UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7510
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS BALLESTEROS, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(l-93-CR-41-1)

(October 12, 1994)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.*

PER CURIAM:

Appellant Ballesteros, convicted of conspiracy and possession with intent to distribute marijuana and sentenced inter alia to a 72-month term of imprisonment, asserts on appeal that he had standing to challenge the warrantless search of the house where he was found and that there was no probable cause for his arrest. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

U.S. Border Patrol agents, while monitoring the riverbanks along the Rio Grande between the U.S. and Mexico, saw three individuals jump into the river and swim across it to Mexico. Thereafter, they found three burlap sacks of marijuana on the U.S. side of the river. The agents followed shoeprints and drag marks from the site on the riverbank where they found the marijuana to a residence and a Lincoln Continental (the "vehicle") parked in front of the residence.

The agents found a fourth burlap sack, similar to the other three, hidden under a washtub in the carport. They followed additional tracks from the carport to the front door of the residence. The agents knocked on the doors of the residence, and, although a television set was on, no one answered. They contacted Laredo police officers, who, without an arrest or search warrant, entered the unlocked residence. There they found, in the bathroom, Ballesteros "huddled" behind a door and two paper grocery bags containing approximately four pounds of marijuana. Thereafter, Ballesteros was arrested, and the marijuana was seized, as were Ballesteros' tennis shoes, jacket, and documents from the vehicle. The soles of Ballesteros' tennis shoes matched some of the shoeprints found by the agents. At the time of his arrest, Ballesteros admitted that the marijuana belonged to him.

Ballesteros filed a motion to suppress the marijuana and any other items seized from the residence, as well as any statements or admissions made by him at the time of his arrest, and any documents seized from the vehicle. He argued that the search

was illegal because it was conducted without consent and no exception to the warrant requirement applied. Although Ballesteros admitted that he was not related to the owner of the residence, he contended that he was a close family friend who had free access to the house and was familiar with the inside of the house. He also contended that he had the owner's permission to make himself at home even when no one else was home. He maintained that at the time of the search, he was in control of the premises, had each of the two doors to the residence closed, and was not an intruder. At the trial, the owner of the residence testified that she knew Ballesteros very well, that she had known him since he was two years old, and that he was welcome in her house. In a prior interview, however, she told Task Force Investigators that she did not know Ballesteros and did not give him permission to be in her house.

The district court held an evidentiary hearing on the motion to suppress, denying the motion as to the marijuana found outside of the house and continuing the hearing until trial. Ballesteros has failed to include the transcript of the suppression hearing in the record on appeal. Immediately prior to the commencement of the jury trial, the court denied the remainder of the motion to suppress, reasoning that

> [h]e was going to this house in the evening to look for an individual that doesn't even live there himself, who lives in Eagle Pass, Texas, which is about a hundred miles away, but he was going on the long shot that maybe this fellow was there. He had not been to this house in three months and he makes no suggestion that he ever has lived there, ever

> kept any belongings there, ever stayed overnight there, as a houseguest. His position is that simply sometimes he goes by to visit the mother of his friend and that he's always welcome to visit the mother of his friend. When he got there, he was let in by somebody he says is a total stranger and then he says he sat there, waiting for the mother to come home, so he could talk to her.

The court cited factors set forth in United States v. Ibarra, 948 F.2d 903, 906 (5th Cir. 1991), reh'g on other grounds, 965 F.2d 1354 (5th Cir. 1992) (en banc), and noted that Ballesteros disclaimed all interest in the marijuana seized in the bathroom, had no possessory interest in the house, did not have the right to exclude others from the house; further, it noted that one of the doors was ajar, and one could see in the windows. The record contains no direct reference by the district court to Ballesteros' contention that the documents seized from the vehicle, as opposed to those seized from the carport or the residence, should be suppressed.

For the reasons he asserted to the district court, Ballesteros argues that the district court erred in finding that he lacked standing to contest the search and seizure. Ballesteros has, however, failed to provide this Court with the transcript of the suppression hearing. "It is appellant's responsibility to order parts of the record which he contends contain error . . . ." United States v. O'Brien, 898 F.2d 983, 985 (5th Cir. 1990). This Court declines to review his assignment of error because he has not supplied portions of the record said to contain error. Id.; see Fed. R. App. P. 10(b).

But even if we were to consider Ballesteros's contention, the record is sufficient to determine that Ballesteros clearly did not have standing to attack the search and seizure.

The right to claim Fourth Amendment protection is based "`upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.'" Minnesota v. Olson, 495 U.S. 91, 95, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990) (citation omitted). Ballesteros bears the burden of establishing standing to challenge the search and seizure under the Fourth Amendment. United States v. Pierce, 959 F.2d 1297, 1303 (5th Cir.), cert. denied, 113 S. Ct. 621 (1992). In assessing whether a defendant has a reasonable expectation of privacy this Court examines several factors, including,

> whether the defendant has a possessory interest in the thing seized or the place searched, whether he has the right to exclude others from that place, whether he has exhibited a subjective expectation of privacy that it would remain free from governmental intrusion, whether he took normal precautions to maintain privacy and whether he was legitimately on the premises.

Ibarra, 948 F.2d at 906 (quotation and citation omitted). At the close of jury trial, the district court reiterated its reasons for denying Ballesteros' motion to suppress, stating that

> [Ballesteros] . . . hadn't been there in three months, doesn't live there, has no ownership interest there, never stays there overnight, has no personal property there, claims nothing in the house, but was sitting around waiting for the woman of the house to come home so that he could ask her something about her son, and under those circumstances, I think he has no privacy right.

The district court did not err in determining that Ballesteros lacked standing to challenge the legality of the search of the residence.

Ballesteros fares no better in his challenge to the court's denial of his motion to suppress documents found in the vehicle. Although Ballesteros alludes to this issue in his appellate brief, he has failed to brief the issue. Arguments must be briefed to be preserved. Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988); see Fed. R. App. P. 28(a)(5). The issue was waived.

Finally, Ballesteros argues, in his "sub-issue," that there was no probable cause to support his warrantless arrest. He appears to imply, as he did in the district court, that even if he lacked standing to contest the search, the officers needed probable cause to enter the residence. His lack of standing prevents him from making that argument. He can complain, however, that the officers lacked probable cause to arrest him after they entered the residence.

A warrantless arrest may be made if the arresting officers have probable cause. Charles v. Smith, 894 F.2d 718, 723 (5th Cir.), cert. denied, 498 U.S. 957 (1990). Probable cause to arrest exists when the facts and circumstances known at the time of arrest are sufficient to cause a reasonable law enforcement officer to believe that a crime has been or is being committed. United States v. Martinez, 808 F.2d 1050, 1055 (5th Cir.), cert. denied, 481 U.S. 1032 (1987).

The officers found Ballesteros huddled behind a door in a room which also contained bags containing four pounds of marijuana. Further, the soles of Ballesteros' shoes matched the shoeprints found by the agents leading from the three burlap sacks of marijuana found on the riverbanks to the residence. Probable cause requires only a showing of the probability of criminal activity. United States v. Daniel, 982 F.2d 146, 151 (5th Cir. 1993). Thus, the officer(s) had probable cause to arrest Ballesteros.

For these reasons, the conviction is AFFIRMED.