

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8696  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALBERT ACOSTA and MARIA  
DEL CARMEN RODRIGUEZ,

Defendants-Appellants.

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Appeal from the United States District Court  
for the Western District of Texas  
(EP-93-CR-88-2)

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(July 22, 1994)

Before POLITZ, Chief Judge, JONES and EMILIO M. GARZA, Circuit  
Judges.

POLITZ, Chief Judge:\*

Maria del Carmen Rodriguez and Albert Acosta appeal their  
convictions by a jury of conspiracy to possess and possession with  
intent to distribute cocaine, 21 U.S.C. §§ 841, 846. Finding no  
error, we affirm.

Background

Rodriguez, an El Paso deputy sheriff assigned to the West

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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should not be published.

Texas Narcotics Multi-County Task Force, worked as an undercover narcotics officer on several matters including cases with the Federal Bureau of Investigation. She typically worked from 8:00 a.m. to 5:00 p.m. Acosta, also an El Paso deputy sheriff, was assigned to patrol in the county on the 7:00 a.m. to 3:00 p.m. shift. He did not work undercover.

Frank Sanches was a paid informant and worked with a number of law enforcement officers in El Paso, including Rodriguez, during 1991 and 1992. In late 1992 or early 1993 Rodriguez asked Sanches to obtain two ounces of cocaine for her in Juarez, Mexico, allegedly so she could "pay a debt." Sanches reported this request to an FBI agent with whom he was working. After Sanches passed a polygraph examination the Bureau enlisted his aid to investigate Rodriguez, providing him with equipment to record his telephone conversations and meetings with Rodriguez.

Sanches recorded two February 15, 1993 conversations with Rodriguez in which arrangements were made for Sanches to deliver an "eight ball" (1/8 ounce) of cocaine to Rodriguez. He also recorded the meeting when the eight ball was delivered. Rodriguez and Acosta met with Sanches, took delivery of the cocaine sample, and negotiated for the purchase of two ounces of cocaine later that week. Rodriguez asked Sanches to "to put a deal together."

The policy of the Multi-County Task Force required officers to deliver all contraband secured in their work promptly to the evidence custodian. Officers were prohibited from taking drugs home. The custodial records do not reflect Rodriguez' delivery of

the eight ball, and the evidence custodian testified that it was not delivered. Rodriguez contends that she did deliver the drug sample and a co-worker, El Paso deputy sheriff Enrique Cubillos, testified that on the day after the sample was obtained he saw Rodriguez deliver to the evidence custodian a quantity of white powder approximately the size of an eight ball.

Arrangements were made for delivery of an ounce two days later. Rodriguez and Acosta met Sanches in front of Sanches' apartment. Sanches wore a body transmitter and several agents maintained surveillance. Sanches had been instructed not to enter the vehicle with Rodriguez and Acosta, but he complied when Rodriguez insisted that he do so. Sanches entered the vehicle, handed over the cocaine, and as Acosta started to drive away the agents acted and placed the duo under arrest. Acosta had approximately \$2200 on his person.

At trial, Rodriguez testified that she was investigating Sanches on her own, pretending to be a corrupt police officer, in an effort to arrest a drug dealer named Arturo Torres. She stated that she convinced Acosta, who was not assigned to undercover work, to assist her in this investigation. She also testified that after Sanches delivered the cocaine she planned to call her supervisor and arrest Sanches. Rodriguez never alerted her superiors that she was engaged in an undercover operation.

In addition to testimony about the foregoing scenario, the government offered evidence that the quantity of cocaine involved exceeded the amount normally purchased for personal use.

Rodriguez and Sanches were indicted for conspiracy and the substantive possession-with-intent charge, as well as for using a firearm during a drug offense. In addition Rodriguez was charged with several telephone counts. The jury found both guilty of the conspiracy and substantive cocaine offense, acquitted both on the firearm charge, and convicted Rodriguez on three counts of using a telephone to facilitate a drug offense. The trial court directed acquittal on one other communications count. Defendants timely appealed, challenging the sufficiency of the evidence.

#### Analysis

The standard for reviewing the sufficiency of the evidence in a criminal case asks whether a rational trier of fact, viewing the evidence in the light most favorable to the government, could have found the essential elements of the offense proven beyond a reasonable doubt.<sup>1</sup> To establish a drug conspiracy the government must prove the existence of an agreement to violate the narcotics laws, the defendants' knowledge of the agreement, and the defendants' voluntary and intentional participation in the conspiracy.<sup>2</sup> An agreement may be inferred from concert of action. Knowledge may be inferred from surrounding circumstances.<sup>3</sup> To establish possession of a controlled substance with intent to distribute, the government must prove beyond a reasonable doubt

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<sup>1</sup>**United States v. Blackburn**, 9 F.3d 353 (5th Cir. 1994).

<sup>2</sup>**United States v. Lopez**, 979 F.2d 1024 (5th Cir. 1992), cert. denied, 113 S.Ct. 2349 (1993).

<sup>3</sup>**United States v. Sanchez**, 961 F.2d 1169 (5th Cir.), cert. denied, 113 S.Ct. 330 (1992).

that the defendants knowingly possessed the cocaine and intended its distribution.<sup>4</sup> Possession may be joint among several defendants and the possession of a larger quantity of drugs than ordinarily would be used for personal consumption may support a finding of intent to distribute.<sup>5</sup>

Rodriguez and Acosta ask that we accept their version of events and reverse their convictions. Stripped to essentials they ask that we reject the critical credibility evaluations made by the jury and substitute our own. This an appellate court should rarely do; this we decline to do on the record before us.<sup>6</sup>

Finally, Acosta maintains that he merely was present and was not an active participant in any alleged conspiracy. The tape recordings reflect otherwise; when Sanches delivered the eight ball of cocaine it was Acosta who inquired about the availability of a larger quantity and fixed the time for the next transaction. Acosta was not a member of the Multi-County Task Force and was not authorized to conduct an undercover investigation. A studied review of the evidence persuades that a rational jury could have found proven beyond a reasonable doubt all of the elements of the offenses of conviction.

The convictions are AFFIRMED.

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<sup>4</sup>**United States v. Valdiosera-Godinez**, 932 F.2d 1093 (5th Cir. 1991), cert. denied, 113 S.Ct. 2369 (1993).

<sup>5</sup>**United States v. Pineda-Ortuno**, 952 F.2d 98 (5th Cir.), cert. denied, 112 S.Ct. 1990 (1992).

<sup>6</sup>**United States v. Carter**, 953 F.2d 1449 (5th Cir.), cert. denied, 112 S.Ct. 2980 (1992).