

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7343
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NOE PENA, JR.,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CR-M90-134-S1-02
- - - - -
(March 25, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:*

Noe Pena, Jr. (Pena), appeals the judgment of the district court revoking supervised release. Pena argues that the evidence is insufficient to support the district court's findings that he conspired to possess cocaine or that he possessed cocaine with intent to distribute it.

At the revocation proceeding, the Government had the burden "to prove, by a preponderance of the evidence, 18 U.S.C. § 3583(e)(3)," that Pena committed the charged offenses. United

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

States v. Montez, 952 F.2d 854, 859 (5th Cir. 1992). This Court reviews the district court's finding that the Government has carried its burden for clear error. Id.

"The essential elements of possession with the intent to distribute narcotics consist of (1) possession, (2) knowledge, and (3) an intent to distribute the drugs." United States v. Chavez, 947 F.2d 742, 745 (5th Cir. 1991). Intent to distribute may be inferred from the possession of a large quantity of narcotics. United States v. Kaufman, 858 F.2d 994, 1000 (5th Cir. 1988), cert. denied, 493 U.S. 895 (1989). "To prove a drug conspiracy, the government must demonstrate that a conspiracy existed and that the defendant knew of and voluntarily participated in the conspiracy." Chavez, 947 F.2d at 744-45. "An agreement may be inferred from concert of action." United States v. Arzola-Amaya, 867 F.2d 1504, 1511 (5th Cir.), cert. denied, 493 U.S. 933 (1989) (internal quotation and citation omitted).

The following evidence was presented at the revocation hearing. A Border Patrol agent testified that he and his partner stopped a 1992 Suburban driven by Alvaro Pena when they became suspicious that Pena, who was a passenger, was an illegal alien. As the agent questioned the driver and passenger, he noticed a mobile telephone and an unopened box of zip-lock baggies on the seat between the driver and the passenger and a brown paper bag on the floor sticking out slightly from under the front seat. When the agent asked the men whether they were carrying weapons or drugs, Pena "nudged" the driver and said "vamonos," indicating

that they should leave. The driver sped away, and the officers followed in pursuit.

At one point, the agents lost sight of the Suburban over a hill for 10-15 seconds. Then, all of a sudden, the driver pulled to the side of the road and stopped. The agents arrested Pena and the driver and inspected the Suburban. The box of baggies was no longer on the seat, and the brown paper bag lay ripped and empty.

A narcotics K-9 handler with the Border Patrol searched the area along the roadway with his dog. In the general area of the hill where the agents had lost sight of the Suburban, the dog alerted; and officers found the box of baggies, a zip-lock plastic bag with some cocaine, and cocaine scattered on the ground. Another Border Patrol K-9 handler ran a check on the Suburban. The dog alerted underneath the center of the console and again on the paper bag that had been under the front seat. Pena was charged with possession of approximately 264 grams of cocaine.

Pena testified that he did not nudge Alvaro and say "vamonos." He said that Alvaro just took off, driving recklessly, and Pena yelled at him to stop because he believed that they were going to crash. Further, Pena stated that the only brown paper bag he saw contained a beer that he was drinking and that he did not see a box of baggies or any narcotics.

The district court was free to reject Pena's testimony and accept the Government's version. United States v. Garza, 990 F.2d 171, 175 (5th Cir.), cert. denied, 114 S.Ct. 332 (1993).

Accordingly, the findings of the district court are not clearly erroneous.

AFFIRMED.