

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8722
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOSE PANIAGUA, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(P-93-CR-60(1))

(December 16, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:¹

Following a jury trial, Jose Paniagua, Jr. was convicted of possessing more than 500 grams of cocaine with the intent to distribute, 21 U.S.C. § 841(a)(1); possessing marijuana with intent to distribute, 21 U.S.C. § 841(a)(1); and using a firearm during and in relation to a drug trafficking offense, 18 U.S.C. § 924(c)(1). He appeals these convictions on the ground that the evidence is insufficient to support the verdict. We affirm.

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

On May 18, 1993, United States Border Patrol agents arrested Paniagua at the Desert Haven, Texas, border checkpoint. Agent Richard Holland testified that he was inspecting traffic when Paniagua approached driving a NorthAmerican Van Lines (NAVL) tractor-trailer. Agent Holland asked Paniagua what he was hauling and Paniagua became nervous and said the trailer was empty. Agent Holland asked for permission to search the trailer and Paniagua consented. Through the trailer's side door, Agent Holland saw blankets and boxes strewn all around. Agent Holland testified that he found this unusual because moving vans are generally clean when empty. Agent Holland asked Paniagua "What is this, I thought you told me you were empty." Paniagua responded that he did not know.

Agent Holland then called for Agent Juan Nunez to bring Victor, a trained narcotics detecting dog, to the trailer. Victor immediately alerted to the box closest to the door. Agent Nunez asked Paniagua what was inside the box. Paniagua said he did not know and opened the box, revealing a big bundle wrapped in cellophane which appeared to be marijuana. Agent Holland testified that Paniagua was cooperative when questioned, but appeared nervous and excited when the drugs were found. Agents Nunez and Holland instructed Paniagua to move the vehicle to the secondary lane. Agent Holland then took Paniagua into custody.

With Victor's assistance, Agent Nunez and other agents uncovered six more boxes of marijuana and one bundle of cocaine. The boxes were all sealed with tape, were of various sizes, and did

not display the NAVL logo. The agents recovered 103 pounds of marijuana and 4.84 pounds of cocaine. No fingerprints were found on the boxes or the drugs.

Agent Holland asked Paniagua if there were any weapons in the vehicle and Paniagua responded that there was a gun in the sleeper compartment of the tractor. The handgun, a loaded Torres .38 Model 80, was in a blue bag in the sleeper, within reach of the driver's seat. Paniagua claimed he bought the handgun in Los Angeles for protection. However, when Agent Holland ran a check on the handgun he learned that it was stolen. A later investigation by the Bureau of Alcohol, Tobacco, and Firearms revealed that the handgun had been reported missing from a prior NAVL moving job; Paniagua had been the driver's helper on that job.

DEA Agent Mark Fann took custody of Paniagua. Paniagua told Agent Fann that earlier in the day, he had delivered a load of furniture to the Empire Warehouse in El Paso, Texas. After that, Paniagua drove the truck to a mechanic to have the clutch repaired. Paniagua said that once the repairs were completed, he drove the vehicle home so he could sleep for a while before departing for Lubbock, Texas. Paniagua claimed that his boss, Fred Morales, instructed him to take the truck to Lubbock to pick up a shipment, but Paniagua could produce no documentation authorizing the trip.

Paniagua told Agent Fann that he noticed some "junk" in the trailer of the truck after he emptied it at the Empire Warehouse. Paniagua also told Agent Fann that he found the gun in the sleeper compartment of the truck before he left and planned to keep it

until he returned from the trip, when he would turn it in. Paniagua insisted that he had no knowledge of the drugs in the trailer.

At trial, the general manager of the NAVL office in El Paso, Morales, testified that he is responsible for assigning drivers to trips, that Paniagua worked for him, and that Paniagua's duties included local driving, loading and unloading, packing and unpacking. Morales stated that drivers are responsible for cleaning vehicles and that drivers normally, but not unfailingly, check the inside of the trailer to ensure that it is empty before leaving on a trip.

Morales testified that he had not instructed Paniagua, or any other driver, to take the truck to Lubbock on May 18. The truck Paniagua was driving that day had been assigned to Juan Gamino, who had been the driver on trip after which the gun was reported missing. Morales asked Paniagua to work on May 18, because Gamino had called in sick. Morales confirmed that Paniagua made a delivery to the Empire Warehouse early on May 18. After the delivery, Paniagua was to take the truck in for repairs to the clutch and the trailer. If the repairs were completed before 5:00 p.m., Paniagua was supposed to return the truck to the NAVL yard. If it got too late, Paniagua was authorized to leave the truck at the repair shop or keep it overnight.

