IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8822
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOEL ACOSTA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP-93-CR-246(1))

(May 27, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Joel Acosta appeals his jury conviction for conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. § 846 and 821(a)(1), and possession with

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1). He challenges both the sufficiency of the evidence to support his convictions, and the effectiveness of his trial counsel. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Acosta was indicted by superseding indictment for conspiring to possess with intent to distribute more than 50 kilograms of marijuana (count one), and possessing with intent to distribute more than 50 kilograms of marijuana (count 2). The indictments arose after El Paso police detective Dale Newkirk was told by an informant that he would give the police information relating to a narcotics operation in the El Paso area. Newkirk was again called by that informant and was told that he was planning to drive a car loaded with marijuana into El Paso from Mexico.

Law enforcement officials notified U.S. Customs agents who allowed the vehicle, a silver Volkswagen Jetta, to cross the border after surveillance was established. A Customs canine alerted to the automobile from over 100 yards away. Later that day, agents observed a vehicle occupied by two individualsSQone of whom was identified at trial as Acosta's co-defendant, Pablo Muñoz-Flores (Muñoz)SQpark next to the Jetta at the Chevron service station previously described by the informant. A third individualSQlater identified as AcostaSQarrived at the station and met with Muñoz. Moments later, Acosta got into the Jetta and drove it away. He was followed by law enforcement officers to an El Paso residence, later

identified as belonging to Acosta's aunt, where he was stopped by El Paso police officers. A subsequent search of the trunk of the Jetta revealed 37 bales of marijuana with a total weight of 228.5 pounds and an estimated street value of over $100,000.

Acosta entered a not guilty plea, and with Muñoz was tried by a jury. Each defendant was convicted on both counts of the indictment. Acosta was sentenced to serve 51 months in prison and three years supervised release, and was ordered to pay a $100 special assessment. He timely appealed his conviction.

II

ANALYSIS

A. Ineffective Assistance of Counsel

Acosta posits myriad errors alleged to have been committed by his trial counsel which, according to Acosta, resulted in a constitutionally deficient level of representation. He alleges that his counsel failed to move for a severance under Fed. R. Crim. P. 12(b)(5); failed to investigate witnesses; failed to attempt to suppress evidence of the cocaine offense prior to trial; opened the door to questions concerning Acosta's alleged prior involvement with marijuana trafficking; spent only minimal time consulting with Acosta prior to trial; and failed to make any pretrial motions for discovery.

None of these alleged deficiencies were brought to the attention of the district court or were in any way developed in that court. Generally, allegations of ineffective assistance of counsel will not be addressed on direct appeal unless they have

first been presented to the district court and a record developed sufficient for consideration on appeal. United States v. Casel, 995 F.2d 1299, 1307 (5th Cir.), cert. denied, 114 S.Ct. 472 (1993). Exceptions to this general rule are made "only when the record has provided substantial details about the attorney's conduct." Id. (internal quotations and citations omitted).

Although the instant record may be sufficient to address some of Acosta's ineffective assistance allegations (his attorney's failure to move for a severance, for example), because the majority of his claims cannot be adjudicated on the existing record and because we find no precedent for addressing less than all of an appellant's ineffective assistance challenges on direct appeal, we dismiss Acosta's ineffective assistance claim without prejudice so that he may challenge the effectiveness of his counsel's representation in the more appropriate context of 28 U.S.C. § 2255. See Casel, 995 F.2d at 1307.

B. Sufficiency of the Evidence

Acosta also challenges the sufficiency of the government's evidence used to convict him of both counts of the indictment. He preserved this claim by moving for a judgment of acquittal at the close of the government's evidence and again at the close of all evidence. In assessing a challenge to the sufficiency of the evidence, we consider the evidence in the light most favorable to the government and afford the government all reasonable inferences and credibility choices. The evidence is sufficient if a rational trier of fact could have found the defendant guilty beyond a

reasonable doubt based on the evidence presented at trial. United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd, 462 U.S. 356 (1983); see also United States v. Barrilleaux, 746 F.2d 254, 256 (5th Cir. 1984).

1. Conspiracy

Section 846 requires the government to prove that (1) an agreement between two or more persons to violate federal drug laws existed; (2) the defendant knew of the agreement; and (3) the defendant voluntarily participated in the agreement. United States v. Gallo, 927 F.2d 815, 820 (5th Cir. 1991). An agreement may be inferred from concert of action, and voluntary participation may be inferred from a "collocation of circumstances." United States v. Espinoza-Seanez, 862 F.2d 526, 537 (5th Cir. 1988) (citation and internal quotations omitted). Standing alone, mere presence at the scene of the offense and close association with those involved are insufficient; nevertheless, they are relevant factors for the jury to consider. United States v. Simmons, 918 F.2d 476, 484 (5th Cir. 1990).

