UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8414
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS L. GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(92-R-404-H)

(April 7, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Jesus L. Garcia, a former immigration officer, was convicted of conspiracy to import marijuana and bribery of a public official and was sentenced to 84 months' imprisonment on all counts to run concurrently. On appeal, he questions the voluntariness of his statements to investigators and sufficiency of the evidence against him. Finding no error, we affirm.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

At trial, the evidence showed that Garcia admitted that he had met Aaron Northrup, a marijuana smuggler from Connecticut, in March or April of 1991 through a man named Tito Hopkins. Garcia agreed to let Northrup enter the United States through the inspection lanes to which he was assigned at the El Paso-Juarez port of entry. He confessed that he assisted Northrup on approximately ten occasions. Garcia told Agent Malley that once he received his work assignments for the day, he would make cryptic notes for Northrup and leave them at a designated location at the port of entry. Northrup would drive through Garcia's inspection lane as a signal that the car behind his was the load vehicle, and Garcia would wave them through. Garcia would either distort the license plate numbers of the vehicles or not enter them at all. Northrup paid Garcia $3,000 for each load.

Garcia argues on appeal that the district court erred in failing to suppress the two statements he gave to the investigative agents. He contends that his statements were involuntary because the agents used coercive interrogating techniques such as insinuating that he might be involved in and intimating that he might be charged in a murder conspiracy. He contends that the officers failed to inform him of the offense for which he was being interrogated, and that he believed that he was being questioned about a conspiracy to murder a witness. He also argues that the interrogating officers exerted improper influence to get him to confess by telling him that he was free to leave and that he was not under arrest, which amounted to a promise of immediate release,

a type of promise which renders a confession involuntary. He contends that the ambiguous language of the employee rights warning form contributed to coerce him to confess because he felt that the language implied that he could be fired if he remained silent. He argues that the Government did not meet its burden of proving that his confession was voluntary.

The government has the burden of proving by a preponderance of the evidence that a defendant voluntarily waived his rights and that the statements he made were voluntary. U.S. v. Restrepo, 994 F.2d 173, 183 (5th Cir. 1993). A confession is voluntary if it is the product of the defendant's free and rational choice. It is voluntary in the absence of official overreaching, either by direct coercion or subtle psychological persuasion. Id. Whether a confession is voluntary is determined by considering the "totality of the circumstances." Id. In reviewing the district court's ruling on a motion to suppress a confession, this court gives credence to the credibility choices and findings of fact of the district court unless they are clearly erroneous. The ultimate issue of voluntariness is a legal question which is reviewed *de novo*. Id.

Garcia filed a motion to suppress his statements in the district court. The only ground he urged for his confession being inadmissible was that his confession was involuntary because the advisement of rights form contained a threat of discharge from his job if he did not confess. The district court held a hearing at

which Garcia testified about the circumstances surrounding his giving of the statements.

Garcia testified that he was employed by the Department of Justice, Immigration Service, as an Immigration Inspector. He was working at the bridges in El Paso on April 9, 1992. At 1:00 p.m., agents from the Office of the Inspector General, Trooper Murray and Mr. Malley, came to the bridge and asked him to accompany them. They said that they had some questions to ask him. He followed them to their vehicle and they drove to the Office of the Inspector General.

When he first arrived, they asked him if he knew Aaron Northrup, and he said that he did not. They showed him a picture of Northrup, and he told them that he did not know him. They asked him to step outside the room, which he did, and then they called him back in. They then showed him a news item which stated that Aaron Northrup had been arrested for conspiracy to murder a federal witness, and they told him that Garcia was a suspect. They asked him again if he knew Northrup. At this point, he became upset, he lost control, and he was unnerved by being associated with a murder. They asked him again if he knew Northrup, and he told them that he did know him. They also told him that Northrup was involved in trafficking drugs and asked him if he wanted to make a statement.

Garcia told them that he was willing to give a statement, and they gave him the employee rights warning, which he read. He admitted that he signed the warning form. This form stated in

part, "If you refuse to answer the questions posed to you on the ground that the answers may tend to incriminate you, you cannot be discharged solely for remaining silent." Garcia testified about what this statement meant to him. "Well, `solely' at that point meant only my silence, but I knew I was there for other things, especially since they had brought up this stuff about Aaron and murder. So, I figured I could be discharged from my job by being silent also." On cross-examination, he testified that he understood the statement on the warning form. He testified, "I could lose [my job] if it was solely for my silence because I understood that it could mean they could bring other, other than my silence, into the picture." The prosecutor questioned him further, asking, "So you did understand then that they could bring in evidence which would cause you to lose your job?" Garcia responded, "That's right, especially when they mentioned something about murder."

Garcia gave a general statement lasting about three hours. He was given a second "Miranda-type"[1] warning, with the word "custodial" scratched out, and they interrogated him further until about 10:30 or 11:00 p.m.

