

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7110
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NORBERTO MONTALVO, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(M-92-CR-71-2)

(December 16, 1993)

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

PER CURIAM:*

In this appeal in which a jury convicted Norberto Montalvo, Jr., of, first, conspiring to possess cocaine with the intent to distribute it and, second, possession of cocaine with the intent to distribute it, we have but a single question to answer: Was the evidence sufficient to support Montalvo's convictions?

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

The evidence at trial revealed that Joe Guerrero, a confidential informant, arranged to purchase five kilograms of cocaine from Lucio Reyes, Montalvo's co-conspirator, for \$80,000. Reyes met with Guerrero and Leo Silva, a DEA agent, at a grocery store. Reyes told Silva, who was posing as the drug purchaser, that his source wanted the money up front. Silva refused to turn over the money before receiving the cocaine, but proposed to pay Reyes for all five kilograms if Reyes would provide one kilogram. Silva retrieved the cash he had in an ice chest in another undercover agent's car to show it to Reyes. After seeing the money, Reyes told Silva he would have to contact his source and got out of Guerrero's car to use a public telephone. Silva testified that he also got out of the car to return the money to the other vehicle, and he overheard Reyes on the telephone ask for "Beto," which is Montalvo's nickname.

The group then arranged to meet at a shopping center. Upon his arrival, Reyes said that his source still wanted the money up front and suggested they meet near the source's home. Reyes would then go in with the money to get the cocaine while the others waited outside. Silva agreed, and the group proceeded to the 1-2-3 Bar, near Montalvo's home. Both Silva and Guerrero testified that when they arrived, Reyes's car was parked in front of Montalvo's house. Reyes emerged from the house and told the men that his source had the cocaine, but wanted the money before he would release the cocaine. Silva and Guerrero testified that they told

Reyes to bring the source out so they could talk with him. Reyes went back to Montalvo's house, Montalvo exited with Reyes and got into Reyes's truck, and they drove back to Guerrero's car.

Silva then showed Montalvo the money. Silva testified that Montalvo looked at the money and nodded his head. As Silva began to walk back to the other vehicle to return the money, Montalvo called out to him. Silva testified he went back to Reyes's vehicle and Montalvo asked Silva if he wanted all five or just one kilogram. Silva said to bring one, and he would pay for all five. At that point, Reyes and Montalvo drove back to Montalvo's house and went inside, and when they came out, Montalvo was carrying a paper bag. Montalvo and Reyes drove back to Guerrero's car and Montalvo handed Silva the bag, which contained a one-kilogram package of cocaine. Silva testified that he cut the package open with a nail file, and said that he would go back to the other car to get the money. Silva then signalled the other agent, and a number of undercover agents converged on the scene and made the arrests.

Reyes testified in Montalvo's defense. Reyes identified his source as a Mexican named Jaime Garza. Reyes testified that he had the cocaine in his possession before he met Guerrero and Silva at the shopping mall, but he did not want to make the exchange then because he had dealt only with Guerrero before and was afraid of involving Silva in the deal. Reyes testified that he told the men to meet him at the 1-2-3 Bar. Reyes said he went inside Montalvo's

home to use the telephone, and Montalvo came out with him because he wanted a ride to pick up his car. Reyes stated that Montalvo did not know he was negotiating a drug deal or that he had cocaine in the truck. According to Reyes, Montalvo first became aware of the drug deal when Silva showed him the cash. Reyes testified that they went back inside Montalvo's house the second time to pick up his keys, and that Montalvo walked out with a paper bag because Reyes asked for a bag for the money. Reyes contradicted Silva's testimony, stating that Montalvo never spoke with Silva concerning the cocaine and that Montalvo never handled the cocaine. On cross-examination, Reyes conceded that he calls Montalvo "Beto," but denied telephoning Montalvo from the grocery. He explained that he called Garza and told him they should meet at Beto's.

On appeal, Montalvo musters a completely unconvincing argument that the evidence was insufficient to support the convictions. He maintains that, at most, the evidence demonstrated that he was present at the time the drug deal took place, and that he passed the container with the cocaine in it to Silva.

It is elementary that we review the sufficiency of the evidence to determine whether any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. U.S. v. Martinez, 975 F.2d 159, 160-61 (5th Cir. 1992), cert. denied, 113 S.Ct. 1346 (1993). In making this determination, the court views the evidence in the light most favorable to the government. U.S. v. Shabazz, 993 F.2d 431, 441 (5th Cir. 1993).

Here, viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in favor of the verdict, the evidence strongly supports both convictions. The evidence convincingly shows that Montalvo was Reyes's source for the cocaine. Silva stated that he overheard Reyes make a phone call to his source and ask for "Beto," Montalvo's nickname. Both Silva and Guerrero testified that, after a couple of meetings with Reyes, Reyes proposed that they meet near his source's home to resolve the problem the parties were having with the timing of the exchange of the money and drugs. They agreed to do so and met at the 1-2-3 Bar, near Montalvo's home. After Reyes stated that his source had to have the money first, Reyes got Montalvo out of his house, he joined the negotiations, returned to his house with Reyes, and emerged carrying a paper bag, which ultimately contained one kilogram of cocaine. Silva further testified that Montalvo handed him the bag with the cocaine in it. Contrary to Montalvo's contentions, the evidence consists of more than his mere presence at the crime scene or of rendering unknowing assistance. Cf. U.S. v. Gardea Carrasco, 830 F.2d 41, 45 (5th Cir. 1987) (no evidence established defendant's knowledge of conspiracy and presence at time of arrest insufficient).

For these reasons, we do not hesitate in holding that the convictions of Norberto Montalvo, Jr. are

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