UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7449
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

AUCENCIO PEREZ-MUNOZ,

Defendant-Appellant.

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

(CA-I-93-22-04)

(March 18, 1994)

Before WISDOM, JOLLY, and JONES, Circuit Judges.

PER CURIAM.[*]

This appeal challenges the impartiality of the district judge who presided over Aucencio Perez-Munoz's trial on drug charges. Perez-Munoz contends that judicial bias tainted his trial. His challenges are frivolous. Therefore, we AFFIRM his conviction.

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[*] Local Rule 47.5.1 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Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Because Perez-Munoz has limited his appeal to an allegation of judicial bias, we need undertake no lengthy disquisition of the facts that led to his trial and conviction. Perez-Munoz drove a brown van to a trucking company parking lot. He and three other men then removed boxes of marijuana from the van and loaded them into a trailer truck. They were observed by law enforcement officials who had been covertly watching the lot. Perez-Munoz and the other men left the scene in their vehicles and were followed by law enforcement officials. The police officers attempted to pull Perez-Munoz over, but he fled. The police gave chase and eventually apprehended Perez-Munoz on foot.

Perez-Munoz was charged with (1) conspiring to possess more than 100 kg of marijuana with intent to distribute[1] and (2) aiding and abetting the possession of approximately 665 pounds of marijuana with intent to distribute.[2] At trial, he admitted procuring and driving the van and helping load the trailer truck, but denied knowing that the boxes he had loaded contained marijuana. The jury returned verdicts of "guilty as charged" on both counts, and Perez-Munoz appealed.

II.

The district judge's duty of impartiality is well established. We summarized this duty in United States v. Carpenter:

> It is axiomatic . . . that the trial judge has a duty to conduct the trial carefully, patiently, and impartially. He must be above even the appearance of being partial to the prosecution. On the other hand, a federal judge is not a mere moderator of the proceedings. . . . He may comment on

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[1] 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846.

[2] 21 U.S.C. §§ 841(a)(1), 841(b)(1)(b); 18 U.S.C. § 2.

> the evidence, may question witnesses and elicit facts not yet adduced or clarify those previously presented, and may maintain the pace of the trial by interrupting or cutting off counsel as a matter of discretion. *Only when a judge's conduct strays from neutrality is the defendant thereby denied a constitutionally fair trial.*[3]

In evaluating an allegation of judicial bias, we look at the trial as a whole in determining whether the "trial judge overstepped the bounds of acceptable conduct".[4] "[E]ven a comment arguably suggesting a judge's opinion concerning guilt is not necessarily reversible error but must be reviewed under the totality of the circumstances, considering factors such as the context of the remark, the person to whom it is directed, and the presence of curative instructions".[5]

A. The District Judge's Comments on the Evidence

1. The "Well Presented" Remarks

Perez-Munoz contends that on two occasions, the district judge remarked that the prosecution's case had been "well presented". In the first instance, the judge stated that

> [Y]ou've seen the tape [a videotape of the chase and arrest of Perez-Munoz] and you've heard the explanations about who moved where and who turned where and why and so forth and it's been, I think, very well presented to you. . . .

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[3] United States v. Carpenter, 776 F.2d 1291, 1294 (5th Cir. 1985) (emphasis added) (quoting Moore v. United States, 598 F.2d 439, 442 (5th Cir. 1979)).

[4] United States v. Lance, 853 F.2d 1177, 1182 (5th Cir. 1988).

[5] Id.

> [Y]ou've heard [the defendant's] explanation for why he did what he did, and that's fine.[6]

The second instance of an allegedly biased comment on the evidence occurred when the judge told the jury that

> [T]his case has been processing here for a couple of months, it's been well presented, and we hope to get a verdict that ends it one way or the other, and that's your duty, to try very hard to do that.[7]

These comments were made in the course of instructing the jury about their duty to deliberate as "impartial judges" and their obligation to attempt to "reach the correct verdict under the law and under the evidence by reasoning intellectually with each other and openly and honestly debating with each other".[8]

Because Perez-Munoz did not contemporaneously object to these comments, we review them for plain error, with the verdict to be upheld unless doing so would result in a manifest miscarriage of justice.[9]

We see no plain error here. The district judge's first quoted comment was obviously an expression of approval of the advocacy presented by both sides. The judge did not state, as Perez-Munoz would have us imply, that the prosecution's case had been better presented

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[6] 2 Rec. 337.

