

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7599
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROMEO TRINIDAD FLORES, JR.,

Defendant-Appellant.

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

(CR-L91-154-02)

(November 3, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Romeo Trinidad Flores was convicted by a jury for conspiracy to possess with intent to distribute marijuana and was sentenced to 20 years' imprisonment and ten years' supervised release. Romeo Flores' first conviction for this offense was reversed and remanded

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

by this Court for a new trial due to the erroneous admission of grand jury testimony of a co-defendant. United States v. Flores, 985 F.2d 770 (5th Cir. 1993).

At the second trial, the Government introduced the testimony of a paid informant who did not testify at the first trial, corroborated by the testimony of surveillance officers. The informant explained the arrangements Edmundo "Mundo" Flores, Romeo Flores' brother,¹ made with his Mexican supplier; described the plan to smuggle marijuana from the Republic of Mexico, to the banks of Falcon Lake, and then to a ranch in Bustamante, Texas; described meetings at which Romeo was present with co-conspirators while plans were discussed; and described Romeo's actions in connection with the operation.

On or about May 21, 1990, while the informant was in the Republic of Mexico, a marihuana supplier, Florencio Maldonado, advised the informant that a large load of marihuana would be transported from Mexico to the United States by boat to the edge of "El Tigre" creek in Zapata County, Texas. Maldonado instructed the informant to relay the information to Mundo and to give Mundo a telephone number where he could reach Maldonado.

The informant brought the message to Mundo's mother's house in Zapata. The informant contacted a member of the Starr County Narcotics Task Force, Octaviano Ramirez, and notified the officer of the impending shipment of marijuana.

¹Because of potential confusion of the two brothers whose last name was Flores, we will hereafter refer to Romeo Flores, the appellant, as "Romeo" and Edmundo Flores, as "Mundo."

Unbeknownst to any of the conspirators, United States Customs Service Special Agent Ernesto Espindola infiltrated the organization. Agent Espindola had been recruited by Gilbert Garcia to physically transport the marihuana for the organization, and on May 22, 1990, Agent Espindola, Garcia and "Pancho" travelled from Brownsville to Zapata for the purpose of familiarizing Espindola with the Bustamante ranch site where the marihuana would be placed inside the tractor-trailer he would drive. The three men drove through Zapata on Highway 83 and turned north on Highway 16. As they exited the city limits, Garcia pointed to a house with horse stables and a dump truck parked on the premises, and stated that "the owner of the marihuana owned that property." As they travelled back toward Zapata, Garcia pointed to a residence, indicating that the resident of the house, a County Commissioner in Zapata County named Flores, was the brother of the owner of the marihuana.

The operation required that the brushy area by El Tigre Grande creek be cleared. Mundo instructed the informant to participate in the clearing of brush from the prospective landing site on the banks of the lake. Mundo dropped off the informant and three other men, identified by the informant as "the three Navarros," at the ranch site near the lake. For more than four hours, the four men cleared a 100 yard-swath from the banks of the lake to a cow path that led away from the lake.

When the four men completed their task, they walked back to the entrance gate to the ranch. Approximately ten minutes after

reaching the gate, Romeo and Mundo arrived in a red vehicle driven by Romeo. Romeo and Mundo dropped off food for the four men. The informant and Mundo conversed about the marijuana shipment. Romeo was present and within hearing distance. The informant advised Mundo that the landing site for the marijuana and path toward the ranch gate were ready. The informant explained that he spoke very loudly because Mundo was hard of hearing. The informant identified the defendant as Romeo Flores.

Romeo then drove the informant, one of the Navarro brothers, and Mundo to the Oso Blanco Hotel near the El Veleno bridge outside of Zapata to meet three persons responsible for transporting the marijuana from Bustamante to Houston. The purpose of the meeting was to inform them that the ranch area was ready. The informant and Mundo exited the vehicle and met with the three transporters, including Garcia. During this meeting, Garcia instructed Mundo to acquire a truck to transport the marijuana from the banks of the El Tigre Grande to the Bustamante ranch where the marijuana would be transferred to another truck.

