IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-8136
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE JORDAN FUENTES,

Defendant-Appellant.

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Appeal from the United States District Court for the
Western District of Texas
(SA-92-CR-125-1)

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(January 6, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

PER CURIAM:

Defendant-appellant George Jordan Fuentes (Fuentes) was convicted, on his plea of guilty, of conspiracy to possess with intent to distribute marihuana, contrary to 21 U.S.C. § 846, and was sentenced to sixty months' imprisonment and five years of supervised release. Fuentes' plea was conditioned on his reserving

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the right to appeal the district court's denial of his motion or motions to suppress evidence. Fuentes now brings this appeal, asserting that his motion or motions to suppress should have been granted. We affirm.

On the early morning of April 8, 1992, Fuentes and Jason Anderson (Anderson) were in Anderson's blue Oldsmobile as it pulled into the fuel pumps at a filling station in Blanco, Texas. Fuentes was driving. Texas Highway Patrolman Haag (Haag), who had been informed by FBI agents of their belief that the vehicle was transporting marihuana, had been following the Oldsmobile and pulled up right behind it at the filling station. Haag exited his vehicle, and requested identification from Fuentes and Anderson, and had them exit the Oldsmobile. Haag asked if he could search the vehicle and Fuentes replied that he could but then refused to sign a written consent form. Haag then asked who owned the vehicle and Anderson replied that he had just purchased it. Anderson then gave Haag written consent to search the Oldsmobile. Haag opened the back door of the Oldsmobile and noticed an odor of marihuana. He then noticed a canvas bag filled with cellophane packages of marihuana (about twenty-five pounds) behind the vehicle's passenger seat. He thereupon arrested Fuentes and Anderson.

The FBI had been alerted to Fuentes and Anderson in the following manner. On April 1, 1992, an FBI agent had received information from a confidential informant concerning narcotics trafficking by Fuentes and Anderson, based on, among other things, personal conversations with them, to the effect that they and

others were storing marihuana (about 4,000 pounds) for distribution on a certain tract of some 10.8 acres in rural Comal County owned by Fuentes' mother. Fuentes lived in San Antonio. Anderson, who was from California, drove a blue Oldsmobile, the license plate number of which the informant furnished the FBI. The informant stated that Anderson would shortly be delivering or picking up marihuana to or from the 10.8 acre tract in the blue Oldsmobile. The informant was known to be reliable and had furnished accurate information in over two hundred criminal matters.

The agents put the 10.8 acre rural tract or ranch under surveillance commencing about April 2. The property had no residence on it other than an unoccupied trailer. During four days of surveillance there was no traffic to or from the tract until the early morning of April 8. The officers did not get closer to the trailer than 150-200 yards. They entered no building on the property. They did notice the odor of marihuana emanating from an outbuilding. At approximately 8:30 a.m. on the morning of April 8, the agents noticed the blue Oldsmobile previously identified to them enter the property, stop, and subsequently depart. Some of the agents followed the Oldsmobile and pointed it out to Haag, whom they had called for assistance, and he subsequently confronted Fuentes and Anderson at the Blanco filling station as above related, and as he had been instructed to do by the agents.

Later that day, the FBI agent in charge swore out an affidavit for a search warrant generally relating the above, and procured a warrant to search the 10.8 acre tract. In the search of this

property pursuant to that warrant, large quantities of marihuana and other incriminating evidence was found. Fuentes was subsequently indicted.

On June 18, 1992, Fuentes filed a motion to suppress evidence seized during the search of the Oldsmobile, and on August 27, 1992, an evidentiary hearing on this motion was held before a magistrate judge, at which Haag and the FBI agent in charge testified, and the search warrant affidavit was admitted in evidence. On September 3, 1992, the magistrate judge issued his memorandum and recommendations that the motion to suppress be denied. The magistrate judge found that there was reasonable suspicion for Haag's "stop"SQif such it wasSQof the Oldsmobile and of Fuentes, and that the search of the Oldsmobile was valid pursuant to the consent of its owner, Anderson. The magistrate judge also found that the agents' pre-warrant entry into the 10.8 acre rural tract or ranch was not violative of the Fourth Amendment, as it was merely an entry into "open fields," citing *Oliver v. United States*, 104 S.Ct. 1735, 1740 (1984), and *United States v. Pace*, 955 F.2d 270, 274 (5th Cir. 1992). Fuentes filed objections to the magistrate judge's report, and after considering these, and reviewing the matter *de novo*, the district court on October 15, 1992, adopted the magistrate judge's findings and recommendations and denied the motion to suppress.