[7] Id. at 339.

[8] Id. at 340.

[9] See United States v. Cartwright, 6 F.3d 294, 300 (5th Cir. 1993); Carpenter, 776 F.2d at 1295.

than the defense's. The quoted statement, which calls the defense's own case "fine", evinces no impartiality on the district judge's part.

The second comment, which refers only to the "case" having been well presented, cannot even be misconstrued as a comment in the prosecution's favor. The comment speaks for itself. No plain error is evident.

2. The Remarks on Uncontroverted Elements of the Offense

Perez-Munoz next argues that the district judge improperly commented that certain elements of the offenses of which Perez-Munoz was accused had not been disputed. The judge remarked that "most of the elements of these two charges are just not in dispute".

We note at the outset that the trial judge's comment was entirely accurate. Perez-Munoz admitted most of the case against him. He admitted driving the trailer truck and helping load it with marijuana. His sole defense at trial was that he was unaware that the boxes he had loaded into the truck contained drugs.

Federal judges may guide jurors in their deliberations by remarking on the evidence, so long as the judge gives the jury a limiting instruction to the effect that they are not bound by the judge's comments.[10] The district judge did just that, instructing the jury that they alone could weigh the evidence and make credibility determinations, and that they must follow the law and disregard any other questions or comments made by the judge.[11]

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[10] United States v. Esparza, 882 F.2d 143, 146 (5th Cir.), cert. denied, 493 U.S. 969 (1989).

[11] See 2 Rec. 318-19, 322.

B. The Jury Instructions

Finally, Perez-Munoz attempts to inflate the trial judge's misstatement of the burden of proof--a misstatement which was immediately corrected, then corrected again at Perez-Munoz's request--into a ground for reversal.

In response to a question from the jury, the district judge gave the jury a full explanation of the required elements of the conspiracy offense. At the end of the explanation, the judge gave the jury a supplemental instruction that contained a misstatement of the burden of proof:

> Now, remember again that, in the end, it's the Government's burden. *In other words, if it's kind of 50-50, well, then the defendant loses.* In fact, the burden is really heavier than that. The Government has to satisfy you beyond a reasonable doubt that their version is right. But having said that, that's the choice you have to make.[12]

What the highlighted text took away from Perez-Munoz, the remainder of the instruction immediately gave back. Read as a whole, the charge states that the government's burden is higher than "50-50". To clear up any doubt, however, the trial judge, at Perez-Munoz's request, brought the jury back and gave them another instruction to the effect that they should disregard his "slip of the tongue" in appearing to assign the burden of proof to the defendant. The judge then told the jury:

> So that means that if you just don't know the answer, if you can't make up your mind in your own heart one way or the other, it's maybe "yes", maybe "no", then that would not be guilt beyond a reasonable doubt and then the defendant would win and the Government would lose. So it's the Government's burden to prove guilt. It is not the defendant's burden to prove guilt. It's the Government's burden to prove that the

[12] Id. at 354.

> defendant is guilty beyond a reasonable doubt. And I hope that's always been clear to you, but in case of the tongue slip here, I'm correcting that.[13]

We must review the jury charge in its totality rather than taking each individual element in a vacuum.[14] Any error in the district judge's slip of the tongue was immediately corrected, then corrected again at great length at Perez-Munoz's request. This challenge to Perez-Munoz's conviction has no merit.

We AFFIRM the defendant's conviction.

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[13] Id. at 356-57.

[14] United States v. Eargle, 921 F.2d 56, 58 (5th Cir.), cert. denied, --- U.S. ---, 112 S. Ct. 52, 116 L. Ed. 2d 29 (1991).