

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-7227  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EFRAIN ALVAREZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas

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(CR-M-89-710-S1)

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(January 25, 1994)

Before THORNBERRY, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge:\*

Efrain Alvarez was convicted of possession with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). On appeal, he contests the propriety of admitting evidence and jury instructions relating to flight. We find no error in his conviction and accordingly affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.



### **Facts and Prior Proceedings**

On November 28, 1989, a confidential informant (CI) arranged a meeting between undercover DEA agent, Leo Silva, and Appellant, Efrain Alvarez, to discuss the purchase of heroin. A deal was made for the delivery of five ounces of heroin. Alvarez delivered the heroin in a brown paper bag that afternoon, and Agent Silva made the arrest.

On December 1, 1989, Alvarez was released on bond to his mother, who was designated as his third-party custodian. Additional conditions of his release required that he appear for all court settings on three days' notice and that he could not leave the State of Texas without permission.

On December 26, 1989, Alvarez was charged in a two-count indictment with conspiracy to possess with intent to distribute heroin (count 1) and possession with intent to distribute heroin (count 2). Sometime between December 26, 1989, and January 10, 1990, Alvarez went to Mexico. Although he was notified by mail of the arraignment hearing, and his mother was notified by telephone, Alvarez failed to appear for his arraignment on January 10, 1990. A superseding indictment was subsequently filed, charging Alvarez with failure to appear. On or about February 19, 1990, Alvarez was involved in a serious car accident in Mexico, which left him in a coma for fifteen days. After recovery, however, Alvarez never reappeared for further court appearances. Alvarez returned to the United States in January, 1992, and was arrested in Houston, Texas, when he attempted to obtain a driver's license.

Alvarez was tried and convicted on count 2, but found not guilty of count 1, the conspiracy count. The district court granted the defendant's motion for acquittal on count 3, the failure to appear charge. Alvarez was sentenced to serve sixty-three months in prison and imposed a four-year supervised release term and a \$50.00 special assessment. Alvarez timely appeals to this Court.

### **Discussion**

Alvarez argues that the district court erred by allowing the admission of evidence pertaining to Alvarez's post-offense flight to Mexico in order to show predisposition of guilt. Specifically, Alvarez argues that the court erred by allowing (1) the admission of the notice of arraignment and accompanying postal receipt<sup>1</sup> and (2) the Government to cross-examine Alvarez's mother concerning his flight to Mexico after he was released on bond. Relying on **United States v. Kang**, 934 F.2d 621, 629 (5th Cir. 1991), Alvarez asserts that because he raised an entrapment defense, evidence of post-arrest flight is not admissible and cannot be used to show his predisposition or the manner of the Government's investigation. **Id.**

During the cross-examination of Alvarez's mother, Alvarez's counsel made one non-specific objection in response to a question concerning her knowledge of whether her son was supposed to show up

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<sup>1</sup> The district court reviewed the notice of arraignment and the postal receipt outside the presence of the jury and did not allow either to be admitted. Because neither document was admitted, Alvarez's argument is moot.

to court for his arraignment. The record shows the following dialogue:

**Q:** And you knew he was supposed to show up here in Court, right?

**Mr. Lindenmuth:** Judge, I'm going to object to -- that's --

**The Court:** He can go ahead and ask that question. Go ahead.

The objection was implicitly overruled. Because Alvarez made a loosely formulated and imprecise objection, this Court will consider the admission of this testimony for plain error only. **United States v. Waldrip**, 981 F.2d 799, 804 (5th Cir. 1993). The decision to correct plain error is discretionary with this Court. **United States v. Olano**, \_\_\_U.S.\_\_\_, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993). That discretion should not be exercised unless the error "seriously affects[s] the fairness, integrity or public reputation of judicial proceedings". **Id.**

Alvarez's reliance on **Kang** is unavailing. Kang stipulated that he willfully committed the charged offense, but believed he was entrapped. **Kang** 934 F.2d at 628. Accordingly, we acknowledged that while evidence of flight is generally admissible to establish guilt, such evidence is no longer probative after admission to the charged offense, and therefore should be excluded. **Id.** at 628-629. In the case before us, however, Alvarez did not admit that he committed any of the crimes charged against him. Therefore, because the Government bore the burden of proving Alvarez's guilt, admission of testimony concerning evidence of flight to show guilt was proper. **See United States v. Murphy**, 996 F.2d 94, 96 (5th Cir.) ("Evidence of an accused's flight is generally admissible as

tending to establish guilt."), **cert. denied**, 1993 WL 432813 (U.S. Nov.8, 1993) (No. 93-6263).

Alvarez also asserts that the district court erred by submitting a flight instruction to the jury without a proper evidentiary basis. Alvarez does not challenge the jury instruction itself, but asserts that the instruction was improper based on the evidence. It is true that a flight instruction is erroneous if allegations of flight are without support in the record. **United States v. Myers**, 550 F.2d 1036, 1050 (5th Cir. 1977), **cert. denied**, 439 U.S. 847 (1978). A flight instruction is proper when the evidence supports four inferences: (1) the defendant's conduct constituted flight; (2) the defendant's flight was the result of consciousness of guilt; (3) the defendant's guilt related to the crime with which he was charged; and, (4) the defendant felt guilty about the crime charged because he in fact committed the crime. **Myers**, 550 F.2d at 1049. In **Myers**, an FBI agent testified that he believed suspects who had parked a motorcycle were "beginning to flee at the time of his arrival." **Id.** However, because there was no other evidence of flight and because the agent had previously testified that he was not "aware" that anyone had attempted to flee, this Court found that an instruction on flight was erroneous. **Id.**

In the instant case, the evidence adduced at trial supports the inference that Alvarez fled to Mexico because he had been arrested, and he was guilty of the charged offenses. The record established that shortly after Alvarez's arrest and release on

bond, he went to Mexico without telling his parents, with whom he lived, anything about the trip. In addition, at the time he left, he had been arrested for selling heroin to an undercover DEA agent, and the conditions of his release on bond very clearly prohibited travel outside the state of Texas. Further, while in Mexico, he did not contact his parents at any time prior to his accident. After his convalescence, he did not return to his parents' home, but was apprehended in Houston approximately two years after his flight. There is plenty of evidence to support an instruction on flight. **See Murphy**, 996 F.2d at 97 (flight instruction was proper even though a month passed between the date of the offense and the flight because the defendant was fully aware at the time of his flight that he was a suspect).

#### **Conclusion**

Based on the foregoing, we affirm Alvarez's conviction.

AFFIRMED.