UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8142
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CESAR HERNANDEZ-RODRIGUEZ and
FRANCISCO ROSALES-QUINTANA,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(P92-CR-74(1))

(February 17, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Cesar Hernandez-Rodriguez (Hernandez) and Francisco Rosales-Quintana (Rosales) challenge their convictions. We **REMAND** as to Rosales, and **AFFIRM** as to Hernandez.

I.

Hernandez and Rosales arrived at the Sierra Blanca Border Patrol checkpoint, driving a rental truck. They informed a Border Patrol agent that they were citizens of Cuba and legal residents of

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[1] 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 Pursuant to that Rule, the court has determined that this opinion should not be published.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 United States; however, neither had the permanent immigration card normally issued to legal resident aliens. The agent directed them to a secondary inspection area because their immigration documents were mutilated and difficult to read, raising concerns about their validity.

At the secondary inspection area, Hernandez and Rosales exited the truck and spoke with the agent while he examined their documents. The agent testified that Hernandez appeared "very nervous, fidgeting, constantly pacing". The agent testified that Rosales acted "very friendly", called him (the agent) "Brother", and "kept ... asking me how come I was doing this to him". Although the agent satisfied himself that the immigration documents were authentic, Hernandez and Rosales' odd behavior and nervousness caused him to suspect that their truck contained contraband. Accordingly, he requested that a dog handler inspect the outside of the truck.

Because another vehicle was being inspected at the secondary inspection area (and contraband had been found in it), and because the checkpoint was in the midst of a shift change, it took five to ten minutes for the dog handler to arrive. Upon arrival, the dog handler led the dog around the vehicle; upon reaching the driver's side cargo area, the dog alerted, indicating contraband. The agent asked, and received, permission from Hernandez to inspect the cargo area.

After opening the truck, the agents could not see inside, because there were mattresses and furniture blocking their view.

The agent asked Hernandez if the furniture could be moved. Hernandez got in the truck and began moving it. The dog then entered the truck and alerted to 15 boxes which were hidden in back of some other furniture. The boxes and their contents weighed 829.40 pounds; inside was cocaine with an estimated "conservative" street value of $70,000,000.

A jury convicted Hernandez and Rosales of conspiracy to possess with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 846, and possession with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1).

II.

Before us are supression of evidence, ***Batson*** and jury instruction challenges. Hernandez raises only the first issue.

A.

Hernandez and Rosales contend that the district court should have granted their motions to suppress the evidence seized from the truck, claiming an absence of probable cause to search it. We review any findings of fact by the district court regarding a motion to suppress for clear error; its ultimate determination of Fourth Amendment reasonableness is reviewed freely. *E.g.*, ***United States v. Seals***, 987 F.2d 1102, 1106 (5th Cir.), *cert. denied*, 114 S. Ct. 155 (1993). Rosales and Hernandez do not contend that the district court erred in its findings of fact; they assert only that probable cause was lacking.

We disagree. The district court's thorough, well-reasoned order denying the motions to suppress recognized that the Sierra Blanca checkpoint is not the functional equivalent of a border, and therefore full customs and immigration searches are not allowed. ***United States v. Pierre***, 958 F.2d 1304, 1308 (5th Cir.) (*en banc*), *cert. denied*, 113 S. Ct. 280 (1992). Nevertheless, Border Patrol agents may detain vehicles and their passengers for brief questioning regarding citizenship without any individualized suspicion. ***United States v. Martinez-Fuerte***, 428 U.S. 543, 556-64 (1976). Indeed, agents may refer motorists to a secondary inspection area without any "particularized reason". ***Id.*** at 563-64 (noting also that agents have "wide discretion in selecting the motorists to be diverted"); *see also* ***Pierre***, 958 F.2d at 1308 ("officers may refer cars to the secondary inspection area for any or no reason"). Although an agent may not then search a vehicle without probable cause, the exterior of a vehicle may be "sniffed" by a narcotics-detection dog without any "reasonable suspicion as a prerequisite", because such a "sniff" is not a "search" for Fourth Amendment purposes. ***Seals***, 987 F.2d at 1106.

