

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8538
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MIGUEL ANGEL GONZALEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(DR-93-CR-24)

(February 22, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Miguel Angel Gonzalez challenges his conviction for importation of marijuana. We **AFFIRM**.

I.

When a vehicle operated by Gonzalez, a resident alien from Guatemala, was proceeding through a customs checkpoint along the Mexican-American border, a drug-detecting canine alerted to the possible presence of drugs in that vehicle. A customs officer instructed Gonzalez to turn the vehicle off; the dog then gave a

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

"final response" -- confirming the presence of narcotics. Gonzalez exited the vehicle; according to the officer, he looked nervous and excited. Gonzalez was asked to move the vehicle to a secondary inspection area. A number of customs officers questioned Gonzalez, who appeared nervous; his hands were shaky and sweaty, and his voice cracked. Customs officers, after determining that the vehicle's gas tank may have been altered, removed it. A large quantity of marijuana was discovered in it, and Gonzalez was arrested.

Gonzalez was indicted on one count of importation of marijuana, in violation of 21 U.S.C. §§ 952(a), 960(a)(1), and one count of possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). An initial trial ended in a mistrial, because the jury could not reach a unanimous verdict. At the second trial, a jury convicted Gonzalez on the importation count.

II.

Gonzalez raises only one issue: whether the district court abused its discretion in sustaining an objection by the government to a question by defense counsel.

In order to convict Gonzalez of the importation charge, the government was required to prove that he "knowingly played a role in bringing marijuana from a foreign country into the United States." *United States v. Diaz-Carreon*, 915 F.2d 951, 953 (5th Cir. 1990) (citation omitted). Although knowledge may be inferred from the exercise of control over a vehicle in which narcotics are

found, that alone will not suffice when the substance is not clearly visible or accessible to the defendant. *Id.* at 954. In such cases, the government must point to circumstances which manifest a "*consciousness of guilt* on the part of the defendant." *Id.* (emphasis in original). Such circumstances include nervous behavior, inconsistent statements, and implausible explanations. *Id.* at 954-955.

The government relied, in part, on Gonzalez's nervous behavior to establish the requisite knowledge. Gonzalez offered an alternative explanation for his nervousness; namely, that it was indicative of fear rather than guilty knowledge. In support, he relied upon the testimony of Miguel Vasquez. Vasquez had directed a refugee relief organization for one year, and had visited Guatemala. He testified that Guatemala had a history of repressive military governments. In concluding this line of questioning, Vasquez was asked the following:

Assume for me that someone has come from Guatemala into this country, and that in their first encounter with federal officials at the border, they're detained for approximately two hours. They're questioned by men with gun at their sides, and they're not told what reason they're being detained and not told what is happening to them.

Would a person from Guatemala with that background be nervous, in your opinion?

The government's objection to the question as speculative was sustained.² Gonzalez contends that, in so ruling, the district court abused its discretion.

Even assuming error by the district court in excluding the evidence, we nevertheless deem it harmless. See Fed. R. Crim. P. 52(a); see also Fed. R. Evid. 103(a) (requiring that evidentiary errors be predicated on rulings affecting substantial rights). The government did not rely only on nervousness to establish the requisite knowledge; it introduced evidence that Gonzalez gave

² Gonzalez views the government's objection as having also been on relevance grounds. Based upon the objection and resulting colloquy, as well as objections made shortly before, we do not read it as such. The objection and colloquy was:

[Government Counsel]: Objection. It calls for speculation. The witness would have no basis for answering this type of question. It's a broad, vague general question and it has nothing at all to do with this defendant. He's not even testified that he knows the defendant.

[Defense Counsel]: Your Honor, this defendant has testified that he comes in contact with approximately four hundred Guatemalans a year, has an extensive basis and knowledge of the Guatemalan government and their practices, and would be able to answer this hypothetical question.

[Government Counsel]: He could no more answer that question than I could say what an American citizen would do when confronted by French authorities.

THE COURT: I'm going to sustain the objection, Mr. Arrambide.

Perhaps the phrase "it has nothing at all to do with this defendant" was meant to be a relevancy objection. At any rate, even if we were to view the objection as also going to relevance, our harmless error conclusion, discussed *infra*, would remain the same.

inconsistent statements and implausible explanations to explain his actions. For example, he stated initially that the vehicle was his, but later stated that it belonged to a friend. He initially told the officers that he was in Mexico to visit relatives, but later stated that he had been hired to fix the vehicle and drive it back across the border. He initially stated that he came to Mexico alone, but later stated that he had come with the vehicle's owner. He claimed to have repaired the vehicle's carburetor prior to driving across the border, but the officers testified that he was clean and that no tools were found. Then, he denied repairing the vehicle.

Such inconsistencies and implausible explanations provide sufficient evidence of guilty knowledge. See *Diaz-Carreon*, 915 F.2d at 954-55. Indeed, inconsistent statements are "[p]erhaps the strongest evidence of a criminal defendant's guilty knowledge". *Id.*; see also *United States v. Anchondo-Sandoval*, 910 F.2d 1234, 1237 (5th Cir. 1990) ("Such inconsistencies in [defendant's] story coupled with possession of the vehicle allow for an inference of his guilty knowledge.").

In addition, as described above, Gonzalez elicited testimony through Vasquez regarding the political conditions in Guatemala. From this testimony, he argued to the jury that his nervousness was indicative of fear stemming from his experiences in Guatemala, rather than guilty knowledge. The jury obviously did not credit this explanation.

III.

In sum, we cannot conclude that the jury would have voted differently had Vasquez been permitted to answer the question in issue. Accordingly, the conviction is

AFFIRMED.