

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7290

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

PEDRO SALINAS-GARZA and
JOSE RODRIGUEZ-DE LA FUENTE,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas
(CR-B-92-278-01)

(April 14, 1994)

Before ALDISERT*, REYNALDO G. GARZA, and DUHÉ, Circuit Judges.

ALDISERT, Circuit Judge.**

Pedro Salinas-Garza appeals his conviction for aiding and abetting the possession of marijuana with the intent to distribute, using and carrying a firearm during and in relation to a drug trafficking crime, possession of a firearm by an alien

* Circuit Judge of the Third Circuit, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

illegally in the United States and possession of a firearm with an obliterated serial number.¹ Jose Rodriguez-De La Fuente appeals his conviction for aiding and abetting the possession of marijuana with intent to distribute. Collectively, the Appellants contend that the district court abused its discretion by permitting a drug enforcement administration agent to testify as to the contents of a Federal Bureau of Investigations report and that there was insufficient evidence to support their convictions. Because we agree that the district court abused its discretion in admitting the drug enforcement agent's testimony, we will reverse the convictions and remand for a new trial.

The district court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291. The Appellants' notices of appeal were timely filed under Rule 4(b) of the Federal Rules of Appellate Procedure.

On the evening of December 6, 1992, two Border Patrol agents, Michael Hester and Michael Vebraska, were conducting surveillance near the Los Indios international bridge when they witnessed a pick-up truck with a single occupant turn off the highway, heading toward the Rio Grande river. Approximately five minutes later, the truck returned with its headlights off and two additional occupants in the cab of the truck. The agents decided

1. Salinas-Garza does not challenge his convictions for possession of a firearm by an alien illegally in the United States or possession of a firearm with an obliterated serial number. Therefore, these convictions are not affected by our decision on appeal.

to make an investigatory stop of the truck because this location was a well-known crossing site for illegal aliens.

After the agents stopped the truck, Agent Hester discovered a fourth individual, Appellant Salinas-Garza, lying on his back in the bed of the truck with his hands underneath him. Appellant Rodriguez-De La Fuente was in the cab of the truck with the truck's owner and Salinas-Garza's brother.

Agent Hester arrested all four occupants after they admitted that they were in the country illegally. When Salinas-Garza stood up in the bed of the truck, Agent Hester discovered a .45 caliber automatic weapon underneath him where his hands had been. The firearm was loaded and ready to be fired, and its serial number had been obliterated with a metal center punch. Salinas-Garza admitted possession of the firearm, but claimed it was for protection from river bandits. Five garbage bags, containing 165 pounds of marijuana, were also discovered in the bed of the truck. The agents testified that prior to opening the bags, they could not see or smell the marijuana within them.

The owner of the truck testified that he had gone to the river to meet two men whom he had hired to help him bring the marijuana into the United States. When he arrived at the river, five men, including the two he had hired, were awaiting him. He denied knowing the Appellants and denied any knowledge of their involvement in the transaction. He stated that the two men he had hired departed as soon as the marijuana was loaded onto the truck and that he gave the Appellants a ride at the request of

the hired men. Finally, the truck owner testified that his marijuana source gave him the address and phone number for a Jose Pilar Rodriguez. A business card with the name Jose Pilar Rodriguez written on the back was found in his wallet at the time of the arrests.²

Salinas-Garza testified that he and his brother had arrived in Matamoros, Mexico on the morning of December 6. They went to Rodriguez-De La Fuente's ranch where they spent the afternoon eating and drinking. In the early evening, the three men decided to cross the border into the United States. After crossing the river, they met two men, whom they assumed had also entered the United States illegally. The Appellants asked the two men for a ride. The Appellants admit helping to load the garbage bags into the pick-up truck, but denied knowing what was in the bags.

At the heart of this appeal is the admission at trial of the testimony of Drug Enforcement Agent John Shexnayder over a defense objection. Agent Shexnayder testified regarding the contents of a Federal Bureau of Investigations report which established that Rodriguez-De La Fuente's fingerprints matched those of Jose Pilar Rodriguez. Without Agent Shexnayder's testimony, there was no direct evidence connecting the Appellants to the truck owner or the marijuana. The Border Patrol agents

2. The Appellants contend that the business card was admitted in violation of their due process rights. We need not address this contention in light of our decision to reverse the convictions and remand for a new trial.

did not see the Appellants load the marijuana and they admitted that the bags did not smell of marijuana.

On appeal, the Appellants contend that the testimony of Agent Shexnayder was hearsay and improperly admitted by the district court over their objections. They argue that the records upon which Agent Shexnayder's testimony was based were not offered into evidence, nor was there testimony regarding their reliability or the procedures used to obtain the finger prints. In addition, Agent Shexnayder did not testify that he had first hand knowledge of any of the information set forth in the records.

"A trial court's ruling of admissibility will not be disturbed unless there was an abuse of discretion creating the likelihood of prejudice to a defendant." United States v. Tansley, 986 F.2d 880, 887 (5th Cir. 1993).

Rule 801 of the Federal Rules of Evidence defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Generally, hearsay is not admissible, unless it falls under the exceptions provided in the Federal Rules of Evidence. The testimony of Agent Shexnayder was clearly hearsay and inadmissible under our decision in United States v. Marshall, 762 F.2d 419, 428 (5th Cir. 1985).

In United States v. Marshall, 762 F.2d at 428, we held that the trial court committed reversible error by permitting "a non-expert witness to give prejudicial hearsay testimony as to

the contents of documents that were not themselves introduced into evidence" and which could not have been introduced "without prior authentication, including a query into their trustworthiness for the purpose for which introduced."

Here, although the records themselves might have been admissible under the public records exception to the hearsay rule after proper authentication, Rule 803(8), we see no justification for the admission of Agent Shexnayder's testimony regarding these records, and the district court gave no explanation for its decision to admit Agent Shexnayder's testimony. See R.E., tab K, at 186.

Therefore, under our holding in Marshall, Agent Shexnayder's testimony was inadmissible hearsay. The prejudicial nature of Agent Shexnayder's testimony cannot be overstated. The government admits that, without Agent Shexnayder's testimony, other evidence produced at trial "was meaningless." Brief of Appellee at 16. Moreover, absent Agent Shexnayder's testimony, there is no direct evidence connecting the Appellants to the truck owner or to the marijuana.

Accordingly, we hold that the district court committed reversible error by permitting, over defense objection, the hearsay testimony of Agent Shexnayder regarding the contents of Federal Bureau of Investigations records. Because we will reverse the convictions of the Appellants and remand for a new trial, we need not address the Appellants' remaining contentions.

The judgment of the district court is **REVERSED** and the proceedings **REMANDED** for a new trial.