Fuentes was rearraigned before the district court on December 7, 1992, and pleaded guilty to count one of the indictment, pursuant to an oral agreement with the government that count two

would be dismissed, and that the government would recommend the court finding that Fuentes accepted responsibility and would consider a three-level reduction under the sentencing guidelines on that basis. The plea agreement also included Fuentes' "ability to appeal the motion to suppress that's on file before the Court, and insofar as it might include the search warrant of the property." It was further explained to the court at that time "that there may be some appellate questions concerning the actual search warrant itself." Thus, the court was asked "to review the search warrant and the five or six page affidavit for probable cause included in the Court's ruling on the motion to suppress." Counsel for Fuentes explained that "motion to suppress on the search warrant was not made . . . because at the time that the officers executed the search warrant there was nobody in the premises. My client did not have standing." Counsel also stated "[t]hese officers went onto that property illegally the day before this search warrant was issued." The district court accepted the guilty plea.

Thereafter, on December 22, 1992, Fuentes filed a second motion to suppress requesting that the court find that the search warrant for the 10.8 acres "was issued without probable cause" and that the property taken in the search pursuant to the warrant be suppressed. The motion asserts, among other things, that "the affidavit" for the search warrant "fails to allege probable cause." The motion alleges that the defendant owned the 10.8 acre tract, and that there was not probable cause for the officers to enter the tract prior to the search pursuant to the warrant. Fuentes at the

same time filed a brief in support of the motion urging that he had an expectation of privacy in the 10.8 acre tract because "Defendant's relative owns the property and Defendant had access to the property." The brief also urged that the agents' entry into the 10.8 acre tract prior to the search warrant was not consistent with the open fields doctrine because the affidavit reflects that the agents noticed the smell of marihuana coming from an outbuilding, and an outbuilding, by definition, was part of the curtilage of the residence on the tract. The government filed an opposition to the motion, contending that the magistrate judge had properly found that the open fields doctrine applied, and that, in any event, even if the statements in the affidavit concerning the smell of marihuana were excised, the balance of the affidavit clearly sufficed to establish probable cause. The government did state that it did not contest Fuentes' standing to question the search of his mother's 10.8 acres. The district court, on consideration of the motion and response, but without a further evidentiary hearing, on January 6, 1993, overruled the December 22, 1992, motion to suppress.

Fuentes was sentenced on February 16, 1993, and timely perfected his appeal.

On appeal, Fuentes raises only two contentions, namely that the "stop" of the Oldsmobile at the filling station was improper as not being based on probable cause or adequate reasonable suspicion, and that the entry on the 10.8 acre tract on the evening of April 7, when the marihuana was smelled, was not justified by the open

fields doctrine because there was an invasion of the curtilage inasmuch as the marihuana smell emanated from an outbuilding.

With respect to the stop at the filling station, it was obvious that there was, at the very least, adequate reasonable suspicion for the stop, and that it was nothing more than a mere *Terry* stop, until Haag found the marihuana in the back seat of the Oldsmobile. *See Terry v. Ohio*, 88 S.Ct. 1868 (1968); *United States v. Rideau*, 969 F.2d 1572 (5th Cir. 1992); *United States v. DeLeon-Reyna*, 930 F.2d 396 (5th Cir. 1990). The magistrate judge correctly analyzed and disposed of this point. The search of the Oldsmobile was not complained of and in any event was pursuant to valid consent, as the magistrate judge found.

As to the open fields doctrine, it is doubtful whether Fuentes has preserved anything in this respect, inasmuch as his December 22 motion to suppress was essentially directed to the sufficiency of the affidavit for search warrant to state facts constituting probable cause. He does not argue that issue on appeal, so it is waived; in any event, it is plainly without merit, as the affidavit is wholly and obviously sufficient to establish probable cause, and is so with or without the reference to smelling marihuana. We also note that it is highly questionable that Fuentes has any standing to complain of this entry onto the 10.8 acres, inasmuch as it was owned by his mother and he did not live there, and he admitted at the guilty plea hearing that he had no standing. But in any event, and even assuming standing, and further assuming that the issue concerning the curtilage was properly asserted in the December 22

motion to suppress, there is no merit to Fuentes' contention in that regard. No building was entered, nor was any barrier crossed but the perimeter fence of the 10.8 acre tract; the evidence shows that the agents did not get closer to the deserted trailer residence than 150-200 yards. There was no contrary evidence. The agents' actions were consistent with the open fields doctrine under *Oliver* and *Pace*, as the magistrate judge found. We note that Fuentes does not complain on appeal of the fact that the district court did not hold another evidentiary hearing on the December 22 motion to suppress. We further note in this connection he does not now, nor did he below, point to any additional evidence relevant to the open fields doctrine which he wanted to present at an additional hearing; nor does he in any way adequately explain why all relevant evidence was not presented at the August 1992 hearing, or provide any adequate excuse for his belated December 22, 1993, motion to suppress. With respect to the open fields matter, the magistrate judge's determination is supported by the record and applies the correct legal principles.

For the foregoing reasons, we reject Fuentes' contentions on appeal, and his conviction and sentence are accordingly

AFFIRMED.