At the conclusion of the meeting, Mundo and the informant rejoined Romeo and Navarro in Romeo's red car. In the presence of Romeo, the informant and Mundo discussed the necessity of locating a truck to transport the marijuana. Upon their arrival in Zapata, Romeo and Navarro exited the vehicle, and Mundo stepped into the driver's seat. At approximately 5:00 or 6:00 p.m., Mundo and the informant began looking for a truck. They arrived at the Flores' family horse stables on Highway 16 where a dump truck was parked.

After they acquired the dump truck, Mundo dropped off the informant where his Ford Bronco was parked, and Mundo departed.

The informant contacted the Starr County Drug Task Force and showed the officers the ranch where the marihuana was going to be offloaded. He entered the ranch between 8:30 and 9:00 p.m. and waited for the other conspirators to arrive. Around 10:30 p.m., Juan Longoria arrived at the ranch in the dump truck in the company of the three Navarro brothers. The informant learned that the marihuana was rescheduled for shipment from the ranch at 5:00 a.m. and not the previously planned 11:00 p.m.

Based upon the information supplied by the informant, United States Customs Service special agents and Starr County Narcotics Task Force officers established surveillance between 8:00 and 9:00 p.m. on May 22, 1990, across from the suspect ranch, which was located approximately 1.5 miles north of Lopeno, Texas, on United States Highway 83. The informant hiked back to the entrance gate of the ranch and notified the two surveillance officers across Highway 83 that the load of marihuana would be transported from the ranch at 5:00 a.m. rather than 11:00 p.m.

Between 1:00 and 1:30 a.m., the marihuana arrived in five boats occupied by eight men. Over the course of the next two and one-half hours, the conspirators unloaded the five boats and placed the marihuana in the dump truck. The eight men in the boats departed, and the informant, Longoria, and the three Navarro brothers sat in the dump truck and rested.

At approximately 4:00 a.m., the officers conducting surveillance observed a Chevrolet Lumina driving slowly from the direction of Lopeno. The vehicle, initially identified by its distinctive tail and brake lights, drove slowly toward the dipping bath near the entrance of the ranch and stopped on the right side of the road. A passenger exited, walked to rear of the vehicle, and began "calling out" or "yelling" in Spanish in the direction of the dipping bath to someone on the other side of the gate. The passenger re-entered the vehicle, and it made a U-turn and returned in the direction of Lopeno.

Moments later, the vehicle returned with the passenger sitting on the door frame to the vehicle, yelling toward the dipping bath area. The agent described the passenger as an hispanic male, between 20 and 30 years of age. The agent also identified the first three digits of the license plate, "696", and that the vehicle was a Lumina.

The vehicle then drove westbound approximately one mile, made a U-turn, drove back, pulled off the side of the road, and stopped just west of the entrance gate to the ranch. The passenger exited the vehicle, and the driver turned around again and drove in the direction of Lopeno. A few minutes later, the same vehicle returned to the gate, a passenger entered the vehicle, and the car drove toward Lopeno.

The same Lumina returned a fourth time, stopped on the eastbound lane of Highway 83, and two occupants exited the vehicle and conversed in Spanish. One of the men was overheard to say, "Ya

es tarde. Nunca salio el troque. Ya se esta haciendo tarde." ("It's already late. The truck never came out.") Then vehicle lights appeared on the horizon, and one of the men observed, "Hay viene el troque ya." ("The truck is coming out already.") Then the two men re-entered the Lumina and headed south towards Lopeno.

The surveillance officers then heard the sound of a "mufflerbusted" truck, identified by the informant as the dump truck. According to the informant, Longoria drove the dump truck to a location about 300 yards from the entrance to the ranch and Highway 83. The informant walked to the gate and waited five to ten minutes until Romeo and Mundo arrived in Romeo's red car.

The lights to the red car were turned off, and Mundo exited the vehicle. Romeo remained seated in the car with the windows down, approximately eight-to-ten feet from the gate. In loud tones, the informant advised Mundo that the marihuana was placed in the dump truck and ready. Mundo told the informant that they had heard that somebody had opened a door or that somebody was down by the highway. The informant told Mundo that he had not seen anything. Mundo explained to the informant that he (Mundo) and the informant were required to return to the Bustamante ranch and break a lock. The informant agreed, took an axe from Mundo, placed the axe in his Bronco, and then he and Mundo entered the Bronco and drove away. The informant drove approximately two-to-three miles towards Zapata from the entrance to the ranch to see if they could see anyone parked there. Upon their return, "Mundo told [Romeo] to

be on the lookout because the dump truck was going to come out." The informant and Mundo departed in the Bronco and drove to the Bustamante ranch.