In the instant case, the agent properly referred Hernandez and Rosales to a secondary inspection area; the "sniff" was permissible; and, upon the dog's alerting to the presence of contraband, probable cause existed to search the vehicle. ***United***

States v. Hernandez, 976 F.2d 929, 930 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2352 (1993). Thus, the search was reasonable.[2]

B.

Rosales contests the district court's denial of a ***Batson***[3] objection, concerning the removal of Hispanic jurors.[4] The district court responded:

> All right. Your motion, at this time, will be denied. Let the record reflect that the defendants also, in their [peremptory] challenges, struck at least one Hispanic juror, and that there will be remaining on the Jury, at least half of the ones remaining would be Hispanic, maybe more.

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[2] Hernandez asserts two other bases for finding a violation of the Fourth Amendment. First, he asserts that agents at an immigration checkpoint may search only for illegal aliens. Second, he asserts that the five to ten minute delay while waiting for the dog was unreasonable. Apparently, neither contention was made to the district court. Absent plain error, we do not consider issues raised for the first time on appeal. In any event, under any standard of review, these contentions are without merit. *See* ***United States v. Muniz-Melchor***, 894 F.2d 1430, 1436-37 (5th Cir.) (upon legitimate stop of vehicle to enforce immigration laws, border patrol agents need not ignore evidence of other crimes), *cert. denied*, 495 U.S. 923 (1990); ***United States v. Lansford***, 838 F.2d 1351, 1354 (5th Cir. 1988) (five-minute detention of nervous individual at secondary inspection area of permanent border checkpoint while agents checked to see if car was stolen not unreasonable). The fortuitous discovery of contraband in another vehicle, coupled with the shift-change, are reasonable explanations for a brief, five-minute delay in undertaking a "sniff" of a vehicle. *See* ***United States v. Sharpe***, 470 U.S. 675, 686 (1985) (in evaluating reasonableness of duration of investigative stop, court should consider "whether the police diligently pursued a means of investigation that was likely to confirm or dispel the suspicions quickly, during which time it was necessary to detain the defendant").

[3] ***Batson v. Kentucky***, 476 U.S. 79 (1986).

[4] The government acknowledges that "*all* of the government's peremptory strikes had the effect of striking panel members with hispanic surnames". (Emphasis added.)

Because the district court did not inquire as to the prosecutor's motive, we find that it implicitly denied the motion for failure to establish a *prima facie* case of discrimination. *See* ***United States v. Branch***, 989 F.2d 752, 755 (5th Cir.), *cert. denied*, 113 S. Ct. 3060 (1993). Such a ruling is reviewed for clear error. ***Id.***

Batson recognized that "a `pattern' of strikes against [minority] jurors included in the particular venire might give rise to an inference of discrimination". ***Batson***, 476 U.S. at 97. In the instant case, such a pattern existed; every peremptory strike available to the prosecutor was used to exclude jurors with Hispanic surnames. Moreover, the district court's explanation for denying the objection apparently followed from erroneous legal conclusions. It is of no moment that the defendants' similarly exercised *one* peremptory challenge; this sheds no light on the possible motive for the prosecutor's strikes. Likewise, whether Hispanics were left on the jury is inconsequential; indeed, assuming a prosecutor were motivated by racial animus, the fact that he lacked sufficient peremptory challenges to exclude totally a particular race would not excuse employing the available challenges towards minimizing their presence on the jury. *See* ***United States v. Joe***, 928 F.2d 99, 103 (4th Cir.) ("The district court erred in ruling that a ***Batson*** violation did not occur since members of the defendants' racial group were seated on the jury. ... [W]hile the fact that [minority] jurors were seated is entitled to substantial consideration, it is not dispositive of this issue and does not preclude a finding that defendants established a prima

facie violation of ***Batson***."), *cert. denied*, 112 S. Ct. 71 (1991). The district court clearly erred in ruling implicitly that Rosales failed to establish a *prima facie* showing under ***Batson***.

