

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7508
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OSCAR HERRADA HERRERA,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(CR L 93 29 2)

(October 10, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

The question presented in this appeal is whether the government failed to produce sufficient evidence of the defendant's predisposition to commit the offenses charged and failed to prove that there was duress involved.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I

The jury found Oscar Herrada Herrera guilty of: conspiring to possess with intent to distribute in excess of 100 grams of heroin (count 1) in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B); possessing with intent to distribute in excess of 100 grams of heroin (count 2) in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. § 2; and using and carrying a firearm in relation to a drug trafficking crime (count 3) in violation of 18 U.S.C. § 924(c)(1). He was sentenced to concurrent 63-month terms of imprisonment on counts one and two and to 60 months on count three to run consecutively to the sentence imposed in the first two counts. The court also sentenced Herrera to concurrent four-year terms of supervised release on counts one and two, and to a three-year term of supervised release on count five to run concurrently with the sentence imposed in the other two counts.

II

In cases when, as here, "the jury has been instructed on entrapment but has rejected the defense, the standard of review before this Court is whether, when viewing the evidence in the light most favorable to the Government, a reasonable jury could find, beyond a reasonable doubt, that the defendant was predisposed to commit the offense." U.S. v. Hudson, 982 F.2d 160, 162 (5th Cir.) (internal quotations and citations omitted), cert. denied, 114 S.Ct. 100 (1993).

A defendant's willing and energetic participation in an offense is sufficient evidence to establish predisposition. U.S. v. Mora, 994 F.2d 1129, 1137 (5th Cir.), cert. denied, 114 S.Ct. 417 (1993) (based on defendant's willing participation in a drug transaction, jury could reject his testimony that he was entrapped and find beyond a reasonable doubt a predisposition to commit the crime); see also Hudson, 982 F.2d at 162 (recognizing that a defendant's enthusiasm for the crime can satisfy the predisposition requirement).

A reasonable jury could, from the evidence presented, find that Herrera was predisposed to commit the offenses. Drug Enforcement Administration (DEA) Agent Leonardo Perez testified to Herrera's active and willing participation in the undercover negotiations leading up to the drug transaction. For example, Herrera set out terms concerning how the transaction was to take place and told Agent Perez that he "would deal directly with him, not with anybody else." Herrera also stated that he could provide larger amounts of heroin in the future if the first transaction was successful. Herrera arrived at the site where the drug transaction was to take place armed with a loaded semi-automatic handgun, and he sent an associate to get the heroin.

Although Herrera's version of events differs sharply from the version presented by the Agent Perez, the jury was entitled to credit the testimony of the agent over that of Herrera. See Hudson, 982 F.2d at 162; see also Mora, 994 F.2d at 1129

("Generally, speaking a defendant's testimony cannot by itself establish entrapment as a matter of law because, absent unusual circumstances, the jury is always entitled to disbelieve that testimony."). Thus, examining the evidence in the light most favorable to support the verdict, there was sufficient evidence from which a reasonable jury could conclude that Herrera was predisposed to commit the offenses.

The jury also rejected Herrera's claim that this conduct was the result of duress caused by Torres' threats to him and to his father. To establish a duress defense, the defendant must prove: 1) that he was under an unlawful, present, imminent, and impending threat inducing a well-grounded apprehension of death or serious bodily injury; 2) that he had not recklessly or negligently placed himself in a situation in which it is probable that he would be forced to choose criminal conduct; 3) that he had no reasonable legal alternative to violating the law, i.e., no chance to refuse to do the criminal act and also to avoid the threatened harm; and 4) that a direct causal relationship could reasonably be anticipated between the criminal action taken and the avoidance of the threatened harm. U.S. v. Liu, 960 F.2d 449, 453 (5th Cir.), cert. denied, 113 S.Ct. 418 (1992).

Since there was no evidence that Herrera was under a present, imminent, and impending threat of death or serious bodily injury at the time he participated in the heroin transaction, or that no reasonable legal alternative existed to committing that crime, a

reasonable juror could have concluded that his conduct was not the result of duress. Thus, his argument fails. See U.S. v. Gant, 691 F.2d 1159, 1162-65 (5th Cir. 1987).

III

For the reasons stated herein, the conviction and sentence of Oscar Herrada Herrera are, in all respects,

A F F I R M E D.