

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8881
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROGACIANO PARRA-PEREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP-93-CR-78-1)

(July 18, 1994)

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

PER CURIAM:*

In this appeal of his non-jury conviction on drug and firearms charges in violation of 21 U.S.C. §§ 841 and 846, and 18 U.S.C. § 924(c)(1), Defendant-Appellant Rogaciano Parra-Perez (Parra)

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

challenges the sufficiency of the evidence to prove guilt beyond a reasonable doubt that he conspired knowingly to use and carry firearms during and in relation to a drug-trafficking offense, and that he actually used and carried the firearms in relation to a drug-trafficking crime. Concluding that the evidence was sufficient, we affirm.

I

FACTS AND PROCEEDINGS

Parra was charged with conspiring to possess and possession of a controlled substance with the intent to distribute, and conspiring to use, and use of, firearms during a drug-trafficking crime. He waived a trial by jury, and in a bench trial the court found him guilty of all four counts in the indictment. Parra timely filed a notice of appeal.

II

ANALYSIS

Parra concedes that he and at least four co-defendants conspired to possess, and did possess, heroin with the intent to distribute. On appeal he challenges only the sufficiency of the circumstantial evidence underlying his conviction for conspiring to carry, and the carrying of, a firearm in connection to a drug-trafficking offense. He argues that on the date of his arrest no firearms were discovered and that the 9mm Smith and Wesson pistol found the following day near the spot of his apprehension did not bear his fingerprints. He posits that no evidence was presented to show that he threw the pistol in the bushes or to connect him to

the pistol at any time.

When evaluating the sufficiency of the evidence after a bench trial conviction, we must determine whether the finding of guilt is supported by "substantial evidence." United States v. Jennings, 726 F.2d 189, 190 (5th Cir. 1984). We view the evidence in the light most favorable to the judgment and deferring to the reasonable inferences of fact drawn by the trial court we ask whether a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. United States v. Reeves, 782 F.2d 1323, 1326 (5th Cir.), cert. denied, 479 U.S. 837 (1986).

To establish an offense under section 924(c)(1) the government had to prove that Parra used or carried a firearm during a drug-trafficking crime. United States v. Ivy, 973 F.2d 1184, 1189 (5th Cir. 1992), cert. denied, 113 S.Ct. 1826 (1993). To convict under this section the government was not required to prove that Parra used the firearm in an affirmative manner. Id. The evidence must show only that "the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking." Id. (internal quotations omitted).

The evidence at trial established that DEA Special Agent Ernestine Hinojos negotiated, with the assistance of a confidential informant, the delivery of 18 ounces of heroin with Parra and three other individuals on February 12, 1993. Co-defendant Fausto Zuniga-Morales (Zuniga) testified that he unsuccessfully attempted to get a pistol at Parra's request while they were in El Paso,

Texas. Zuniga stated that in Anthony, Texas, they encountered a woman named Blanca whom he knew, and that they agreed to ask her to purchase a pistol for them with Zuniga's money. Zuniga testified that Parra stated "that he needed a pistol because it was kind of touchy because [of] the money he was going to receive for the heroin."

The pistol was also identified at trial as the one Blanca purchased for the men. Zuniga stated that he placed one of the guns in the van and handed the 9mm pistol to Parra. An agent with the BATF, Chrisanto Perez, Jr., testified that the 9mm was purchased at a Wal-Mart store in Las Cruces, New Mexico, by a female named Blanca Quintana and that the gun was functional. The evidence also established that at the time of Parra's arrest the defendants had wrecked the van and fled on foot. DEA Agent Salvador Martinez witnessed Parra exit from the passenger's side of the van and run toward the Rio Grande. Martinez chased two of the defendants. He caught Parra first and pushed him to the ground, then continued chasing the other man, co-defendant Aleman Sarabia.

On the following day Martinez went back to the scene to look for guns, given Zuniga's post-arrest statement that guns were involved. Martinez testified that he found the loaded 9mm pistol in a bush a few feet away from the spot where he had knocked Parra down.

The district court's ruling on the firearms offense was as follows:

The issue then proceeds to the Counts 3 and 4. Count 3 is the one that charges a

conspiracy among three of the named defendants, defendant Parra-Perez, Mr. Zuniga, who testified, and Pedro Mendoza-Mesa, about which we heard very little. But, I guess, he's named there because there's some testimony that he was riding in the van where one of our firearms was later found.

In any event, the question boils down to the issue of Mr. Parra-Perez. The allegation in overt act number one, that Mr. Parra-Perez gave money to Zuniga-Morales for the purpose of purchasing firearms, that was not proved.

The evidence which was not disputed was that Mr. Zuniga, using funds that he had in his own possession, that had not been given to him by defendant Parra, took those funds and turned them over to a woman acquaintance named Blanca, and that Blanca was the one that actually went in and bought the guns. I assume the reason is that she was a citizen and she had identification and that she could. That wasn't [sic] ever spelled out, but I assume that was it.

Mr. Zuniga went along with her and he was present, either inside or outside the stores at the time these purchases were made, and he did furnish the money. But, in any event, he's the one that ended up with the firearms.

Then he brought them back to Anthony, Texas. One of the firearms, at least, was found in the van later. We don't [sic] know exactly who's [sic] hands that passed through. It was found in the van.

The other one, of course, was the .9mm [sic] pistol, which was found in some tumbleweeds by one of the agents who pursued the fleeing defendants. And there is certainly circumstantial evidence, which is very convincing, that Mr. Parra-Perez, the defendant in this case, had the .9mm [sic] pistol in his hands or on his person, and that during the act of fleeing from the wrecked van, that he threw or hid in some fashion the .9mm [sic] pistol in the bushes or in the tumbleweeds. And that's [sic] how it came to be there when the following day the agents made a search of the area and found the .9mm

[sic] pistol.

So, I think Counts 3 and 4 have been proved, with respect to the .9mm [sic] pistol, showing that Mr. Parra-Perez used and carried that pistol within the legal definitions of those terms, as applied to this particular offense, during and in relation to a drug trafficking crime, to-wit, the possession of heroin with intent to distribute the heroin.

So, my ruling is that the case has been proved with respect to Counts 3 and 4 only, in terms of the .9mm [sic] pistol, and not with respect to the other pistol, the .357 Magnum.

I don't [sic] know if that will make any difference when the time comes for sentencing or not, but that's [sic] the way I find. He is guilty as charged on Counts 3 and 4, but only, specifically, with reference to the .9mm [sic] pistol.

The test is whether the evidence is sufficient to justify the conclusion of the trial judge, as trier of the facts, that the defendant was guilty beyond a reasonable doubt. Jennings, 726 F.2d at 190. Testimony from Zuniga proved that Parra requested that a gun be purchased, and the officer who apprehended Parra discovered the gun near the location of Parra's capture. As we conclude that the determination that Parra possessed the 9mm pistol in relation to the drug-trafficking offense is supported by "substantial evidence," see Jennings, 726 F.2d at 190, the judgment of the district court is

AFFIRMED.