The government, however, contends that Rosales waived the objection, citing ***United States v. Arce***, 997 F.2d 1123 (5th Cir. 1993). It relies on the following unsolicited comment of the prosecutor:

> Let the record also reflect that jury selection by the Government was a joint effort between me and [two other U.S. Attorneys] and there were several reasons why those persons were struck. Either no eye contact, information from law enforcement officers present in the Courtroom, things of that nature.

Because Rosales did not challenge this "explanation", and does not do so now, the government asserts that the district court was not required to consider the validity of the explanation, and that Rosales may not now challenge it. *See* ***Arce***, 997 F.2d at 1126-27.

We disagree. Although the ***Arce*** opinion is vague about the precise sequence of events at trial, the prosecutor in ***Arce*** made an explanation *before* the trial court ruled on the ***Batson*** objection. *See* ***id.*** at 1126. This suggests that the district court had proceeded beyond a finding of whether the defendant had established a *prima facie* showing of discrimination, and was in the process of assessing the second-level of ***Batson***: whether the prosecutor had a race-neutral explanation. *See* ***Batson***, 476 U.S. at 97 ("Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging [minority] jurors.").

Rosales' ***Batson*** objection was overruled summarily -- before the proffered explanation by the government. There was no pending objection to which the prosecutor's comments pertained; the district court did not solicit them; and it did not acknowledge them, much less utilize them to rule in the alternative on the already-denied ***Batson*** motion. In short, the comments were of no legal significance.

Moreover, after the prosecutor's explanation, Rosales took steps to preserve the ***Batson*** issue for appellate review (at least so far as the court's actual ruling, rather than the prosecutor's suggested grounds, were concerned). Specifically, Rosales requested that the court, "[f]or Batson purposes", accept into evidence the list the prosecutor used to make his peremptory challenges, as well as a list of all the jurors. The district court agreed to attach the lists as exhibits. Without further comment, the court proceeded to empanel the jury. Under these circumstances, Rosales hardly concurred in the government's explanation. *See* ***Arce***, 997 F.2d at 1127 (quoting and citing ***United States v. Rudas***, 905 F.2d 38, 41 (2d Cir. 1990)).

Because the district court erred in implicitly finding no *prima facie* violation of ***Batson***, we remand Rosales' case to the district court for it to undertake such further proceedings as may be necessary to analyze the ***Batson*** objection.[5] *See* ***Joe***, 928 F.2d

[5] We remand only for Rosales; although Hernandez joined in the objection at trial, he did not raise this issue on appeal. Pursuant to Fed. R. App. P. 28(i), Hernandez could have adopted by reference Rosales' contentions, but he did not do so. While there is authority in this Circuit for allowing a defendant to adopt a

at 104; ***United States v. Romero-Reyna***, 867 F.2d 834, 838 (5th Cir. 1989).

C.

Rosales also contends that the district court erred in refusing to give a requested jury instruction. Similarly, he asserts that the district court's use of a "deliberate ignorance" instruction was erroneous. In order to convict Rosales under 21 U.S.C. §§ 841(a)(1) and 846, the government had to prove that Rosales "knowingly and intentionally" possessed cocaine.

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co-defendant's contentions at oral argument (a circumstance not present here), *see* ***United States v. Gray***, 626 F.2d 494, 497 (5th Cir. 1980), *cert. denied*, 449 U.S. 1091 (1981), such lenity is an extraordinary exception from the general rule that the failure to raise an issue in one's brief forfeits the issue. *See* ***Zuccarello v. Exxon Corp.***, 756 F.2d 402, 407-08 (5th Cir. 1985) (concluding that Fed. R. App. P. 28(a)(4) counsels that "when an appellant raises an issue for the first time at oral argument, the Court ordinarily will not consider it"). Several reasons counsel against *sua sponte* considering this issue to be raised by Hernandez. First, from his silence, it appears Hernandez does not want it raised as to him. Second, Hernandez's brief failed to comply with Fed. R. App. P. 28(a)(4), Rule 28(e), and Fifth Circuit Rule 28.2.3, because Hernandez made no record citations; therefore, his appeal could have been dismissed. ***Moore v. FDIC***, 993 F.2d 106-07 (5th Cir. 1993). Our consideration of the issue actually raised by Hernandez is more than generous. Third, and most important, a defendant's failure to make a ***Batson*** objection at trial, even when a co-defendant makes such an objection, prevents the defendant from raising the issue on appeal -- even when the co-defendant continues to assert the issue on appeal. ***United States v. Pofahl***, 990 F.2d 1456, 1465-66 (5th Cir.), *cert. denied*, 114 S.Ct. 266, 560 (1993). Accordingly, it would be anomalous to consider the issue raised by Hernandez on appeal when he has not raised it himself. Finally, we do not believe that our disposition of this case on the summary calendar prejudices Hernandez by depriving him of the opportunity to attempt to adopt Rosales' ***Batson*** contention at oral argument; Hernandez begins his brief with the following statement: "Appellant hereby *waives any oral argument and believes his appeal is sufficiently presented in the argument and authorities contained herein*." (Emphasis added.)

