

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8215
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ADOLFO GARCIA-VILLAREAL,
RAMON VASQUEZ-LARA and
LUIS SANCHEZ-VILLARREAL,

Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Texas
(MO-92-CR-087(3))

(January 13, 1993)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendants-Appellants Adolfo Garcia-Villareal (Garcia), Ramon Vasquez-Lara (Vasquez) and Luis Sanchez-Villarreal (Sanchez) were charged with various narcotics offenses. They appealed their jury

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

convictions, claiming insufficiency of the evidence and lack of jurisdiction. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

A jury found Garcia, Vasquez and Sanchez guilty of possession with intent to distribute more than 100 kilograms of marihuana, conspiracy to commit the same offense, and conspiracy to import. The jury also found Sanchez guilty of the substantive count of importation of the marihuana. All three co-defendants timely appealed, challenging the sufficiency of the evidence. Garcia and Vasquez also challenged jurisdiction and venue.

Martin De la Rosa, a current federal prisoner, testified that in August 1992, he took two trips to Mexico with Sanchez, under Sanchez's direction, to negotiate a marihuana purchase. On the second trip, the marihuana arranged for by Sanchez was at Piedritas, Mexico. De la Rosa never saw the marihuana, but he met with Vasquez to arrange for its transportation. On De la Rosa and Sanchez's return trip to the United States, Sanchez paid the Mexican customs officials to pass the marihuana across the border.

Marcelino Rodriguez, a confidential informant for the Texas Department of Public Safety (DPS), met with DPS Inspector Zeke Rodarte to inform him that marihuana would be coming into the United States. Rodriguez then met with Isidoro Ortega ("Chilo") and agreed to transport the marihuana from Mexico to McCamey, Texas. Before leaving for La Linda, Rodriguez informed Rodarte of the plan. On the drive to La Linda, Rodriguez met Rodarte and

another agent who rode with Rodriguez past the checkpoint and instructed Rodriguez on what to do with the marihuana. Rodriguez arrived at La Linda late due to car problems and called Sanchez to inform him of the delay.

Rodriguez met Ortega in La Linda, and Ortega, Vasquez and Garcia loaded the marihuana, which was wrapped in plastic and contained in sacks. Ortega drove ahead of Rodriguez to check for anything suspicious. During the trip back to the United States, Rodriguez turned over the marihuana to Rodarte who returned it to Rodriguez at the Fort Stockton airport. Rodriguez then met in a park with Ortega and Sanchez to be paid, but the two men did not give Rodriguez any money. Rodriguez then took the marihuana to a liquor store in McCamey where Ortega and another person loaded the contraband into a car.

Ortega, also a federal prisoner, testified that in August 1992, Sanchez instructed him to help collect some marihuana in Mexico and give it to the persons who would bring it over to the United States. Ortega later met with Marcelino Rodriguez, who would bring the contraband from La Linda, Mexico, to McCamey, Texas. Sanchez gave Ortega money for transportation expenses. Sanchez was also supposed to pay Ortega for his involvement in the smuggling scheme.

On August 18th Ortega left Fort Stockton driving De la Rosa's pickup truck. Ortega drove to Piedritas, Mexico, where he met with Ramon Vasquez and Garcia. The three men picked up the marihuana, which was stored in an abandoned mine, and loaded it into the

truck. The three men then drove the marihuana to La Linda, Mexico, where they unloaded it from the truck. Although Mexican customs officials were in the area, they did not interfere with the three men.

When Rodriguez did not come to take the marihuana at the pre-arranged time, Ortega called Sanchez. Relying on that telephone call, Ortega waited until Rodriguez arrived later in the afternoon. Rodriguez, Ortega, Vasquez and Garcia¹ loaded the marihuana into Rodriguez's truck. Rodriguez then left for the United States. Ortega also left for the United States, giving Vasquez and Garcia a ride.

Shortly before reaching the border, Ortega dropped off Vasquez and Garcia. When Ortega reached Fort Stockton, he went to a park and met De la Rosa, Rodriguez and Sanchez to determine where to deliver the merchandise. De la Rosa also testified that he met in the park with Ortega, Sanchez and Rodriguez. The next day Sanchez instructed Ortega to go to McCamey, Texas, the marihuana's final destination. Ortega was arrested in McCamey.

Justin Corp, a DPS officer, testified that on August 19th he participated in a marihuana investigation in McCamey, Texas, seizing from the trunk of a vehicle marihuana that was contained in sacks and wrapped in plastic. Ernest Rodriguez, a Border Patrol Agent, testified that he also participated in the seizure of the marihuana taken from a car in McCamey, Texas. Rodriguez also

¹ Although Ortega refers to "Raul," his testimony indicates he is referring to Garcia.

interviewed Garcia who waived his constitutional rights, and confessed to aiding the transportation of the marihuana and acting as a guard for the marihuana at the mine in exchange for a ride to Fort Stockton and payment for his services.

II

ANALYSIS

A. Sufficiency of the Evidence

Garcia, Vasquez and Sanchez contend that the evidence was insufficient to prove that they engaged in any conspiracy or possessed the marihuana. Sanchez also contends that there was insufficient evidence to prove that he imported any marihuana into the United States.

