

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10108

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARIO MENDEZ, JR., MIGUEL RAMIREZ HERNANDEZ,
and JULIO HERNANDEZ,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(4:93 CR 103 A)

March 29, 1995

Before HIGGINBOTHAM, SMITH, and STEWART, Circuit Judges.

PER CURIAM:*

After considering all of appellants' challenges to their convictions and sentences, we summarily reject all but one of them. The one issue that requires further discussion is the sufficiency of the evidence supporting Miguel Ramirez Hernandez's conviction for conspiracy to distribute cocaine and to possess cocaine with intent to distribute.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

DEA Special Agent Ivan Lugo testified at trial that on May 20, 1993, he posed as a cocaine buyer and accompanied Donny Fisher, Eric Garcia, and Mario Mendez to Miguel Hernandez's house at 2240 Washington Avenue, Fort Worth. Mendez went inside to get Michael Hernandez, and Lugo waited outside on the front porch. Miguel Hernandez then arrived and asked Lugo what he was waiting for. Lugo told him he was there to buy cocaine. Miguel told Lugo that he had recently been arrested with six or seven ounces of cocaine that he had been holding for his son Michael. He then told Lugo:

[I]f I [Lugo] was going to do a deal, not to do it in his [Miguel's] house because his house was too hot, to do it somewhere else. He said that if I was to get the cocaine there at his house, the police was going to pull me over a block away and then they were going to arrest me. He also said that, you know, the cocaine was good, but not to do the thing there, do it somewhere else at another location.

On cross-examination, Lugo reiterated that Miguel "said the quality of the cocaine was good, and just to do the deal somewhere else with Michael because otherwise we would be arrested."

Counsel for Miguel interprets these remarks as dissociating Miguel from the drug deal rather than furthering the conspiracy. The government interprets this testimony as indicating Miguel's participation in the conspiracy. It points to Miguel's praise of the cocaine's quality and his tactical suggestion that Lugo should do the deal, but in a safer place. These statements look like prudent sale tactics.

The jury certainly could have accepted Miguel's version of events, but after judging Lugo's demeanor and tone it read those statements as furthering the conspiracy. While the issue is a

close one, we find that a reasonable jury could have made such a finding beyond a reasonable doubt. The deciding factor is Miguel's praise of the cocaine's quality. Standing alone, the statement "Don't do the deal in my house" could only have meant that Miguel wanted nothing to do with drug dealing. But coupled with Miguel's statements that the cocaine was good and that Lugo should go ahead with the deal in a safer place, a jury could have understood the admonition to go elsewhere as a mere tactical move to avoid police detection.

That this was a permissible inference for the jury is supported by the events of the preceding week. A SWAT team secured the house at 2240 Washington and state narcotics officers then executed a search warrant for the house. When Miguel Hernandez saw the SWAT team, he began to run toward the house, yelling in Spanish, but an officer tackled him before he could enter the house. When the SWAT team entered the house, officers removed Miguel Hernandez's wife, who was obstructing entry into the front left bedroom. Behind her, officers found a teenage girl (presumably Miguel's daughter) stuffing cocaine into a toilet adjacent to that bedroom. Officers seized twelve packets, containing a total of 192.27 grams of cocaine. In the front left bedroom, officers found two handguns, a shotgun, ammunition, a flak jacket, and digital scales suitable for weighing cocaine. That bedroom belonged to Miguel's seventeen-year-old son Michael. In the middle bedroom, officers found a loaded handgun and ammunition

under the mattress and \$8900 in \$100 bills in a dresser. That bedroom belonged to Miguel and his wife.

Finding no reversible error, we AFFIRM.