Paniagua's trial testimony was consistent with Morales' except on the subject of his orders after the repairs. Paniagua testified that, when the repairs were completed, he called Morales and was

instructed to take the truck home and to be "ready to roll tonight." Paniagua said he called Morales again at about 4:00 p.m., at which time Morales instructed him to get a cash advance for the trip and head up to Lubbock. Paniagua stated that he asked Morales what he was supposed to do in Lubbock, and Morales told him just to drive to Lubbock and call back in the morning for further instructions.

Paniagua testified that he did not know that the trailer contained drugs. He did not recall whether he was nervous when he was stopped at the checkpoint, but he had been through checkpoints many times and knew the routine. Paniagua testified that he found the handgun in the sleeper compartment of the truck, that he had never seen it before and that he put it in his bag for safekeeping. He explained that he told one of the agents he purchased the handgun in Los Angeles because he was nervous and because it was such a shock to him when they found the drugs.

II.

A.

Ordinarily, the standard for sufficiency of the evidence is whether "a rational trier of fact could have found that the evidence establishes the essential elements of the offense beyond a reasonable doubt." **United States v. El-Zoubi**, 993 F.2d 442, 445 (5th Cir. 1993).

However, Paniagua failed to move for a judgment of acquittal at any point in the trial. This Court has held that such a failure limits appellate review to the plain error standard, under which a

conviction will be reversed only for a "manifest miscarriage of justice." **United States v. Thomas**, 12 F.3d 1350, 1358 (5th Cir.), **cert. denied**, 114 S. Ct. 1861, and **cert. denied**, 114 S. Ct. 2119 (1994). "Such a miscarriage would exist only if the record is devoid of evidence pointing to guilt, or . . . [if] the evidence on a key element of the offense was so tenuous that a conviction would be shocking." **Id.** at 1358 (quoting **United States v. Galvan**, 949 F.2d 777, 782-83 (5th Cir. 1991)).

Paniagua argues that due process requires us to apply the rational trier-of-fact standard despite his failure to move for acquittal. **See Jackson v. Virginia**, 443 U.S. 307, 324, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). We recently recognized that both constitutional and practical considerations may support this position. **See United States v. Pennington**, 20 F.3d 593, 597 & n.2 (5th Cir. 1994); **United States v. Sias**, No. 93-5475 (5th Cir. Sept. 30, 1994) at 4 n.1. We also recognized that only an **en banc** ruling of this Court can change the current plain error standard. **Id.** We do not delve into this thicket now because under either standard of review, the evidence supporting Paniagua's conviction is sufficient.

B.

Paniagua argues that the evidence was insufficient to prove that he had knowledge of the drugs in the trailer. As we stated in **United States v. Garza**:

The knowledge element in a possession case can rarely be established by direct evidence. Knowledge can be inferred from control of the vehicle in some cases; however, when the drugs are hidden, control over the

vehicle alone is not sufficient to prove knowledge. The general rule in this circuit is that knowledge can be inferred from control over the vehicle in which the drugs are hidden if there exists other circumstantial evidence that is suspicious in nature or demonstrates guilty knowledge.

990 F.2d 171, 174 (5th Cir.) (internal quotations and footnotes omitted), **cert. denied**, 114 S. Ct. 332 (1993). Because the marijuana was in sealed boxes which were not visible from outside the trailer, it was "hidden" for purposes of the knowledge analysis. **See Pennington**, 20 F.3d at 598. "Additional evidence of guilt may come from nervousness, inconsistent statements, implausible stories, or possession of large amounts of cash by the defendants." **Id.**

The jury had more than enough evidence from which to conclude beyond a reasonable doubt that Paniagua knew of the drugs in his truck. Paniagua was nervous both when asked what he was hauling and when the drugs were found. Paniagua told Agent Fann that he noticed "junk" in the trailer after he unloaded the shipment that morning, but he failed to discard it even though he claimed to be driving to Lubbock to load the trailer with a new shipment. This "junk" consisted of enough boxes and blankets that one agent testified it would have taken hours to inspect, and yet Paniagua told Agent Holland that his trailer was empty. From Morales' testimony, the jury could conclude that Paniagua was using the truck without his employer's knowledge or permission. The jury could reasonably decide that Paniagua lied about the reason for his travels, suggesting an "underlying consciousness of criminal behavior." **United States v. Diaz-Carreon**, 915 F.2d 951, 954 (5th

Cir. 1990).

Paniagua's challenge to his related firearm conviction must also fail. Paniagua's only argument was that the evidence is insufficient to support the underlying drug convictions. Because the evidence supports the drug trafficking convictions, Paniagua's argument on this count fails.

AFFIRMED.