On a sufficiency-of-the-evidence claim, we examine the evidence in the light most favorable to the government, making all reasonable inferences and credibility choices in favor of the verdict. The evidence is sufficient if a reasonable trier of fact could have found that it established guilt beyond a reasonable doubt. Every reasonable hypothesis of innocence need not have been excluded; neither need the evidence be entirely inconsistent with innocent conduct. United States v. Vasquez, 953 F.2d 176, 181 (5th Cir.), cert. denied, 112 S.Ct. 2288 (1992).

To convict a defendant of possession of marihuana with intent to distribute, the government must prove that he 1) knowingly 2) possessed marihuana 3) with intent to distribute it. United States v. Gallo, 927 F.2d 815, 821-22 (5th Cir. 1991). To prove importation, the same elements must be proved "along with proof

that the defendant played a role in bringing the controlled substance from a foreign country into the United States[.]" United States v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992), cert. denied, 113 S.Ct. 1291 (1993).

Illegal possession of controlled substances may be either actual or constructive. United States v. Knezek, 964 F.2d 394, 400 (5th Cir. 1992).

In general, a person has constructive possession if he knowingly has ownership, dominion, or control over the contraband itself or over the premises in which the contraband is located. Constructive possession need not be exclusive, it may be joint with others, and it may be proven with circumstantial evidence.

United States v. McKnight, 953 F.2d 898, 901 (5th Cir.), cert. denied, 112 S.Ct. 2975 (1992) (internal citation omitted).

To prove the conspiracy, 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). The elements of conspiracy may be established by circumstantial evidence. United States v. Lewis, 902 F.2d 1176, 1181 (5th Cir. 1990). Although mere presence at the scene or association with those in control of illegal drugs is insufficient alone to support a conviction for conspiracy, these facts are relevant factors that the jury may consider. United States v. Simmons, 918 F.2d 476, 484 (5th Cir. 1990). It is not necessary for the government to prove an express, explicit agreement; a tacit, mutual agreement "will

usually suffice" to prove a conspiracy. United States v. Prieto-Tejas, 779 F.2d 1098, 1103 (5th Cir. 1986). Further, a defendant is not required to know all the details of the conspiracy. "Evidence that the defendant had knowledge of the conspiratorial agreement and associated with the plan in order to promote its success is sufficient to sustain a conspiracy conviction where the conspiracy has been adequately established by other independent evidence." United States v. Fernandez-Roque, 703 F.2d 808, 814-15 (5th Cir. 1983).

Sanchez contends that the government's evidence of his involvement in a conspiracy consists mainly of Ortega's testimony, and that Ortega is an incredible accomplice witness. A conviction may be based on uncorroborated testimony of an accomplice, however, provided that the testimony is not incredible or otherwise insubstantial on its face. United States v. Osum, 943 F.2d 1394, 1405 (5th Cir. 1991). The jury is the ultimate arbiter of the credibility of a witness. Testimony generally should not be declared incredible as a matter of law unless it asserts facts that the witness could not have observed or events that could not have occurred under the laws of nature. Id. Ortega testified only to facts within his direct knowledge, and his testimony was corroborated by De la Rosa and Marcelino Rodriguez. Consequently, Ortega's testimony was not incredible as a matter of law.

From the facts related above, a reasonable jury could find that the three men knowingly possessed the marihuana with the intent to distribute it and, further, conspired to possess the

marihuana with the intent to distribute it and to import it to the United States. Vasquez and Garcia held the marihuana in Mexico and transferred it to the members of the conspiracy who were to deliver the contraband to the United States. Sanchez arranged for the purchase, transportation, and delivery of the marihuana. Sanchez's role in arranging delivery of the marihuana into the United States also demonstrates that he illegally imported the contraband from Mexico to this country. We find sufficient evidence to support the convictions of all three defendants.

B. Jurisdiction and Venue

Garcia and Vasquez argue that the district court did not have the proper jurisdiction and venue to convict and sentence them because any proscribed conduct took place in Mexico. But the law is settled that federal courts have jurisdiction over drug conspiracy cases if the evidence indicates that the defendants intended to consummate the conspiracy within the territorial boundaries of the United States. United States v. Gray, 659 F.2d 1296, 1298 (5th Cir. 1981). The evidence discussed above indicates that the defendants so intended, as they assisted in the transportation of the marihuana from Mexico into the United States. We are satisfied that the district court had jurisdiction to convict and sentence Garcia and Vasquez for the two conspiracy counts. See id.

Jurisdiction to convict and sentence the two men for possession of the marihuana presents a different question. We find no case law directly on point and have been cited to none. We have

determined that a district court has jurisdiction over an alien in a similar situation, but he was charged with smuggling heroin and conspiracy to smuggle heroin. Rivard v. United States, 375 F.2d 882, 887 (5th Cir.), cert. denied, 389 U.S. 884 (1967). Regardless of the age of the Rivard decision and the difference in its underlying offense (smuggling), we are satisfied that its reasoning is both sound and applicable. Rivard relied upon Strassheim v. Daily, 221 U.S. 280, 285, 31 S.Ct. 558, 55 L.Ed. 735 (1911), which stated that:

Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.

Rivard, 375 F.2d at 887. This court then concluded that "when a substantive offense is committed within the territorial limits of the United States, . . . the Court has jurisdiction over an alien principal whose participation was all without those territorial limits." Id. Our reasoning in Rivard provides sufficient support for our determination today that the district court had jurisdiction to convict and sentence Garcia and Vasquez for possession of the marihuana.

AFFIRMED.