UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8639

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALVARO RASCON GONZALEZ,
and ELCO GONZALEZ-MENDOZA,

Defendants-Appellants.

Appeals from the United States District Court for the
Western District of Texas
(P-93-CR-43)

(October 17, 1994)

Before GARWOOD, JOLLY and STEWART, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendants-appellants Elco Gonzalez-Mendoza (Gonzalez) and Alvaro Rascon-Gonzalez (Rascon) were convicted of, and sentenced for, possession with intent to distribute more than five kilograms of cocaine and conspiracy to commit the same, in violation of 21 U.S.C. §§ 841(a)(1) and 846. On appeal, they contend that the evidence of their knowledge of the cocaine was insufficient to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

support their convictions. We affirm.

Facts and Proceedings Below

At approximately 1:40 a.m. on May 8, 1993, Border Patrol Agent John Kennedy Miller, working as the primary inspection officer at the Sierra Blanca checkpoint near El Paso, Texas, stopped a brown 1984 Volkswagen van with a Texas license plate. Miller ascertained that Rascon was the driver of the van; Gonzalez was the passenger and owner of the van. In response to Miller's inquiry regarding their citizenship, Rascon and Gonzalez handed over their resident alien cards; these valid cards revealed that the defendants were legally in the United States.

At the defendants' trial, Miller testified that both men appeared highly nervous when he stopped them at the checkpoint: Gonzalez was perspiring, the hands of both men were shaking as they handed over their resident alien cards, and neither man made eye contact with Miller. Miller noticed a strong odor of air freshener and a fresh odor of bondo coming from the driver's window;[1] he testified that, according to his experience, it was common practice for narcotics smugglers to use air freshener to mask the odor of narcotics.[2] Gonzalez told Miller that he lived in El Paso but was traveling with Rascon, his nephew, to Arlington, Texas. Looking

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[1] Bondo is a product often used to recondition the body or structure of a vehicle.

[2] Defendants argue that the air freshener is not evidence of narcotics smuggling in this case because, unlike marihuana, cocaine does not have an odor that can be detected by humans. Defendants ignore the fact that dogs can smell cocaine and thus the air freshener could have been used in an attempt to disguise the scent of the cocaine in the event of a canine search such as the one conducted at the checkpoint.

through the van's picture window, Miller could see no visible luggage, clothing, food, drink, or any other items whatever in the van which would suggest such a trip. He referred the vehicle to the secondary inspection site.

At the secondary inspection site, Rascon moved to unlock the back door of the van before he was asked to do so, an action which Miller described in his testimony at trial as uncommon. Rascon was unable to unlock the back door, however, because his hands were shaking so badly he could not fit the key in the keyhole. Border Patrol Agent Joe Tammen conducted a canine inspection of the van; the dog alerted positive to the interior of the van behind the rear seat.

In the engine compartment in the rear of the Volkswagen, Miller discovered fresh paint and bondo attached to a wall that should have been forward of the engine compartment. Further investigation revealed that the fire wall between the rear seat and the engine compartment had been recently painted, and Miller noticed a seal of fresh bondo around the edges of the fire wall. The agents removed the rear seat of the van as well as a passenger compartment heater found on the floor beneath the rear seat.[3] Miller pulled the carpet back, revealing more fresh paint and bondo. Agent Tammen scraped the paint with a screwdriver and discovered a door that had been cut into the middle of the fire wall. Pushing the screwdriver through the wall, Agent Tammen

[3] At trial, Agent Tammen testified that the heater was a water-operated heater and thus did not belong on a Volkswagen, which has an air-cooled motor. He stated that the heater was positioned in such a way as to conceal the hidden compartment.

discovered a white, powdery substance which subsequently tested positive for cocaine.

Upon removing the door, the agents found fifty-three bundles of cocaine. The total weight of the bundles, including the packaging, was 129 pounds.[4] Packed in the compartment with the cocaine were approximately twenty to thirty packets of air freshener. Rascon and Gonzalez were arrested for possession of narcotics and informed of their *Miranda* rights.

Raymond Kelly, a Special Agent with the Drug Enforcement Administration, interviewed the defendants following their arrest. Rascon told Kelly that he had arrived in El Paso from Mexico on May 6 to meet Gonzalez, who was his uncle, and drive with him to Arlington, Texas, to look for a job. He stated that both men stayed at the Gateway Hotel in El Paso until May 8. On the 7th, Rascon and Gonzalez went to Juarez, Mexico, to a night club. They returned to El Paso in the 1984 VW van and left for Arlington. Rascon drove the van because Gonzalez believed his temporary driver's license was insufficient. Rascon had a valid Texas driver's license, listing an address in Arlington.[5] Rascon denied any knowledge of the cocaine in the van.

