

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-50706  
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EFRAIN WISSAR-NEVAREZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
(P-93-CR-63-1)

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(May 15, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:\*

Defendant-Appellant Efrain Wissar-Nevarez (Wissar) challenges as insufficient the evidence on which he was convicted by a jury for possessing with intent to distribute more than 100 kilograms of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

marijuana, in violation of 21 U.S.C. § 841(a)(1). Albeit a close call, we are satisfied that the evidence is sufficient to support the jury's verdict of guilty, so we affirm Wissar's conviction.

## I

### FACTS AND PROCEEDINGS

Following a jury trial, Wissar was convicted of possession with intent to distribute more than 100 kilograms of marijuana. The district court sentenced him to 90 months of imprisonment, followed by a four-year term of supervised release.

United States Border Patrol Agent Stuart Gary testified that he was working the Desert Haven Border Patrol Checkpoint near El Paso, Texas, on May 20, 1993, when Wissar drove a U-Haul truck into that checkpoint. Gary testified that when he asked Wissar's citizenship status, Wissar stated that he was not an American citizen and presented what appeared to be a valid legal resident document. