

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-8254
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROGELIO ARCE, a/k/a Rojo and
JOSE LEON GONZALEZ-LONGORIA,
a/k/a Juan Vela,

Defendants-Appellants.

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Appeal from the United States District Court for the
Western District of Texas
(SA-92-CR-65-16)
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(July 22, 1994)

Before GARWOOD, JOLLY and SMITH, Circuit Judges.*

GARWOOD, Circuit Judge:

Defendants-appellants Rogelio Arce (Arce) and Jose Leon Gonzalez-Longoria (Gonzalez) were charged with seventeen other defendants in a seventeen-count indictment with various drug trafficking, firearms, and money laundering offenses. Both

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

defendants waived their rights to a jury trial and proceeded to a trial before the court. The district court found them both guilty of conspiracy to distribute more than five kilograms of cocaine and one hundred kilograms of marihuana (Count One) and aiding and abetting the possession with intent to distribute of marihuana (Count Nine). Gonzalez was also convicted of aiding and abetting the distribution of cocaine (Count Seven) and aiding and abetting money laundering (Count Fourteen). The court sentenced Arce to 270 months' imprisonment, 5 years' supervised release, \$20,000 in fines, and a \$100 assessment. Gonzalez received 2 concurrent sentences of life imprisonment for Counts One and Seven, concurrent sentences of 40 years and 10 years for Counts Nine and Fourteen, a 5-year term of supervised release, fines totalling \$200,000, and a \$200 assessment. In this appeal, both defendants challenge the sufficiency of the evidence supporting their convictions. Gonzalez also contends that the government violated his constitutional right to prepare his defense by denying him access to wiretap tapes and transcripts prior to his trial. Finding no merit to these claims, we affirm both convictions.

Facts and Proceedings Below

In 1986, Arce recruited Santiago Jimmy Gutierrez (Gutierrez) to help distribute marihuana in the Dallas area. On five or six occasions in 1987, and once or twice in 1988, Arce caused loads of marihuana weighing between two hundred and eight hundred pounds to be transported to Gutierrez from Laredo and Houston. Arce and Gutierrez continued their illicit association until the DFW Airport Narcotics Task Force interrupted operations on July 6, 1988.

Despite the arrest, neither individual abandoned the drug trade for long.

In December 1988, Gutierrez relocated to San Antonio and began working as a manager at a stripper club (Giorgio's). In 1990, he resumed his drug trafficking, this time with the assistance of Gonzalez, the head of an extensive state-wide cocaine distribution scheme. Gonzalez had people working in several Texas cities including Houston, Austin, and Laredo, but needed Gutierrez to serve as his San Antonio contact. Gutierrez proceeded to move several kilos of cocaine for Gonzalez throughout 1990. During this time, Gonzalez was arrested in Matamoros, Mexico, but promptly escaped from prison and returned to San Antonio. Meanwhile, Arce, having also returned to a life of crime, was experiencing some difficulty in moving a shipment of marihuana. He contacted Gutierrez to see if his former accomplice knew of anyone interested in buying several hundred pounds. In December 1991, Gutierrez arranged a meeting at Giorgio's to introduce Arce to Gonzalez. This meeting began an on-going relationship between Arce and Gonzalez that ended with the present convictions.

In January and February 1992, law enforcement officials conducted extensive court-authorized wiretap surveillance on four telephones used by the defendants. On January 10, 1992, Mexican law enforcement officials seized 274 kilograms of cocaine near Mexico City, half of a shipment Gonzalez intended to smuggle into the United States. Conversations intercepted in late January indicated that the remaining half was successfully transported to Houston and received by Gonzalez. The intercepts also indicated

that Gonzalez and Arce were arranging a transaction involving 1,000 pounds of marihuana set for late February. Around 9:00 p.m. on February 27, 1992, acting on this information, agents stopped a U-Haul truck in which they found a picture of Gonzalez, documents associated with drug trafficking, several mattresses, and 18 bales of marihuana weighing 763 pounds. About an hour later, Gonzalez was intercepted in several calls, including one to Arce, discussing the marihuana seizure. On March 4, 1992, investigators searched Gonzalez's residence and seized a money counter, a police scanner, a fax machine, an adding machine, unused money wrappers, two cellular phones, documents containing codes used for drug trafficking, approximately \$334,000 in cash, 6 semiautomatic pistols, and a semiautomatic carbine. Arce and Gonzalez were both arrested that day.

After being incarcerated at the Guadalupe County Jail, Gonzalez was provided with copies of all the intercepted recordings in May 1992. On August 10, 1992, Gonzalez was moved to Atacosa County Jail, where he remained until August 17, 1992, at which time, he was transferred to Bexar County Jail.¹ While at Atacosa and Bexar, Gonzalez was placed in twenty-three-hour "lock-down," which limited his access to a telephone to one hour per day and restricted his use of recording devices, but allowed visits by his

¹ The United States Marshal's Service moved Gonzalez because it considered him to be a high escape risk. This conclusion resulted from a number of factors: his prior escape from prison in Mexico; his fugitive status from a state drug conviction; his access to large quantities of cash; his dangerousness, as evidenced by possession of numerous firearms and possible involvement in a murder in Houston; his prior use of aliases; and his repeated statements of his intent to escape.

attorney at any time. On August 24, he filed a motion complaining that Bexar officials would not permit him to possess a tape recorder to listen to wiretap recordings. In response to this motion, the Marshal's Service moved Gonzalez to the Central Texas Parole Violators Facility (Wackenhut) in downtown San Antonio on August 31, where he remained until November 25, 1992. At Wackenhut, Gonzalez remained under twenty-three-hour "lock-down," but was allowed access to a tape recorder and the wiretap tapes.

On November 12 and 20, 1992, the government provided Gonzalez's counsel draft and corrected transcripts of recordings it intended to present at trial. Gonzalez's counsel appeared at a docket call on November 24 and announced readiness for trial scheduled to begin on November 30.² Fearing Gonzalez's renewed threats to escape,³ and believing he no longer needed to review tapes based on his counsel's readiness for trial, the Marshal's Service moved Gonzalez from Wackenhut back to the more secure Bexar County Jail on November 25. Gonzalez's counsel sent a recorder and tapes to the Bexar County Jail on December 8, but jail officials refused to allow Gonzalez to use the recorder due to the jail's general policy prohibiting the possession of recorders by inmates.

Finally, on December 24, 1992, Gonzalez was transferred to Comal County Jail, where he remained until trial. At Comal, jail

² On December 4, the district court continued the trial, setting a docket call for January 4, 1993, and trial for January 11, 1993.

³ Gonzalez made statements to the effect, "I don't know why the government's going to spend all of this money on me I won't be here very long"; and "You better keep a real close eye on me, I won't be here very long."

officials denied Gonzalez the use of a tape recorder because it did not meet the jail's security requirements, but the officials advised counsel where to obtain an acceptable device. Altogether, Gonzalez was denied a tape recorder for a total of forty-three of the roughly three hundred days between his arrest and his trial. During this time, no restrictions were placed on his counsel's access to the tapes or transcripts.

Discussion

I. Arce

A. Sufficiency of the Evidence

Arce contends that the evidence was insufficient to support his convictions for conspiracy and aiding and abetting the possession with intent to distribute marihuana. Specifically, he argues that (1) the testimony of the co-conspirator turned government informant, Gutierrez, is incredible as a matter of law, (2) the evidence did not establish the identity of his voice on wiretap tapes, and (3) testimony by surveillance agents was inconsistent and contradictory. In reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in the light most favorable to the judgment and affirms if a rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt. *United States v. Puig-Infante*, 19 F.3d 929, 937 (5th Cir. 1994); *United States v. Ruiz*, 987 F.2d 243, 259 (5th Cir.), *cert. denied*, 114 S.Ct. 163 (1993). We do not make credibility determinations or pass on the weight of the evidence, but rather determine whether the evidence is sufficient to justify the conclusions of the trial judge. *United States v. Ross-Fuentes*,

970 F.2d 1379, 1381 (5th Cir. 1992). Thus, we will accept all credibility determinations and reasonable inferences that support the trial court's judgment. *Puig-Infante*, 19 F.3d at 937; *United States v. Pofahl*, 990 F.2d 1456, 1467 (5th Cir.), *cert. denied*, 114 S.Ct. 266 (1993); *see also United States v. Bass*, 10 F.3d 256, 258 (5th Cir. 1993) ("We must give credence to the credibility choices and findings of fact of the district court unless they are clearly erroneous.").

To secure a conviction under 21 U.S.C. § 846, the government must prove that the defendant knew about the conspiracy and that he voluntarily joined and participated in it. *Pofahl*, 990 F.2d at 1467. The essence of a conspiracy under section 846 is an agreement to violate the narcotics laws—that is, to possess with the intent to distribute a controlled substance. The government need not prove that the defendant participated in every phase of the conspiracy, *United States v. Grassi*, 616 F.2d 1295 (5th Cir.), *cert. denied*, 101 S.Ct. 363 (1980), or that the defendant knew every detail of the conspiracy, *United States v. Parrish*, 736 F.2d 152 (5th Cir. 1984).

In the present case, the government offered ample evidence to establish that Arce caused more than 750 pounds of marihuana to be delivered to Gonzalez on February 27, 1992. Arce and Gonzalez discussed the transaction during several telephone conversations intercepted and recorded by investigators; Arce received \$23,600 from Gonzalez for what appeared to be a prior transaction; Arce took steps to obtain mattresses to conceal the marihuana and accompanied the contraband in a convoy toward Gonzalez's residence.

This evidence proves far more than Arce's mere presence in the vicinity of marihuana, as he contends. It shows his knowing and voluntary participation in the conspiracy and his control over the marihuana with the intent to deliver it to Gonzalez for distribution.

The trial court clearly credited Gutierrez in finding Arce guilty. Gutierrez was the government's prime witness, and his testimony was determinative for many of the court's findings. Because of this, Arce contends the court should not have believed Gutierrez's testimony because he was a disreputable liar who agreed to testify against his former compatriots in the hopes of receiving a more lenient sentence. "However, the law in this Circuit as to the use of accomplice or co-conspirator testimony is clear: a conviction may be based even on uncorroborated testimony of an accomplice or of someone making a plea bargain with the government, provided that the testimony is not incredible or otherwise insubstantial on its face."⁴ *United States v. Osum*, 943 F.2d 1394, 1405 (5th Cir. 1991). In *Osum*, as here, the defendant implored the court to disregard the testimony of cooperating co-conspirators purely on the basis that they had agreed to testimony in the hopes of reducing their own sentences. *Id.* at 1404. We have no doubts as to Gutierrez's purpose in aiding the prosecution nor illusions

⁴ In the present case, Gutierrez's testimony was strongly corroborated by recorded telephone conversations, government surveillance, and the seizure of drugs, money, firearms, and other incriminating evidence.

as to his virtue.⁵ Nevertheless, the district court is the ultimate arbiter of a witness's credibility. Our review of the record indicates that Gutierrez, in testifying about conversations and transactions in which he participated, did not assert any facts of which he could not have had knowledge, nor did he describe any situations that physically could not have occurred. His testimony is not rendered worthless merely because he testified pursuant to a plea agreement and had strong motives to favor the prosecution.

Arce also challenges the identification of his voice on the wiretap recordings. Once again, Arce focuses his complaint almost entirely on the reliability of the information source SOGutierrez. As noted above, this Court cannot and will not second guess the credibility determinations of the trial court. In this instance, even were the trial judge skeptical as to the witness's ability to identify the defendant's voice, such identification could be established circumstantially. See *United States v. Gonzalez-Rodriquez*, 966 F.2d 918, 922 (5th Cir. 1992). Arce's identity was

⁵ In his appellate brief, Arce asserts that Gutierrez was not the "innocent and naive hotel manager [who] was corrupted and lured into the drug trafficking business by Rogelio Arce." Arce implies rather forcefully that Gutierrez was well-entrenched in the drug trade in Dallas long before the two men began working in unison. Arce even alleges that Gutierrez once plotted to kill his own brother-in-law to prevent him from exposing Gutierrez's drug operations. His argument proceeds to the logical conclusion that "[b]ecause Gutierrez would do and say anything to help himself, . . . it is obvious that Gutierrez would not hesitate to imagine, exaggerate, distort, or misrepresent facts concerning his 'friends' in order to insure that his testimony amounted to 'substantial assistance' and he received the reduction of his sentence for which he bargained."

Gutierrez's self-interest in turning on his co-conspirators was fully disclosed and thoroughly explored on cross-examination. The trial judge heard this evidence and yet found the testimony credible.

corroborated by government surveillance of him using telephones during the purported conversations and by his meeting with Gonzalez in accordance with intercepted calls. Thus, the evidence was amply sufficient to identify Arce's voice.

Finally, Arce contends that the testimony of the surveillance officers was inconsistent and contradictory. Clearly, some minor discrepancies in the testimony did exist. Resolving conflicts in evidence, however, is the duty of the fact finder. Moreover, none of the inconsistencies rendered the evidence supporting Arce's conviction insufficient. While three agents disagreed as to which of the vehicles conveying marihuana actually contained Arce, an overwhelming amount of consistent testimony, electronic surveillance, the drug seizure, and documents connecting Arce to Gonzalez, when viewed in the light most favorable to the government, strongly supported the conclusion that he participated in the marihuana transaction.

B. Sentencing

The district court based Arce's sentence on the possession with intent to distribute 1,575 kilograms of marihuana. Because this amount exceeded 1,000 kilograms but was less than 3,000 kilograms, Arce received a base offense level of 32. *United States Sentencing Commission, Guidelines Manual* (U.S.S.G.) § 2D1.1(a)(3) (1992). He also received a two-level enhancement under U.S.S.G. § 2D1.1(b)(1) for possessing a firearm, and a two-level enhancement under U.S.S.G. § 3B1.1(c) for his leadership role in an organization of less than five persons. Thus, the court found the total offense level to be 36.

Arce challenges the court's findings regarding the quantity of drugs and his possession of a weapon. For sentencing purposes, the district court's calculation of the quantity of drugs is a factual finding that will be upheld unless it is clearly erroneous. *United States v. Mergerson*, 4 F.3d 337, 345 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1310; *United States v. Sherrod*, 964 F.2d 1501 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1422 (1993). Similarly, this Court will only review the district court's findings regarding the possession of a firearm for clear error. *United States v. Condren*, 18 F.3d 1190, 1195 (5th Cir. 1994); *United States v. Devine*, 934 F.2d 1325, 1339 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 954 (1992). A thorough review of the record reveals that the district court did not clearly err on either of these issues.

1. *Quantity of drugs*

The district court adopted the findings of the presentence investigation (PSI) that Arce's relevant conduct involved approximately 3,465 pounds (1,575 kilograms) of marihuana. This quantity included 7 marihuana distributions in Dallas during 1987 and 1988, totalling an estimated 2,185 pounds (991 kilograms) of marihuana; the February 26-27, 1992, transaction with Gonzalez, estimated to involve at least 1,000 pounds (454 kilograms) of marihuana and resulting in the seizure of an additional 750 pounds (341 kilograms); and the distribution of 280 pounds (127 kilograms) of marihuana to Enrique Zuniga.

The district court found that the quantity was accurately calculated, but noted that even if the quantity were reduced by a substantial amount, the relevant offense conduct easily exceeded

1,000 kilograms. In determining drug quantity under the Sentencing Guidelines, the court may consider drug quantities not specified in the indictment if they are part of the same scheme, course of conduct, or plan. U.S.S.G. § 1B1.3; *United States v. Young*, 981 F.2d 180, 185 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2454 (1993). Where the actual amount of drugs seized in an investigation does not reflect the scale of the offense, the court must approximate the quantity involved in the relevant offense conduct. U.S.S.G § 2D1.1, comment. (n.12). In making this determination, the court may rely on the information contained in the PSI as long as it has "some minimum indicium of reliability." *Young*, 981 F.2d at 185; *United States v. Windham*, 991 F.2d 181, 182 (5th Cir.), *cert. denied*, 114 S.Ct. 444 (1993). The defendant bears the burden of proving the information is "materially untrue". *Young*, 981 F.2d at 185. If the defendant fails to do so, the court may adopt the PSI's facts without more specific inquiry, provided the facts are supported by an adequate evidentiary basis. *United States v. Rodriguez*, 897 F.2d 1324, 1327-28 (5th Cir.), *cert. denied*, 111 S.Ct. 158 (1990).

We conclude that there were sufficient indicia of reliability to find that Arce possessed with intent to distribute at least 1,000 kilograms of marihuana. While Arce contends the court should have limited the drug quantity to the amount seized by agents on February 27 (approximately 341 kilograms), surveillance evidence and intercepted conversations indicated that a related transaction occurred the previous day. Other recordings also confirmed that Gonzalez planned to store 1,000 pounds of marihuana at his

residence. Arce essentially asks this Court to disregard these findings, as well as the seven Dallas transactions and the Zuniga delivery, because the government bases its evidence on the testimony of Gutierrez. Arce's thinly veiled reiteration of his attack on Gutierrez's credibility is no more availing here than it was with the sufficiency issue. Arce offers no evidence to contradict Gutierrez's testimony, nor does he provide any basis for finding the PSI's facts materially untrue.

2. *Possession of a firearm*

Section 2D1.1(b)(1) directs the court to increase the base offense level by two points if the defendant possessed a dangerous weapon or firearm. The adjustment should be applied whenever a weapon is present "unless it is *clearly improbable* that the weapon was connected with the offense." *United States v. Guerrero*, 5 F.3d 868, 872 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1111 (1994) (quoting U.S.S.G. § 2D1.1(b), comment. (n.3)). "Such a strict application of the enhancement for weapons possession 'reflects the increased danger of violence when drug traffickers possess weapons.'" *Id.* at 873. "Possession of firearms obviously increases the *danger of violence* whether or not such weapons are actually used." *Id.*; *see also Condren*, 18 F.3d at 1197 (applying *Guerrero* to possession of a firearm while in possession of drugs). Thus, the government need not prove the defendant actually used or brandished the weapon, "but may meet its burden by showing that the weapon facilitated, or could have facilitated, the drug trafficking offense." *Guerrero*, 5 F.3d at 873 (citing *United States v. Capote-Capote*, 946 F.2d 1100, 1104 (5th Cir. 1991), *cert. denied*, 112

S.Ct. 2278 (1992)).

The government offers two grounds for upholding the imposition of the weapons possession enhancement. First, Gutierrez testified that Arce carried a firearm during every drug transaction in which he was involved. This testimony was corroborated by the recovery of weapons from the hotel room where Arce and Gutierrez were arrested in 1988 and by an intercepted conversation in which Arce threatened Zuniga for failing to pay for marihuana. Given this evidence, we cannot say it was "clearly improbable" that the recovered firearms were connected with Arce's drug trafficking. Alternately, Arce may be held accountable for the reasonably foreseeable possession of a firearm by his co-defendant. *Guerrero*, 5 F.3d at 871 & n.7; *United States v. Aguilera-Zapata*, 901 F.2d 1209, 1215 (5th Cir. 1990). Substantial evidence, including the seizure of numerous semiautomatic weapons, established that Gonzalez routinely possessed firearms in the course of his drug trafficking. Either basis is sufficient to uphold the district court's enhancement for weapons possession.