Gonzalez told Agent Kelly that he came to El Paso from Mexico

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[4] The cocaine itself weighed fifty-three kilograms, or one hundred sixteen pounds. The cocaine was eighty-one percent pure and had a street value of approximately $5,000,000, or $15,000,000 if "stepped on" (mixed with a cutting agent such as baking soda) prior to final sale.

[5] Rascon said he had been employed previously in Arlington painting highway lines, and had returned to Mexico to visit his family during the month of April after he was laid off from his job.

around the 22nd or 23rd of April 1993 to purchase a car for his family in Mexico. He bought the 1984 VW van for $1,500 from one Angel Andrade, whom he had met in El Paso at the San Jacinto Plaza. According to Gonzalez's statement to Agent Kelly, Gonzalez then returned to Mexico. It is not clear exactly when he supposedly returned to Mexico, however, because Gonzalez later testified at trial that he attempted to get a new resident alien card in El Paso on April 29, but the office was closed. He got a room at the Gateway Hotel for the night. Records from the Gateway Hotel indicated that Gonzalez only rented a room on the night of April 30 and departed May 1, the room being rented for one person. There was no record of a room rented to Rascon.

Upon his return to Mexico, Gonzalez spoke with his nephew, Rascon. Both men needed work and decided to meet in El Paso on May 6 to travel to Arlington to seek employment. According to Gonzalez, he arrived in El Paso on May 6 and spent the night in a club in Juarez, Mexico. He and Rascon left for Arlington around midnight of May 7 and were stopped at the checkpoint in the early hours of May 8. Gonzalez acknowledged ownership in the van, but, like Rascon, he denied any knowledge of the presence of the cocaine. Gonzalez's temporary driver's license contained a false El Paso address. His explanation for this was that, because he needed a Texas driver's license in order to return to Mexico after purchasing the van, he applied for a Texas driver's license listing a false El Paso address. He then applied for a post office box in El Paso in order to have an El Paso address.

The defendants were indicted in a two-count indictment on May

10, 1993, and charged with (1) conspiracy to possess with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 846; and (2) possession with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1). On July 7, 1993, following a two-day trial, a jury returned a verdict finding both defendants guilty on both counts.[6] The district court denied defense motions for instructed verdict at the close of the government's case-in-chief and for acquittal at the close of all the evidence.

The district court sentenced Gonzalez to concurrent terms of 189 months imprisonment and 5 years supervised release. Rascon received concurrent terms of 188 months imprisonment and 5 years supervised release. Each was ordered to pay a special assessment of $100.

Both defendants filed timely notices of appeal.

Discussion

The sole issue raised on appeal by each defendant is whether there was sufficient evidence that he knew about the cocaine in the van. Gonzalez claims that the evidence supporting his conviction showed only that he was the owner of the vehicle and was nervous at the checkpoint. Rascon contends that his conviction rests solely on the fact that he was driving the van when it arrived at the checkpoint. The defendants, however, ignore other evidence which supports the verdict.

We will sustain the defendants' convictions if a rational

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[6] Both defendants testified at trial in their own defense.

trier of fact could have found from the evidence, as to each defendant, that each of the elements of the offense was established beyond a reasonable doubt. *United States v. Shabazz*, 993 F.2d 431, 441 (5th Cir. 1993). We view the evidence in the light most favorable to the government, drawing all reasonable inferences in support of the verdict. *United States v. Pennington*, 20 F.3d 593, 597 (5th Cir. 1994).

To convict the defendants of the conspiracy charge, the government had the burden of proving (1) the existence of an agreement between two or more persons to violate federal narcotics laws; (2) that the defendants knew of the agreement; and (3) that both defendants voluntarily participated in it. *United States v. Gallo*, 927 F.2d 815, 820 (5th Cir. 1991). Each element may be proved by circumstantial evidence. *Id*. Although neither mere presence at the scene of an illegal activity nor association with members of a conspiracy alone suffices to prove participation in a conspiracy, both are relevant factors. *Id*.

To convict the defendants of the possession charge, the government had to prove that the defendants knowingly possessed cocaine with the intent to distribute it. *Shabazz*, 993 F.2d at 441. Possession may be actual or constructive; "Ownership, dominion, or control over the contraband, or over the vehicle in which it was concealed, constitutes constructive possession." *Id*. The intent to distribute may be inferred from the quantity and value of the substance possessed. *United States v. Casilla*, 20 F.3d 600, 603 (5th Cir. 1994).

At issue here is the element of knowledge: both defendants

challenge the sufficiency of the evidence that they *knowingly* possessed the cocaine. Knowledge may be inferred from control over a vehicle in some cases. *United States v. Garza*, 990 F.2d 171, 174 (5th Cir.), *cert. denied*, 114 S.Ct. 332 (1993). Both Rascon and Gonzalez had constructive control over the van: the former as the driver of the van, and the latter as the van's owner present in it. In cases involving vehicles with hidden compartments, however, knowing possession normally may not be proved solely by a defendant's control of the vehicle. Instead, there must exist some other circumstantial evidence that demonstrates guilty knowledge or is suspicious in nature. *Id*.