1.

Rosales first urges that the district court erred in refusing to instruct the jury that, insofar as the term "knowingly" was concerned, "mere suspicion is not knowledge" and "suspicion alone is not proof of knowledge beyond a reasonable doubt". The factual predicate for the requested instruction was Rosales' testimony that, although he had opened the boxes in the truck and saw "white bricks", and although he "imagined that it was cocaine", he "wasn't sure". According to Rosales, his "suspicion that the substance might be some type of narcotic" does not amount to knowledge that he possessed cocaine.

Of course, a district court "has broad discretion in formulating the charge so long as the charge accurately reflects the law and the facts of the case." ***United States v. Allred***, 867 F.2d 856, 868 (5th Cir. 1989) (citation omitted). We will reverse a district court's refusal to give a proposed instruction only if it is substantively correct, was not substantially covered in the charge actually given, and concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to present a given defense. *E.g.,* ***United States v. Graves***, 5 F.3d 1546, 1554 (5th Cir. 1993) (citing and quoting ***United States v. Grissom***, 645 F.2d 461, 464 (5th Cir. 1981)).

The refusal to give the requested instruction did not seriously impair Rosales' ability to present a given defense. His statement that he "imagined that it was cocaine" and admission that he "thought that it was probably cocaine", coupled with his

acknowledgement that he hoped to "trade it [the cocaine] in for a car" or a piece of property upon arriving in Miami, completely belies his assertion that he had only a "mere suspicion" that the material was cocaine. Indeed, the evidence of Rosales' guilt was overwhelming. (In the alternative, the requested instruction was substantially covered by the given instruction that "knowledge on the part of a defendant cannot be established merely by demonstrating that the defendant was negligent, careless or foolish".)

2.

Our conclusion in part 1, *supra*, is bolstered by our finding that the district court did not err in giving the following "deliberate ignorance" instruction:

> You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what otherwise would have been obvious to him. While knowledge on the part of a defendant cannot be established merely by demonstrating that the defendant was negligent, careless or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

This instruction was entirely appropriate. A "deliberate ignorance" instruction is proper when the evidence, viewed most favorably to the government, shows that the defendant was subjectively aware of a high probability of the existence of the illegal conduct, and the defendant purposely contrived to avoid learning of the conduct. ***United States v. Stouffer***, 986 F.2d 916, 925 (5th Cir.), *cert. denied*, 114 S. Ct. 115 (1993).

Such was the case here. As discussed, Rosales' own testimony established that he thought the substance was probably cocaine; indeed, he admitted that he told Hernandez of his hopes to trade some of it for a car or property. Rosales' alleged failure to conduct additional inquiry or inspection under these circumstances "suggests a conscious effort to avoid incriminating knowledge", legitimating a deliberate ignorance instruction. ***United States v. Daniel***, 957 F.2d 162, 169-70 (5th Cir. 1992) (citation omitted). Moreover, Rosales' own testimony raised the ignorance issue. *See* ***United States v. Pena***, 949 F.2d 751, 757 (5th Cir. 1991).

III.

For the foregoing reasons, Hernandez's conviction is **AFFIRMED**, and Rosales' case is **REMANDED** for further proceedings regarding his ***Batson*** claim.

AFFIRMED in PART and **REMANDED in PART.**