

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7357
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

OCTAVIANO BUSTOS, a/k/a/
Octaviano Rodriguez Bustos,

Defendant-Appellant.

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

(CR-L-92-251-01,02)

(May 18, 1994)

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge:*

Facts and Prior Proceedings

Octaviano Bustos was convicted by a jury of conspiracy to possess with intent to distribute marijuana and the substantive offense of possession with intent to distribute the same, in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 846, and 18 U.S.C. § 2. He was sentenced to ten years' imprisonment and eight years' supervised release. Bustos timely appeals to this Court, contending that the evidence was insufficient to support his convictions. Specifically, he argues that the evidence adduced at trial does not sustain a finding that he was a knowing participant in the conspiracy or that he knowingly possessed marijuana. Finding no merit in his contentions, we affirm the convictions.

Discussion

Because Bustos moved for judgment of acquittal at the close of the Government's case-in-chief and at the close of the evidence, we examine the sufficiency of the evidence supporting his conviction in the light most favorable to the verdict and affirm "if a rational trier of fact could have found the essential elements beyond a reasonable doubt." **United States v. Casel**, 995 F.2d 1299, 1303 (5th Cir.), **cert. denied**, ___ U.S. ___, 114 S.Ct. 472 (1993).

To establish the offense of a drug conspiracy under 21 U.S.C. § 846, the Government must prove that a conspiracy existed, that the defendant knew of the conspiracy, and that he voluntarily joined it. **United States v. Limones**, 8 F.3d 1004, 1009 (5th Cir. 1993), **pet. for cert. filed**, No. 93-8123 (Feb. 28, 1994). To establish the offense of possession of a controlled substance with intent to distribute under 21 U.S.C. § 841, the Government must prove knowing possession of the controlled substance with intent to distribute. **Id.** The Government is not required to prove by direct evidence either the existence of the conspiracy or the defendant's

knowing participation in the conspiracy; rather, drug conspiracies may be proven by circumstantial evidence. **United States v. Cardenas**, 9 F.3d 1139, 1157 (5th Cir. 1993). Circumstantial evidence such as presence and association may be used to prove the elements of a conspiracy, which may be inferred from the development of the circumstances. **United States v. Ayala**, 887 F.2d 62, 67 (5th Cir. 1989). The jury may also infer the existence of a conspiracy from a defendant's concert of actions with others. **Cardenas**, 9 F.3d at 1157.

To establish the offense of possession of a controlled substance with intent to distribute under 21 U.S.C. § 841, the Government must prove knowing possession of the controlled substance with intent to distribute. **Limonas**, 8 F.3d at 1009. In some cases, knowledge in a possession case can be established by showing control of the apparatus containing the controlled substance; however, if the controlled substance is not readily observable, knowledge can only be inferred if there is other circumstantial evidence that is suspicious in nature or demonstrates guilty knowledge. **United States v. Garza**, 990 F.2d 171, 174 (5th Cir.), **cert. denied**, 114 S.Ct. 332 (1993).

The following facts suggest Bustos was a knowing participant of the conspiracy and had knowledge that he was driving a truck loaded with an illegal substance.

On April 29, 1992, Jose A. Rodriguez, Bustos' codefendant, called his friend, Border Patrol Agent Nicholas Prado, Jr., and offered to pay him in exchange for allowing illegal drugs to pass

through the Hebronville, Texas, Border Patrol checkpoint on Highway 16. Prado reported the call to his superiors and was instructed to discuss the bribe with Rodriguez and tape the conversations.

During the next several months, a series of tape-recorded conversations between Rodriguez and Prado took place. Finally, it was decided that they would move a carload of marijuana through the checkpoint while Prado was on duty. Rodriguez was to drive his red truck, heading southbound on Highway 16. At some point south of the checkpoint, Rodriguez was to meet with the driver of the vehicle carrying the marijuana. This driver was unknown to Rodriguez but he could be identified as the driver of a white Ford F-350 truck with a compressor mounted on the back. Rodriguez was to switch trucks with this person, and the unknown driver would proceed in Rodriguez's red truck northbound on Highway 16 through the checkpoint. Rodriguez was to follow him driving the truck carrying the marijuana.

A surveillance team was organized in positions north and south of the checkpoint and at the checkpoint station. As expected, Rodriguez was observed driving his red truck southbound on Highway 16 past the checkpoint. A white Ford pickup truck with a compressor in the back, driven by a person later identified as Appellant Bustos, was observed a few miles south of the checkpoint, travelling northbound. As soon as the two trucks passed each other, Bustos made a u-turn and followed Rodriguez in the red truck. Because of the open terrain, surveillance was discontinued.