Both defendants claim that the only evidence of guilty knowledge is their nervousness in the presence of the Border Patrol agents. To support a finding of guilty knowledge, nervousness must be combined with "'facts which suggest that [the nervousness] . . . derives from an underlying consciousness of criminal behavior . . . .'" *Id*. (quoting *United States v. Diaz-Carreon*, 915 F.2d 951, 954 (5th Cir. 1990)). *See United States v. Williams-Hendricks*, 805 F.2d 496, 500 (5th Cir. 1986) (a defendant's anxiety is "inconclusive *unless* viewed in the context of other facts") (original emphasis).

Contrary to the defendants' contentions, their convictions do not rest solely upon evidence of their control over the van and nervousness at the checkpoint. The record provides ample support for the jury's inference that the defendants acted with guilty knowledge.

We have previously acknowledged that a large amount of an

illicit substance tends to support an inference of knowledge of the presence of the illicit substance, reasoning that the owner or source of the contraband would be unlikely to entrust it to an unwitting person. *United States v. Martinez-Moncivais*, 14 F.3d 1030, 1034 (5th Cir. 1994). This reasoning is relevant here. Rascon and Gonzalez were stopped in a van containing over fifty kilograms of cocaine with a purity of eighty-one percent and a street value of at least $5,000,000. It is improbable that the owner of the cocaine would have allowed Gonzalez to take control of the van if Gonzalez had been unaware of its contents.

We have also recognized that under certain circumstances a jury may infer that a vehicle's most recent occupant is responsible for concealing the illicit substance in it. *Shabazz*, 993 F.2d at 442. In the present case, the hidden compartment in the van was newly constructed; the smell of the bondo was still fresh, and the Border Patrol agents noticed evidence of fresh paint. Although Gonzalez had owned the van only a few weeks prior to his arrest at the checkpoint, the jury was entitled to consider the likelihood that, as the van's most recent occupant, he was responsible for, or at least aware of, the compartment and the cocaine.[7]

As discussed above, nervousness, combined with other facts linking the nervousness with consciousness of guilt, is relevant

[7] Agent Tammen testified that a layman, or someone without experience working with sheet metal or welding, could not have constructed the compartment. Although neither defendant was shown to have had the skills required to construct the compartment, the newness of the construction nevertheless still tends to support the inference that they were aware of the compartment and its contents.

evidence of knowledge of hidden narcotics. *Garza*, 990 F.2d at 174. Agent Miller testified that the defendants were shaking and made no eye contact, that Gonzalez was perspiring, and that Rascon continued to allow his foot to slip on the brake pedal. Heightened nervousness as agents close in on the area where the substances are hidden may also be taken into consideration in assessing the defendants' knowledge. *United States v. McDonald*, 905 F.2d 871, 874 (5th Cir.), *cert. denied*, 111 S.Ct. 566 (1990). Agent Tammen testified that he watched the defendants' expressions as the canine inspected the van; the two men became more nervous when the dog approached the rear of the van, where the cocaine was hidden:

> "Their demeanor were [sic] they had complete eye contact with the dog. They were watching every move myself [sic] and the canine unit made all the way around. When we came around the vehicle, the dog alerted. . . . There was a look of, `You got me,' or, `It's over.' The look just went from maybe, maybe, oh, you know, and then when Mr. Rascon came over to the vehicle and tried to open the back door, when he was shaking so severely, I knew that it was indeed in this area and it was indeed loaded."

Furthermore, there was evidence that the defendants showed no surprise when the cocaine was discovered. Because an innocent person would normally react with shock if a large amount of cocaine were unexpectedly found in his or her car, a lack of surprise in such circumstances may be evidence of consciousness of guilt. *United States v. Romero-Reyna*, 867 F.2d 834, 836 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 1818 (1990). When asked to describe the defendants' demeanor when the cocaine was discovered, Agent Tammen replied: "Total defeat. Just, it's over, you now [sic]. At first there was the glimmer of hope, maybe they won't find it. Then it was total defeat." Agent Miller also testified that the

defendants' demeanor altered when the cocaine was discovered: instead of registering surprise or consternation, Rascon and Gonzalez appeared calmer than before.

> "At the point that the cocaine had been found, we had been pulling it out of the vehicle, both men were no longer visibly shaken, they no longer appeared to be visibly nervous. . . . [T]hey looked more relieved than anything."