He admitted that he was not restrained and that he was free to leave at any time during the interrogation. The agents were courteous, treated him well, allowed him to go to the restroom, and offered him something to drink.

---

[1] Garcia does not claim that he was in custody or that his Miranda rights were violated. His issue on appeal deals solely with the voluntariness of his confession. Blue brief, 7.

Garcia testified that he went for another interview on September 23, 1992. An agent called him at his home and asked if he would agree to another interview. He drove himself to the interview. He repeated much of the same story to Agent Fleming with more specifics. He testified that when he discussed the case on September 23, the warnings which he had received in April regarding the fact that he could lose his job were still on his mind.

The district court found that Garcia's statements were voluntary and denied his motion to suppress. Agents Malley and Fleming testified about the substance of the statements and the circumstances surrounding the taking of the statements at trial with no further objection from Garcia. Their testimony substantially agrees with Garcia's testimony.

The only argument which Garcia made in the district court regarding his statement being involuntary was the issue of the ambiguous employee warning. In his motion to suppress, Garcia cited Garrity v. State of New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), in which the Supreme Court held that the defendant police officers' statements were coerced because they were made under threat of being removed from office. In that case, the employee warning form was very explicit that if the officers refused to answer the questions, they "shall" be removed or forfeit their office. Id. at 494 n.1. The employee warning form in this case does the exact opposite. It states that the employee "cannot be discharged solely for remaining silent." Garcia attempted to

show that he understood this warning to mean that he could be discharged. However, his testimony can be reasonably construed to mean that he understood that he could not be discharged "solely" for refusing to talk, but that there must be some other evidence of wrongdoing on his part before he could be discharged. Although the district court did not make an explicit finding on this fact, it is implicit in the court's conclusion that the statement was voluntary. This finding is not clearly erroneous.

Looking at the totality of the circumstances surrounding the taking of his statements on April 9 and September 23, the conclusion is that Garcia's statements were voluntary. He was asked to accompany the officers, he was not arrested, he was free to leave at any time, and they were courteous to him. There is simply no evidence of official overreaching or coercion.

Garcia raises several new arguments on appeal which were not raised in the district court to support his claim that his statements were involuntary: coercion by mentioning that Northrup was arrested for conspiracy and suggesting that he was involved, failure to inform him of the actual offense for which he was being interrogated, and promising him he was not under arrest and was free to leave. Garcia may not raise new theories on appeal which were not presented to the district court absent manifest injustice. See U.S. v. Jackson, 700 F.2d 181, 190 (5th Cir.), cert. denied, 464 U.S. 842 (1983). This court will not consider his new arguments unless they involve only a question of law and failure to

consider them will result in manifest injustice. U.S. v. Romero-Reyna, 867 F.2d 834, 835 (5th Cir. 1989).

Whether the agents failed to inform him of the actual reason they were interrogating him or led him to believe that he would be charged with participation in a murder conspiracy is a disputed question of fact on this record and should not be considered. Whether the fact that he was told that he was not under arrest and was free to leave at any time during the interview rendered his confession involuntary is a question of law, but failure to consider it would not result in manifest injustice because the promise not to arrest him was kept. See Streetman v. Lynaugh, 812 F.2d 950, 957 (5th Cir. 1987) (a promise of immediate release, if not kept, renders confession involuntary).

Garcia also argues that the district court erred in denying his motion for acquittal on the basis of insufficiency of the evidence. He contends that the record does not show that the Government established each element of the offenses charged beyond a reasonable doubt. Specifically, he contends that there was no accurate evidence regarding the amounts of marijuana imported, the dates marijuana was imported, or the amounts of money he received in payment. He also contends that there was no evidence, other than his confession, that a conspiracy existed, because Northrup did not testify and the other two coconspirators cold not identify him as the agent Northrup hired.

Garcia's argument that his confession was not sufficiently corroborated because the two other coconspirator

witnesses could not identify him as the agent who assisted Northrup ignores the other evidence corroborating his admissions. Milikien and Montgomery testified that Northrup called the agent "Garcia" and "Jesus." Garcia's name, address, and phone number were found in Northrup's home. A Federal Express receipt addressed to Garcia was found in Northrup's home in Connecticut, which corroborated Garcia's admission that his payments were sent by Federal Express from Connecticut. Within an hour after Northrup and Cerda met to arrange for the transportation of a load of marijuana, at which meeting Northrup said he would call his agent to arrange it, Northrup placed a call to Garcia's home. Northrup and Garcia met later that evening. Garcia's work records coincided with Northrup's statements to Cerda about the agent's work schedule. Northrup's statements to Cerda regarding the fact that the agent knew which car was the load vehicle because it was the vehicle immediately behind Northrup's car corroborates Garcia's admission of that fact. This evidence was sufficient to corroborate Garcia's confession, and the evidence was sufficient to support Garcia's convictions.

The judgment of the district court is **AFFIRMED.**