Acosta contends that the government failed to adduce sufficient proof that he knowingly participated in any conspiracy to sell marijuana, or that he knowingly possessed the marijuana in the Jetta. In particular, he argues that his mere presence at the crime scene, association with a co-conspirator, and possession of the vehicle in which the drugs were found, do not satisfy the government's burden of proof. Under the facts of this case we disagree.

The evidence at trial established the following facts. Acosta went to the Chevron station at Muñoz's request, after repeated phone calls from Muñoz. Acosta's purpose in going to the service station was to pick up the car. The two men held a short discussion at the station, after which Muñoz specifically pointed out the Jetta to Acosta, who got into that car and drove it away. The government offered testimony of five different persons, each of whom stated that the car smelled strongly of marijuana; Acosta was the only witness who, when asked, claimed to have been unable to detect the odor of marijuana. He also offered an inconsistent explanation to the arresting officers concerning his presence at his aunt's house. The government adduced evidence of Acosta's prior involvement in a marijuana transaction with an undercover law enforcement agent.

Acosta, on the other hand, offered the following explanation for the same events. He testified that he was called repeatedly by Muñoz that day because he (Muñoz) wanted Acosta's help in selling a car. After receiving several calls from Muñoz, Acosta remembered that his cousin needed a car and, finding himself near the Chevron station, decided to stop by, see the car, and take it to his aunt's house so that she and his cousin could test drive it. (His aunt, however, testified that she was not at home that day, was not expecting Acosta to stop by, and was not expecting him to drop off a car.) Acosta testified that, although he noted a "musty" odor when he got into the Jetta, he could not identify the smell as marijuana because he was not familiar with the odor of marijuana.

Acosta also offered a different version of his conversation with the police officers at his aunt's house, testifying that he approached the police officers directly and asked if he could be of some help, rather than, as both officers testified, first walking towards the house before being hailed by the officers. And Acosta denied telling the officers that he was on his way home.

The jury was presented with two versions of these events but chose to believe the version portrayed by the government witnesses and to disbelieve Acosta's version of the events. As the ultimate arbiter of witness credibility, the jury was entitled to credit the testimony of the government's witnesses over that of Acosta. United States v. Martinez, 975 F.2d 159, 161 (5th Cir. 1992), cert. denied, 113 S.Ct. 1346 (1993). When we construe all reasonable inferences in favor of the verdict, see id., we conclude that the government adduced sufficient evidence to support the jury's determination that Acosta was a knowing member of a conspiracy to possess with intent to distribute the marijuana.

The jury could have believed that Muñoz contacted Acosta about picking up the car loaded with marijuana, and that Acosta met Muñoz at the gas station where the two men spoke for several moments and where Muñoz pointed out the proper car to Acosta, who got in and drove away. The jury also could have believed that Acosta noticed the police following him and attempted to evade them by driving a roundabout route to his aunt's house, where he attempted to ignore the police and go into the house. It was also well within the jury's province to believe that Acosta's story was a fabrication.

United States v. Straach, 987 F.2d 232, 239 (5th Cir. 1993) ("The jury was entitled to assess the credibility of the witnesses and to disbelieve [Acosta's] feigned innocence. . . ."). Once the jury rejected Acosta's version, it was entitled to accept the government's version without excluding every other possible construction of the evidence. United States v. Maseratti, 1 F.3d 330, 337 (5th Cir. 1993), cert. denied, 114 S.Ct. 1096 (1994), and cert. denied, 1993 WL 570539 (U.S. Apr. 18, 1993) (No. 93-7706).

2. Possession with Intent to Distribute

Acosta has also challenged the sufficiency of the evidence used to convict him of possession with intent to distribute marijuana. Section 841(a)(1) requires the government to prove (1) knowledge, (2) possession, and (3) intent to distribute drugs. United States v. Garza, 990 F.2d 171, 174 (5th Cir.), cert. denied, 114 S.Ct. 332 (1993). Possession of the illicit drug may be actual or constructive. United States v. Gardea Carrasco, 830 F.2d 41, 45 (5th Cir. 1987). Constructive possession is the knowing exercise of, or the knowing power or right to exercise dominion and control over, the proscribed substance. Id. Possession may be established by circumstantial evidence. Id. Intent to distribute may be inferred from possession of a large quantity of the illicit substance. United States v. Prieto-Tejas, 779 F.2d 1098, 1101 (5th Cir. 1986).

Based on the circumstances outlined above, the jury could have concluded that Acosta knowingly possessed the marijuana with the intent to distribute it: the calls from Muñoz and meeting with him

at the gas station; Acosta's attempt to avoid the police; his implausible testimony at trial regarding his possession of the car; and his denial of noticing the odor of marijuana, all support the jury's conclusion that he was guilty of possession with intent to distribute marijuana.

For the foregoing reasons, Acosta's convictions on both counts are

AFFIRMED.