False or inconsistent statements concerning the defendants' activities in connection with their trip from El Paso to Arlington provide further support for the inference that the defendants were aware of the cocaine in the van. *See Shabazz*, 993 F.2d at 433 (inconsistent accounts of recent whereabouts considered as evidence of guilty knowledge); *United States v. Diaz-Carreon*, 915 F.2d 951, 954-55 (5th Cir. 1990) (change in claims of residence and destination supported evidence of guilt). In the present case, Gonzalez was in possession of a temporary driver's license with a false El Paso address when he was arrested. Although he explained that he needed a valid driver's license in order to take the van into Mexico, the jury was not required to credit the explanation.

In addition, the defendants' explanations of the origin of their trip were contradictory and inconsistent. According to DEA Agent Kelly, Gonzalez claimed that Rascon arrived in El Paso from Mexico one week prior to their trip and stayed with him at the Gateway Hotel, a hotel in El Paso located near the international border with Mexico. Rascon gave a similar story. At trial, the manager of the Gateway Hotel testified that, according to hotel records, Gonzalez had checked into the hotel on April 30 and departed on May 1; he registered and paid for a room for one

person.[8] The room he was given was small, with a full-sized bed.

Gonzalez testified in his own defense. On direct examination, he testified that he was in El Paso on April 30 to apply for a new resident alien card and stayed at the Gateway Hotel that night. He stated that he stayed at the hotel only one night and that no one stayed with him. Later in his testimony, however, Gonzalez stated that he and Rascon were together in El Paso only one day before leaving for Arlington and that they both stayed at the Gateway Hotel on the night of May 6. He then denied having been at the hotel on April 30.[9]

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[8] Gonzalez paid $20.95, the rate for a single room. A room for two persons cost $25.51.

[9] Gonzalez's claim that he did not stay in the hotel on April 30 is somewhat ambiguous and could be interpreted as a recantation that he and Rascon had not stayed at the hotel on the night of May 6, but had instead gone to Juarez, Mexico, to a dance hall before leaving for Arlington. (Rascon also testified at trial; he confirmed the story of the dance hall.)

> "Q. How long were you and your nephew together before you left town?
> A. Just one day, from one day to the next.
> Q. Do you ever recall having taken [Rascon] to the Gateway Hotel or him ever spending the night there?
> A. Yes.
> Q. And when was that?
> A. The 6th.
> Q. At the Gateway?
> A. Yes.
> Q. One night?
> A. Yes, only one night.
> Q. And are you telling us that you spent the night of April 30th there also?
> A. We didn't stay there. We didn't stay there, we stayed down at the administration office around where the couches are and the chairs. And we stayed there and talked and we didn't leave until 8:00 at night, thinking about if we should go ahead and rent a hotel room or not.
> Q. Did you rent one?
> A. No, we didn't.

Finally, the defendants gave several implausible explanations of their actions and circumstances which may be evidence of their guilt. *See Diaz-Carreon*, 915 F.2d at 955 (defendant claimed that vehicle was on loan from a short-term acquaintance but would not reveal owner's residence or agreed return site); *see also Garza*, 990 F.2d at 175 (implausible explanation of false bill of lading).

Rascon and Gonzalez claimed that they were on their way to Arlington to seek employment. They were traveling without any personal belongings or clothing or food or drink or the like; nothing in the van indicated that the occupants were making a long trip with the intention of remaining, at least temporarily, at their destination. *See Romero-Reyna*, 867 F.2d at 836 ("The interior of the vehicle was unusually clean, particularly after a multi-hour trip with four people, two of whom were children."). Although he claimed he was moving to Arlington to seek employment, Gonzalez admitted that he did not inform his family or friends of his plans. Moreover, Gonzalez claimed that neither he nor Rascon noticed the smell of the air freshener in the van, even with the windows rolled up. Agent Miller testified that the smell was noticeable when Rascon unrolled his window at the checkpoint. When the agents discovered the hidden compartment, they found twenty to

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Q. Did you finally leave town?
A. We went to Juarez, went to a dance hall, a bar in Juarez."

Under either interpretation, Gonzalez's trial testimony is inconsistent with his previous statements to Agent Kelly, when he claimed that he and Rascon met in El Paso a week before the trip to Arlington and stayed together at the Gateway Hotel.

thirty packets of air freshener with the cocaine.[10]

Conclusion

The defendants' control over the van, combined with the evidence of their extreme nervousness at the checkpoint, the large amount of cocaine, the newness of the hidden compartment, and their inconsistent and implausible explanations for their activities, provides ample evidence of the defendants' knowing participation in the offenses charged. Therefore, the convictions and sentences of Rascon and Gonzalez are

AFFIRMED.

[10] Agent Tammen agreed at trial that the air freshener had a "sickly cherry smell to it." Two packets of the air freshener were included in the exhibits in the record on appeal. Even more than a year after the defendants were stopped at the checkpoint, these packets retain an overwhelming odor.