

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-7636
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DANIEL SAUCEDA-MENDEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-L93-89-3 & 4)

(June 21, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:¹

Sauceda-Mendez challenges the sufficiency of the evidence to support his conviction on various narcotics offenses and a conviction for unlawful entry. We affirm.

I.

On the evening of April 26, 1993, U.S. Border Patrol Agents Mark Butler, Arturo Betancourt, Gustavo Reveles, and Bob Molina conducted a "field line watch" from different locations on the bank

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

above the Rio Grande River. The agents set up this line to detect individuals making illegal entries from Mexico. Agent Butler was stationed farthest upriver, with Agent Betancourt between 60 and 100 yards south of Butler, and Agents Reveles and Molina farther down river. The agents were in contact with each other by walkie-talkie.

At approximately 9:30 p.m., Agent Butler observed two groups of men cross the river from Mexico on inner tubes. The men had large black duffle bags stacked on top of the inner tubes and floated past Agents Butler and Betancourt. Butler was not able to identify any of the men. After the group floated past Butler, he relocated so that he could intercept the individuals if they made their way to a local highway.

Agent Betancourt testified that he saw four, rather than five, individuals cross the river in inner tubes that evening. Two of the individuals landed momentarily on the river bank, approximately 15 feet from Betancourt's position. Betancourt testified that he "got a very good look" at two of the subjects and was able to see their faces. He testified that the men were wearing dark clothing. He identified the defendant, Daniel Saucedo-Mendez, as one of the individuals he saw in the river. He also testified that the individuals who were subsequently arrested were the same individuals he saw in the river.

Agent Molina testified that he saw five individuals with four black duffle bags floating down river in inner tubes. He testified that the men wore only their underwear. Molina was within ten feet of the individuals as they traveled down river; however, Molina did

not see the men land because he had moved to a trail near a local radio station.

Agent Butler observed the group near the antenna towers of the radio station. He described five individuals moving at a fast pace, wearing dark shirts, and carrying black bags. Butler radioed Agent Molina. Shortly thereafter, Agent Molina saw five men on a trail near the radio towers. The men were wearing dark shirts and carrying four black duffle bags. Molina was within ten feet of the men. He identified Saucedá-Mendez as one of the men he saw running on the trail. Molina followed the men and moments later he saw them walking back to his position without the duffle bags.

Molina announced himself to the men as a Border Patrol agent and they began running. The men were arrested 25 feet from where Molina identified himself. Molina traced the footprints from where he first encountered the group and discovered four black duffle bags filled with marijuana alongside a fence. Agents Butler and Betancourt traced footprints back to the river bank, where they found four inner tubes.

Other than the five individuals seen by the agents, four of whom were apprehended, the agents did not see any other movement or apprehend any one else in the area that evening. Agents Butler and Molina both testified that there was a full moon on the evening of the arrest. However, the defense solicited the testimony of a local weather forecaster who testified that the moon was just over one quarter full on the evening of the arrest.

The jury found Saucedá-Mendez guilty of conspiracy to possess

marijuana, importation of marijuana, possession of marijuana, and illegal entry.² The district court sentenced Saucedo-Mendez to 65 months of imprisonment and five years of supervised release.

II.

Saucedo-Mendez argues that the evidence was insufficient to sustain his convictions because the testimony of the agents was so varied on significant points that no reasonable jury could have found him guilty. Although Saucedo-Mendez did not move for a judgment of acquittal at the close of evidence at trial, he did file a motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29 within seven days of the jury's guilty verdict. A party making such a motion preserves his right to appellate review. **See United States v. Allison**, 616 F.2d 779, 783-84 (5th Cir.), **cert. denied**, 449 U.S. 857 (1980).

In reviewing challenges to sufficiency of the evidence, this Court views the evidence in the light most favorable to the jury verdict and affirms if a rational trier of fact could have found that the Government proved all essential elements of the crime beyond a reasonable doubt. **United States v. Castro**, 15 F.3d 417, 419 (5th Cir. 1994). All inferences and credibility determinations are to be resolved in favor of the jury's verdict. **Id.** The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt. **United States v. Maseratti**, 1 F.3d 330, 337 (5th Cir.