Meanwhile, the Lumina entered the ranch and proceeded with its headlights turned off in the direction of the dump truck. Moments later, the dump truck emerged with its headlights off. Surveillance officers observed the Lumina immediately behind the dump truck. The dump truck exited the ranch, proceeded towards Zapata on Highway 83, and turned on its headlights as it reached the "El Tigre Grande" bridge. Surveillance officers observed three men walking around the Lumina and shutting the ranch gate. The men entered the car and followed the dump truck, turning the headlights on as the vehicle entered Highway 83. At 4:42 a.m., the other surveillance team members were notified that the dump truck and the red vehicle with Texas license plate "696" were travelling on Highway 83 towards Zapata.

The dump truck was followed by several surveillance vehicles. Agent Roy Rivera recalled passing a small, compact sedan south of Zapata before catching up with another surveillance vehicle, occupied by Agents Salinas and Lozano, and the dump truck at the El Veleno bridge just outside the city of Zapata. Agents followed the dump truck through Zapata until it was stopped one mile east of the city on Highway 16.

The dump truck contained 77 bags of marihuana weighing approximately 2,700 pounds, valued at approximately \$2.5 million. After the dump truck was stopped, the same red vehicle that Agent

Rivera passed on Highway 83 while following the dump truck was observed driving north on Highway 16, passing the scene of the stop of the dump truck.

At Agent Lozano's direction, Texas Department of Public Safety Trooper Joseph Vaughn located the red Lumina. The vehicle was approximately two-to-three miles east of the dump truck. At 5:25 a.m., Trooper Vaughn pulled over the Chevrolet Lumina. Vaughn identified Romeo Flores as the driver. Romeo told Vaughn that he was "just driving around." Vaughn identified the front seat passenger as Robert Sanchez and immediately recognized the rear seat passenger as Oscar Navarro.

Vaughn ran a check on Romeo's driver's license and discovered that Romeo had outstanding traffic tickets. Vaughn instructed Romeo to follow him to the Zapata County Courthouse. When they arrived at the courthouse, Romeo paid a \$38 fine with a hundred dollar bill, told the officer that he would pick up his change later, and hurriedly left.

Romeo's wife, Gloria, was the registered owner of the 1990 Chevrolet four-door vehicle, license plate 696 WNM. Agent Rivera testified that he personally accompanied the informant to the landing site at the ranch a few days after the drug seizure and observed that brush had been cut along a caliche road toward Falcon Lake. He also confirmed that stables located off Highway 16 between Zapata and Bustamante were owned by the Romeo Flores family.

OPINION

Speedy Trial

Romeo argues that he was deprived of his Sixth Amendment and statutory rights to a speedy trial, and that he was deprived of due process of law under the Fifth Amendment. His argument is mainly based on the delay between the issuance of this Court's mandate reversing his conviction and his second trial. He also appears to make an argument regarding the total delays beginning back before his original trial until his second trial. Romeo also argues that the Speedy Trial Act is unconstitutional because it forces a defendant to choose between his right to a speedy trial and his right to defend himself by filing pretrial motions such as a motion for release.

The mandate of this Court reversing Romeo's conviction was issued on May 24, 1993. According to the Speedy Trial Act, the Government had seventy days to retry Romeo. See 18 U.S.C. § 3161(e). The periods of excludable delay listed in § 3161(h) apply when calculating the seventy-day time limit. Id.

Romeo's second trial began on August 13, 1993, with jury selection.² August 2 was the seventieth day and the last day to begin Romeo's trial under the Act, and so Romeo's trial began 11 days past the Act's time limit.

²Contrary to Flores' argument that the trial did not start with jury selection on August 13, trial begins on the voir dire of the jury. See U.S. v. Howell, 719 F.2d 1258, 1262 (5th Cir. 1983), cert. denied, 467 U.S. 1228 (1984).

The Government filed a motion to continue the trial because the Solicitor General was still deciding whether to seek review of this Court's decision by writ of certiorari to the Supreme Court. The Solicitor General eventually decided not to seek writs. The Government also filed a supplemental request for exclusion of additional time from the seventy-day period. The district court granted the Government's motion for a continuance, holding in part that the Speedy Trial Act was not violated because there were at least 11 days of excludable time resulting from the pendency of the Government's motion for continuance. Romeo filed a motion to dismiss the indictment for violation of the Speedy Trial Act, which the district court denied based on the reasons in its order granting the Government's motion for continuance.

