

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20848
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BENANCIO DE LOS SANTOS,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

(CR H 94 0090)

(August 18, 1995)

Before GARWOOD, WEINER, and PARKER, Circuit Judges.

PER CURIAM:*

FACTS

Benancio De Los Santos (De Los Santos) was convicted of being

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

a felon in possession of a firearm and making false statements to obtain a firearm in violation of 18 U.S.C. § 922 (a)(6) and § 922 (g)(1), respectively. He was subsequently sentenced to 180 months of imprisonment to be followed by three years of supervised release. Prior to trial, De Los Santos filed a motion to suppress statements that he made to investigating officers. In the motion, he argued that he was illegally seized and in custody when agents interrogated him at his home and then took him from his home to their office. He also contended that the investigating agents failed to advise him of his constitutional rights when they questioned him. The pertinent evidence adduced at the hearing was as follows.

In May 1991, special agent Michael Bryant of the Bureau of Alcohol, Tobacco, and Firearms (BATF) was investigating an unrelated matter at a local pawn shop when his partner for that day, a local policeman, discovered a form signed by De Los Santos. The form, a BATF Form 4473, was a firearms transaction record that firearm dealers must use when conducting firearms transactions. The form included a question concerning whether the buyer has been convicted of a crime punishable by a term of imprisonment exceeding one year. De Los Santos answered the question in the negative. A subsequent search of De Los Santos's criminal history revealed that De Los Santos had a prior felony conviction. Based on this information, Agent Bryant began a formal investigation of De Los Santos.

Agent Bryant confirmed that the handwriting on the BATF form

was in fact De Los Santos's, and made arrangements with De Los Santos's parole officer, Ms. Beverly White, to be notified the next time De Los Santos reported to her office.

On July 16, 1991, Agent Bryant, together with BATF agent Rudy Hardy, traveled to the parole office after being notified by Ms. White that De Los Santos had scheduled an appointment for that date. Upon entering the office where De Los Santos was located, Agent Bryant identified himself and his partner as federal agents, advised De Los Santos that they were investigating federal firearm violations, and then instructed De Los Santos to stand so they could search him for weapons. After the pat-down, Agent Bryant read De Los Santos his constitutional rights and De Los Santos signed a written waiver of those rights. The waiver was also signed by Ms. White as a witness.

Thereafter, De Los Santos admitted that it was his signature on the BATF form, but he explained that he had used his identification so that another man could pawn a gun. De Los Santos then gave the agents written permission to search his car and his girlfriend's home. Neither search revealed any firearms.

After the agents searched De Los Santos's girlfriend's home, he was taken to BATF headquarters in North Houston. While at BATF, De Los Santos was given his *Miranda* rights in writing a second time. He then initialed the writing which indicated that he both understood his constitutional rights and that he was giving a voluntary statement. De Los Santos then gave the same explanation concerning the pawning of the gun, and Agent Bryant wrote the

explanation down. De Los Santos then initialed each paragraph of the statement and allowed Agent Bryant to roll his thumbprint on the statement. De Los Santos was never handcuffed, and he never asked for an attorney. After giving the statement, De Los Santos was taken back to the parole office and he was allowed to leave.

A subsequent investigation revealed that the firearm De Los Santos claimed to have pawned for a friend, had been bought new and that the first retail sale had been to De Los Santos.

At the conclusion of the suppression hearing, De Los Santos argued that the statements given to Agent Bryant should be suppressed because he was in custody and the statements were not freely and voluntarily given. The district court denied the motion to suppress, and the oral and written statements of De Los Santos were used as evidence at trial.

DISCUSSION

De Los Santos argues that the statements given to BATF agents were involuntary and the result of coercion. He maintains that the district court erred when it refused to suppress the statements. "A confession is voluntary if, under the 'totality of the circumstances,' the statement is the product of the accused's 'free and rational choice.'" *United States v. Doucette*, 979 F.2d 1042, 1045 (5th Cir. 1992) (quoting *United States v. Rogers*, 906 F.2d 189, 190 (5th Cir. 1990)). On appeal, this Court must give credence to the credibility choices and findings of fact of the district court unless they are clearly erroneous. *Id.* The ultimate issue of voluntariness, however, is a legal question, subject to *de novo*

review. *Id.* (citing *United States v. Menesses*, 962 F.2d 420, 428 (5th Cir. 1992)).

De Los Santos argues he was coerced into giving the statements as a result of an implied promise made by Agent Bryant. De Los Santos's contention is based on his subjective belief that he and Agent Bryant reached an understanding that the sooner De Los Santos signed a confession, the sooner he would be released. Agent Bryant testified that nothing was promised to De Los Santos in return for his statement. A defendant's subsequent and wholly subjective belief that a statement was given in exchange for an implied promise of release does not negate a finding of voluntariness. See *United States v. Rojas-Martinez*, 968 F.2d 415, 418 (5th Cir. 1992) (finding confession voluntary where officers made no statements to the defendants that could be construed as a promise of release in return for a confession) *cert. denied*, ___ U.S. ___, 113 S. Ct. 828, 121 L. Ed. 2d 698 (1992). The conflicting testimony of De Los Santos and Agent Bryant left the district court with a credibility choice, which it resolved in favor of the government. This conclusion was not clearly erroneous in light of the evidence.

The voluntariness of De Los Santos's statements is further evidenced by the fact that De Los Santos was given his *Miranda* rights in writing on two separate occasions. On both occasions De Los Santos repeatedly affirmed, in writing, that he was proceeding voluntarily and that he understood that he was free to cease questioning at any time.

CONCLUSION

The district court did not err in denying De Los Santos's motion to suppress because the government carried its burden of proof by showing by a preponderance of the evidence that, under the totality of the circumstances, De Los Santos's statement was voluntarily given and not the product of a misleading promise. De Los Santos's conviction is AFFIRMED.