Fifteen minutes later, Rodriguez's red truck reappeared, now driven by Bustos, and headed toward the checkpoint to the north. Rodriguez, driving the white Ford, followed behind Bustos.

Victor Lugo, a member of the surveillance team, positioned his vehicle between the two trucks in the line of traffic on the highway. At the checkpoint, Prado waved Bustos through. Lugo stopped and talked with Prado for a short while. This was done intentionally to delay Rodriguez so that Bustos would proceed far enough ahead on Highway 16 to prevent him from observing Rodriguez's arrest, which was planned for just north of the checkpoint. Rodriguez approached the checkpoint, talked to Prado for about 15 seconds, and was sent on through.

Rodriguez was arrested about one-half mile north of the checkpoint. The white Ford truck that Rodriguez was driving contained 435 pounds of marijuana hidden in the flatbed. Rodriguez refused to give a post-arrest statement, but he confirmed that he planned to meet a man in a red truck at a store.

Meanwhile, Bustos, driving Rodriguez's red truck, was observed driving northbound on Highway 16 until he reached Hebronville, where he stopped at a small convenience store on the highway. Bustos got out of the truck and looked two to three times toward the south watching the approaching northbound traffic on Highway 16. He went into the store and then disappeared behind the building for about 15 seconds. He then began walking south on Highway 16, leaving the red truck parked at the store. Agents moved in and arrested him. Bustos told agents that he was walking

to Pharr, Texas, to pick watermelons. He denied knowing anything about the red truck.

At their joint trial, Rodriguez testified and asserted an entrapment defense. He testified that the plan to smuggle marijuana through the checkpoint was Prado's idea and that Prado had pressured him into participating. He testified that he did not conspire with Bustos, had never met him, denied that Bustos was his contact for the marijuana, and did not know where Bustos got the white truck with the marijuana or from whom. He testified that he did not know if Bustos knew that the truck contained marijuana, but did know that Bustos knew about the plan to switch trucks and meet at the store. He did admit that he and Bustos switched trucks.

It is clear from the facts that the circumstantial evidence in this case is sufficient to infer Bustos' knowing participation in the conspiracy and knowing possession of the marijuana. Rodriguez told Prado that he would meet someone driving a white Ford truck containing the marijuana, switch trucks with him, and drive through the checkpoint. Rodriguez admitted that he and the driver of the white truck, planned to meet on the other side of the checkpoint at the store. Bustos was observed driving the white truck containing the marijuana. Rodriguez admitted that he switched trucks with Bustos. Bustos drove through the checkpoint and stopped at a store where he appeared to be waiting for someone. The moral coincidence is strong. Bustos and Rodriguez engaged in concerted action from which it could be inferred that they conspired together. It is also unlikely that Bustos would be

entrusted by other members of the conspiracy to drive a truck containing 435 pounds of marijuana worth over a quarter of a million dollars if he was not part of the conspiracy. **See United States v. Gallo**, 927 F.2d 815, 821 (5th Cir. 1991).

Even if Bustos and Rodriguez had never met and did not know each other's identities, that would not prevent Bustos from being found guilty of conspiracy. The jury could find Bustos guilty of conspiracy if he knowingly participated with a core conspirator, even in the absence of contact with other conspirators. **United States v. Lokey**, 945 F.2d 825, 833 (5th Cir. 1991). The circumstantial evidence was sufficient for the jury to infer that Bustos conspired with the person whom Rodriguez testified was his contact, and the supplier of the marijuana, who sent Bustos with the white truck to meet Rodriguez.

The same evidence which establishes Bustos' knowing participation in the conspiracy supports the inference that he knew the truck contained marijuana. **See United States v. Rosalez-Orozco**, 8 F.3d 198, 201 (5th Cir. 1993). Further, the jury could infer from the fact that Bustos started to walk away from the store that he knew something had gone wrong when Rodriguez did not appear shortly after he arrived at the store, and he sought to distance himself from the truck containing the marijuana.

The evidence adduced at trial, when viewed in the light most favorable to the verdict, is sufficient to convict Bustos. We cannot say that a rational trier of fact would not have found each element of each offense beyond a reasonable doubt.

Conclusion

Based on the foregoing, Bustos' convictions and sentences are
AFFIRMED.