This Court reviews the facts supporting a district court's ruling on a Speedy Trial Act violation for clear error and reviews legal conclusions *de novo*. United States v. Johnson, 29 F.3d 940, 942 (5th Cir. 1994). Section 3161(h)(1)(F) provides for a period of excludable delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on the motion or other prompt disposition of the motion. 18 U.S.C. § 3161(h)(1)(F); Johnson, 29 F.3d at 942. The actual filing date of the motion and the date of the court's disposition are excludable. Johnson, 29 F.3d at 944 n.4. The Act is all but absolute in excluding time during which motions are pending. United States v. Neal, 27 F.3d 1035, 1042 n.4 (5th Cir. 1994).

The Government filed its motion for continuance on July 19, 1993, Romeo filed a response objecting to the grant of a continuance, the district court held a hearing on the motion on July 30, and the court ruled on the motion on August 2. The period from July 19 until August 2, a period of fifteen days, is excludable delay according to § 3161(h)(1)(F). Therefore, the district court's finding of a period of excludable delay during the pendency of the motion is correct, and the commencement of Romeo's trial on August 13 was timely under the Act.

Because this period of excludable delay is sufficient to cover the eleven-day delay between August 2 and 13, this Court need not address Romeo's other arguments regarding whether a continuance was justified while the Government decided whether it would seek writs, or whether the Act violated the Ninth Amendment because it forced Romeo to choose between a speedy trial and filing a motion for release.

Regarding Romeo's Sixth Amendment speedy trial and Fifth Amendment due process arguments, Romeo did not raise these issues in the district court. Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, this Court may remedy the error only in the most exceptional case. United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. United States v. Olano, ___ U.S. ___, 113 S. Ct. 1770, 1777-79, 123 L. Ed. 2d 508 (1993).

First, an appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain ("clear" or "obvious"), and that it affects substantial rights. Olano, 113 S. Ct. at 1777-78; Rodriguez, 15 F.3d at 414-15; Fed. R. Crim. P. 52(b). This Court lacks the authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Olano, 113 S. Ct. at 1778 (quoting Fed. R. Crim. P. 52(b)). As the Court stated in Olano:

the standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, [297 U.S. 157] (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Olano, 113 S. Ct. at 1779 (quoting Atkinson, 297 U.S. at 160). Thus, this Court's discretion to correct an error pursuant to Rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

Considering that the Speedy Trial Act was not violated, a delay of 81 days between the issuance of the mandate and retrial is not plain error affecting Romeo's substantial rights. To the extent that Romeo challenges the delay between his initial

indictment before his first trial and his retrial,³ Romeo did not raise a speedy trial issue with regard to his first trial in his previous appeal, and any delay since then has been due to Romeo's appeal and retrial.

Trial Publicity

Romeo argues that his right to a fair trial under the Sixth Amendment was violated because the district court failed to grant a mistrial when a local newspaper published prejudicial information regarding his prior convictions during the trial.

Romeo brought the newspaper article to the attention of the court and moved for a mistrial. The district court conducted individual voir dire of all the jurors to determine if they had read the article. Juror Pulido stated that she saw the headline, but did not read the article. She stated that reading the headline would not affect her decision in the case. Juror Reyna stated that she had not read the newspaper, but that she had heard something about the trial on the radio mentioning Zapata and a ton of marijuana. She did not hear any details, and the little she heard would not affect her decision. The district court found that the jury had not been contaminated and denied Romeo's motion for mistrial. Romeo made no objection to the ruling.

³Romeo's brief focuses mainly on his statutory right to a speedy trial and the delay between the issuance of this Court's mandate and his retrial. Although he refers to the Sixth Amendment, his argument does not focus on the total delays from first indictment to retrial, and he does not provide any law or analysis on his Sixth Amendment or Fifth Amendment claims. Therefore, these claims can be considered abandoned. See Yohey v. Collins, 985 F.2d 222, 225 (5th Cir. 1993).

