IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7153
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTONIO GARCIA-ALEMAN,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. CR-L-92-248
- - - - - - - - - - -
(January 5, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Antonio Garcia-Aleman argues that the evidence was insufficient to support his drug offense convictions because there was no evidence that he had actual or constructive possession of the heroin and because there was no evidence that he knowingly participated in a conspiracy. Because Garcia-Aleman did not renew his motion for a judgment of acquittal at the close of the Government's evidence, he waived any objection to the denial of his motion. See United States v. Daniel, 957 F.2d 162,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

164 (5th Cir. 1992); Fed. R. Crim. P. 29. Therefore, this Court reviews the evidence to determine only if there was a "manifest miscarriage of justice." United States v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988). A manifest miscarriage of justice exists only if the record is "devoid of evidence pointing to guilt." Id. (citations omitted).

Conspiracy offenses

In a conspiracy prosecution under 21 U.S.C. § 846, the Government is required to prove that an agreement exists between two or more persons to violate the narcotics laws, that each person knew of the conspiracy and intended to join it, and that each person did voluntarily participate in the conspiracy. United States v. Salazar, 958 F.2d 1285, 1291 (5th Cir.), cert. denied, 113 S.Ct. 185 (1992). All elements may be inferred from circumstantial evidence. Id.

The evidence is sufficient to establish that Garcia-Aleman knowingly participated in the conspiracy to possess and distribute heroin. Garcia-Aleman's meeting with Ochoa was arranged by Villarreal. Garcia-Aleman met the man who had possession of the heroin and went with him to the motel to exchange the heroin for money. Garcia-Aleman knew that at least two other people, besides himself, were acting in concert to deliver the heroin to Ochoa.

By delivering a guilty verdict, the jury made a credibility determination in favor of Ochoa and Cuellar. This Court will not disturb that determination. See United States v. Garcia, 995 F.2d 556, 561 (5th Cir. 1993).

Aiding and abetting

"The crime of aiding and abetting occurs when the defendant associates with a criminal venture, purposefully participates in it, and seeks by his actions to make it succeed." Salazar, 958 F.2d at 1292 (internal quotation and citation omitted). "[T]ypically, the same evidence will support both a conspiracy and an aiding and abetting conviction." Id.

A defendant need not have actual or constructive possession of the drugs to be guilty of aiding and abetting possession with intent to distribute. United States v. Williams, 985 F.2d 749, 753 (5th Cir.), cert. denied, 114 S.Ct. 148 (1993). A conviction merely requires that the defendant's association and participation in the venture were in a way calculated to bring about the venture's success. Id.

Garcia-Aleman was responsible for bringing the man with the heroin to meet Ochoa. His actions facilitated the distribution of the heroin. Further, the large amount of heroin was sufficient to infer intent to distribute. See United States v. Romero-Reyna, 867 F.2d 834, 836 (5th Cir. 1989), cert. denied, 494 U.S. 1084 (1990). The evidence was sufficient to convict Garcia-Aleman of aiding and abetting the possession with intent to distribute and distribution of heroin.

Garcia-Aleman also argues that the modified Allen** charge given to the jury was so prejudicial that it constituted plain

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** Allen v. United States, 164 U.S. 492, 17 S.Ct. 14, 41 L.Ed. 528 (1896)(supplemental instructions urging jurors to forego their differences and reach a unanimous verdict).

and fundamental error. The use of the Allen charge is reviewed for an abuse of discretion. United States v. Lindell, 881 F.2d 1313, 1320 (5th Cir. 1989), cert. denied, 496 U.S. 926 (1990). However, because Garcia-Aleman did not object to the charge at trial, this Court may reverse the conviction only if the charge constitutes plain error. See United States v. Taylor, 530 F.2d 49, 51 (5th Cir. 1976).

To determine whether an Allen charge is plain error, this Court must evaluate whether the particular charge is coercive in light of the facts and circumstances of the case and whether further instructions following a timely objection could correct the problem. Id. Any variation from the classic Allen language will be subject to intense scrutiny. Id.

The Allen charge given by the district court is similar to that found in the Fifth Circuit Pattern Jury Instructions, Criminal Cases (1990), p. 55-56, previously approved of by this Court. See Lindell, 881 F.2d at 1321. The district court's instruction included language that no one should sacrifice their consciences, an instruction on reasonable doubt, and a statement that the jurors could "take all the time" they wanted to reach a verdict. The district court made a few additional comments regarding the number of cases pending, the ill-effect pride or stubbornness could have on the jurors' duty, and that the case would be retried if they did not reach a verdict. However, the charge did not materially vary from the classic Allen language.

In evaluating the totality of the circumstances surrounding the use of the charge, this Court proceeds on a case-by-case

basis. Lindell, 881 F.2d at 1321. The district court specifically instructed the jury that they could take their time to reach a verdict. As noted above, the same evidence supporting the two conspiracy counts would also support the two aiding and abetting counts. See Salazar, 958 F.2d at 1292. Thus, once the jurors reached a conclusion regarding one of the counts, it is likely that the other counts were disposed of more easily. Because the charge was not coercive, instructions to cure the alleged error were not necessary. See Taylor, 530 F.2d at 52. The district court's modified Allen charge did not result in plain error. The judgment of the district court is AFFIRMED.