 35 checkpoint near Laredo, Texas, after Border Patrol agents discovered a hidden compartment in the trailer of the eighteen-wheel truck he was driving. The hidden compartment contained approximately 2,334 pounds of marijuana.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Sandoval had arrived at the checkpoint at 8:00 p.m. on August 14, 1992, and reported that he was hauling pallets from Edinburg, Texas, to Muleshoe, Texas. Because Sandoval was hesitant in answering questions and appeared nervous, the agent requested that Sandoval pull over for a secondary inspection. Sandoval complied and a trained dog alerted to the presence of drugs at the front end of the trailer. The agent asked for Sandoval's cargo invoice and noticed that Sandoval's hands trembled as he handed it to him. The invoice, bearing number 7767, indicated that the pallets were paid for in cash, but were to be shipped to T & S Produce in Muleshoe. A second invoice, bearing number 7766, was retrieved from the cab and showed that the pallets were paid for in cash and picked up at J & R Supply in McAllen. The agent could not get a listing for T & S Produce in Muleshoe from directory assistance.

A DEA officer arrived and Sandoval explained to him that he was driving the rig for his employer, Diego Bernal, that he had picked up the loaded trailer from Bernal, and that he was destined for Muleshoe to pick up a load of watermelons. The DEA officer noted that Sandoval was driving an unventilated, non-refrigerated truck. The DEA officer attempted to verify Sandoval's explanation by calling the telephone number that Sandoval provided. A person identifying himself as Diego Bernal came to the phone, but remained silent when asked to confirm whether he supplied a trailer to Sandoval and then hung up. During a second inspection by a different trained dog, which also alerted to the presence of drugs

at the front of the trailer, the DEA officer observed Sandoval mumbling to and crossing himself as if in prayer.

Fifteen agents unloaded several hundred pallets from the trailer and discovered a wall with new screws and fresh caulking. The agents drilled a small hole in the wall, which enabled them to see several bundles and a leafy green substance. The agents then removed the wall and seized the marijuana.

Employees of J & R Supply testified that Sandoval arrived at J & R Supply at 4:00 p.m. on August 14th in a virtually empty tractor-trailer rig accompanied by an unidentified male. Sandoval purchased 360 pallets and instructed one of the employees, Marcos Martinez, to prepare the second receipt indicating that the pallets were to be shipped to T & S Produce. Then the men watched as store personnel loaded the pallets onto the truck. One of the owners of T & S Produce testified that T & S Produce has never been located, or maintained an office, in Muleshoe.

I

Sandoval argues that the evidence was insufficient to prove that he knowingly possessed marijuana with intent to distribute it. In reviewing the sufficiency of the evidence, this court must examine the evidence in the light most favorable to the government and must uphold the conviction if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. U.S. v. Gallo, 927 F.2d 815, 820 (5th Cir. 1991). Because Sandoval failed to renew his motion for judgment of

acquittal at the close of all of the evidence, we must determine only whether there was a manifest miscarriage of justice. U.S. v. Pierre, 958 F.2d 1304, 1310 (5th Cir.) (en banc), cert. denied, 113 S.Ct. 280 (1992). "Such a miscarriage would exist only if the record is devoid of evidence pointing to guilt, or because the evidence on a key element of the offense was so tenuous that a conviction would be shocking." Id. (internal quotation and citation omitted).

To convict Sandoval, the government had to prove the knowing possession of the contraband with intent to distribute. U.S. v. Williams-Hendricks, 805 F.2d 496, 500 (5th Cir. 1986) (internal citation omitted). The exercise of dominion or control over a motor vehicle in which a contraband substance is concealed may be deemed to be possession of contraband. U.S. v. Olivier-Becerril, 861 F.2d 424, 426 (5th Cir. 1988) (internal quotation and citation omitted). Possession and intent to distribute may be inferred solely from the possession of a large amount of the substance. U.S. v. Prieto-Tejas, 779 F.2d 1098, 1101 (5th Cir. 1986). The "proof that possession of contraband is knowing will usually depend on inference and circumstantial evidence." U.S. v. Richardson, 848 F.2d 509, 514 (5th Cir. 1988). "Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof." Id. (internal quotation and citation omitted). When the case involves

hidden compartments in a vehicle, reliance may not be placed solely on control, there should be corroboration of circumstances evidencing a consciousness of guilt. Olivier-Becerril, 861 F.2d at 426-27. Nervous behavior during questioning and providing false information established "guilty knowledge." U.S. v. Ayala, 887 F.2d 62, 68 (5th Cir. 1989).

The evidence supports the jury's verdict. The record contains sufficient evidence that Sandoval exercised control and dominion over the rig containing an extremely large amount of marijuana, thereby satisfying the elements of possession and intent to distribute. Trial testimony established that (i) the contraband was located behind a newly constructed wall containing shiny screws and fresh caulking; (ii) Sandoval lied about picking up a fully loaded trailer and that he had possession of the trailer before it was loaded; (iii) he supervised the loading of the pallets; (iv) he instructed a J & R Supply employee to falsify the second receipt; (v) he lied about his destination; (vi) he was unable to substantiate his employment by Diego Bernal; (vii) his story was inconsistent (during the first questioning he was delivering pallets, but later he claimed to be on his way to pick up watermelons); and (viii) he exhibited nervous behavior at least three times during the inspection. All of the foregoing evidence shows a consciousness of guilt sufficient to support the inference otherwise flowing from the command of the truck, and, accordingly,

the jury's verdict does not constitute a manifest miscarriage of justice.

II

Sandoval contends that he received ineffective assistance of counsel because his attorney allowed him to testify. A claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court, because there has not been an opportunity to develop the record on the merits of the allegations. U.S. v. Pierce, 959 F.2d 1297, 1301 (5th Cir. 1992), cert. denied, 113. S.Ct. 621 (1992).

III

For the reasons stated herein, the conviction of Julian Sandoval is

A F F I R M E D.