The management of midtrial publicity is entrusted to the broad discretion of the district court. This Court will not reverse unless there is an abuse of that discretion. United States v. Bermea, 30 F.3d 1539, 1556 (5th Cir. 1994). When there has been publicity that could possibly prejudice the defendant's case if it reached the jurors, a district court should ask the jurors what information they have received, ask about the prejudicial effect, and make an independent determination whether the jurors' impartiality has been destroyed. Id. at 1560 (citation omitted). The district court did exactly this and determined that the jury had not been contaminated by the newspaper article. The district court did not abuse its discretion in denying Romeo's motion for mistrial.

Sufficiency of the Evidence

Romeo argues that the evidence was insufficient because he was never adequately or properly identified as a conspirator and was not proven to be in possession of any contraband. He also argues that, at most, the Government proved his mere presence at a place where a crime was committed.⁴

The standard of review for sufficiency of the evidence is whether a reasonable trier of fact could have found that the

⁴We note that Romeo's brief on this issue is seriously lacking in substance. He does not refer to any law regarding the sufficiency of the evidence or the elements of a conviction under 21 U.S.C. § 846, nor does he provide any detailed record cites of the evidence as it relates to his argument.

evidence established guilt beyond a reasonable doubt. This Court considers the evidence in the light most favorable to the Government, including all reasonable inferences that can be drawn from the evidence. Bermea, 30 F.3d at 1551.

In order to prove that Romeo committed the crime of conspiracy to possess with intent to distribute marijuana under 21 U.S.C. § 846, the Government had to prove that 1) a conspiracy to possess narcotics with intent to distribute existed, 2) Romeo knew of the conspiracy, and 3) Romeo voluntarily participated in the conspiracy. Bermea, 30 F.3d at 1551. No proof of an overt act is required. Id. at 1551-52. But see United States v. Shabani, 993 F.2d 1419 (9th Cir. 1993) (holding that the elements of a drug conspiracy under 21 U.S.C. § 846 do include an overt act requirement), cert. granted, ___ U.S. ___, 114 S. Ct. 1047, 127 L. Ed. 2d 370 (1994). Presence among or association with drug conspirators can be considered, but mere presence or association alone cannot establish that a person has voluntarily joined a conspiracy. Bermea, 30 F.3d at 1552.

The informant testified that Romeo and Mundo, riding in Romeo's red Lumina, brought food to the ranch for several of the conspirators to eat after they cleared the brush away to make room for the marijuana to be unloaded from the boats, and that Romeo was present and within hearing distance when he, the informant, and Mundo discussed the plan to smuggle marijuana; that Romeo, driving the red Lumina, drove the informant and Mundo to a meeting of the conspirators and was present in the car when he and Mundo discussed

the need to acquire a dump truck to haul the marijuana; and that Romeo and Mundo arrived together at the ranch in Romeo's red Lumina on the night the marijuana arrived, that Romeo was present and within hearing distance when the informant told Mundo that the marijuana was ready, and that Mundo told Romeo to be on the lookout for the dump truck. The red Lumina drove up and down the highway in front of the ranch several times, went into the ranch, then came out again following the dump truck containing the marijuana. The red Lumina was stopped in Zapata shortly after the dump truck was stopped, and Romeo was driving.

This evidence establishes more than mere presence. The informant's testimony establishes that Romeo acted as a driver to transport the conspirators to meetings and to the ranch, and that he acted as a lookout for the dump truck. This evidence is sufficient to establish voluntary participation in the conspiracy. The jury could reasonably infer that Romeo knew of the existence of the conspiracy and was participating knowingly. See United States v. Crain, ___ F.3d ___, (5th Cir. Sept. 19, 1994, No. 93-1331), slip p. 35, 1994 WL 508248 at *6 (circumstantial evidence that defendant accompanied other defendant going to Fort Worth to help with driving was sufficient; jury could reasonably infer that defendant knew that other defendant was going to Fort Worth to obtain drugs). The informant sufficiently identified the defendant as Romeo Flores, the person involved in the conspiracy.

The Government was not required to prove possession of the marijuana by Romeo for the conspiracy conviction. Proof of

possession, be it actual or constructive, would only be necessary if Romeo had been charged for the substantive offense. See Crain, No. 93-1331, slip p. 35-37 (discussing difference in burden of proof for conspiracy vs. substantive drug offense).

AFFIRMED.