II. Gonzalez

Gonzalez alleges the conditions of his pretrial detainment deprived him of his constitutional rights to due process, to the effective assistance of counsel, and to prepare his defense.⁶ Specifically, he argues that his confinement in Bexar County Jail under twenty-three hour "lock-down" status prevented him from

⁶ Gonzalez also adopts Arce's arguments regarding the sufficiency of the evidence. But, for the same reasons stated above, we find the evidence sufficient to convict Gonzalez as well.

communicating with his counsel and from reviewing the wiretap recordings and translated transcripts.⁷ While Gonzalez admits he is unable to identify any material inaccuracies in the transcripts or any specific prejudice caused by his lack of access to this evidence, he maintains that his right to prepare for trial is so fundamental as to mandate relief. We disagree.

While pretrial detention is often necessary to ensure the defendant's presence at trial, the Due Process Clause of the Fifth Amendment prohibits holding pretrial detainees under conditions that amount to punishment. *Bell v. Wolfish*, 99 S.Ct. 1861, 1872 (1979). Nevertheless, "[p]rison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry." *Id.* at 1878. Indeed, as the Supreme Court has noted, "security measures may directly serve the Government's interest in ensuring the detainee's presence at trial." *Id.* at 1874 n.22. Because safeguarding institutional security and preventing escape will necessarily infringe upon some protected rights of a pretrial detainee, this Court generally grants prison officials considerable deference in balancing these conflicting obligations. *McCord v. Maggio*, 910 F.2d 1248, 1250 (5th Cir. 1990). Thus, we will not find the conditions constitutionally infirm as long as they "are reasonably related to the institution's interest in maintaining jail security." *Wolfish*, 99 S.Ct. at 1874.

In the present case, Gonzalez has not demonstrated that the

⁷ The wiretap recordings were predominantly in Spanish.

Marshal's Service acted unreasonably in transferring him to Bexar County Jail. In fact, the evidence indicates quite the contrary. Being housed in a relatively low security facility in downtown San Antonio and having ready access to large amounts of cash and a state-wide criminal network to assist him, Gonzalez clearly posed a significant escape risk and repeatedly expressed his intent to escape. He cannot now ask this Court to chastise the Marshal's Service for taking his threats seriously. The "lock-down" was not a means of punishing Gonzalez but was reasonably related to the legitimate objective of preventing his escape; as such, it did not violate due process. *McCord*, 910 F.2d at 1250-51.

The remaining aspects of Gonzalez's claim are similarly unavailing. We recognize that under the Bail Reform Act of 1984 the detainee must "be afforded reasonable opportunity for private consultation with his counsel." 18 U.S.C. § 3142(i)(3). While Gonzalez's phone privileges were limited to one hour per day, he could request to call his attorney at other times, but he never made any such request. Moreover, his "lock-down" status did not prevent his attorney from meeting him in person, and no limitations were placed on playing the tapes during these visits. Thus, we conclude the jail officials afforded Gonzalez reasonable access to his attorney.

We also conclude Gonzalez received an adequate opportunity to prepare his defense. His ability to review the wiretap recordings was virtually unimpeded from May through November, and even after the Bexar County officials curtailed his access to the tapes, his attorney could still review them, consult experts, and establish

the accuracy of the translations. Had Gonzalez needed additional time to review the tapes, he could have moved for a continuance, which he did not. Moreover, he has failed to show, or even to allege, any specific prejudice.

Furthermore, we emphasize that the evidence presented at trial against Gonzalez was overwhelming. His conviction was not based solely on the recorded conversations, as he would have this Court believe. It was also based on the testimony of 4 accomplice witnesses who testified about drug transactions with him, extensive surveillance of his activities by law enforcement officers, and the seizures of over 750 pounds of marihuana, additional controlled substances found at his residence, documents connecting him to the co-conspirators, and numerous firearms.

Conclusion

The convictions and sentences of both Arce and Gonzalez are

AFFIRMED.