² The district court dismissed a conspiracy-to-import-marijuana charge against Saucedo-Mendez.

1993), **cert. denied**, 114 S.Ct. 1096 (1994)(U.S., Apr. 18, 1994) (No. 93-7706).

To support a conviction for conspiracy to possess a controlled substance with intent to distribute, the Government must show "(1) the existence of an agreement between two or more persons to violate the narcotics laws, (2) knowledge of the conspiracy, and (3) voluntary participation in the conspiracy." **United States v. Rosas-Fuentes**, 970 F.2d 1379, 1381-82 (5th Cir. 1992) (citation omitted). The elements of a conspiracy may be established by circumstantial evidence. **United States v. Lewis**, 902 F.2d 1176, 1181 (5th Cir. 1990). To establish the offense of possession of a controlled substance with intent to distribute, the Government must prove knowing possession of the contraband with intent to distribute. **United States v. Limones**, 8 F.3d 1004, 1009 (5th Cir. 1993), **cert. denied**, 1994 WL 70301 and 70331 (U.S., Apr. 18, 1994)(Nos. 93-8123 and 93-1360). To sustain the charge of importation, the Government need prove only that the defendant knowingly played a role in transporting contraband from a foreign country into the United States. **United States v. Gibson**, 963 F.2d 708, 710 (5th Cir. 1992). Finally, a conviction for illegal entry will be sustained if the Government proves that an alien entered or attempted to enter the United States at any time or place other than as designated by immigration officers or that an alien eluded examination by immigration officers. **See** 8 U.S.C. § 1325.

Sauceda-Mendez argues that irreconcilable conflicts in the testimony of the agents preclude a guilty verdict. He argues that

Agent Betancourt identified four individuals wearing dark clothes; however, Agent Molina identified five individuals wearing only their underwear. He also argues that there was not a full moon that night as the agents had testified. He further argues that he was arrested in an area known for smuggling and therefore someone else could have crossed the river and left the black bags of marijuana at the fence.

In arguing that the testimony of the agents is in irreconcilable conflict, Saucedo-Mendez challenges the credibility of the agents. Determining the weight and credibility of the evidence is within the sole province of the jury. **United States v. Martinez**, 975 F.2d 159, 161 (5th Cir. 1992), **cert. denied**, 113 S.Ct. 1346 (1993). An appellate court will not supplant the jury's determination of credibility with that of its own. **Id.** A witness' testimony will be found "incredible" as a matter of law only if it is factually impossible. **United States v. Casel**, 995 F.2d 1299, 1304 (5th Cir. 1993), **cert. denied**, 114 S.Ct. 1308 (1994).

The testimony of Agents Betancourt and Molina is not "incredible." The men could have removed their clothes at some point during their river journey. Further, the testimony regarding how many individuals were crossing the river and what they were wearing was peripheral. Both agents positively identified Saucedo-Mendez and Agent Betancourt identified Saucedo-Mendez as the man he saw in the river. Although the agents' testimony regarding the full moon was rebutted by a weather expert, this did not require the jury to reject the balance of the agents' testimony. Also relevant was Agent Molina's testimony that

Sauceda-Mendez and the others fled when he identified himself as a Border Patrol agent. This evidence was admissible as tending to establish guilt. **United States v. Murphy**, 996 F.2d 94, 96 (5th Cir.), **cert. denied**, 114 S.Ct. 457 (1993).

In sum, Saucedo-Mendez's presence, together with the agent's identification of him carrying a bundle which was later found to contain marijuana, and his flight when confronted by Agent Molina, entitled the jury to infer that Saucedo-Mendez knowingly participated in the smuggling of marijuana across the river with his co-conspirators. **See Rosalez-Orozco**, 8 F.3d at 201. The same circumstantial evidence of Saucedo-Mendez's participation in the conspiracy also supports the inference that Saucedo-Mendez possessed the marijuana and illegally entered the United States. Because the evidence was sufficient to support Saucedo-Mendez's convictions, the judgment of the district court is affirmed.

AFFIRMED.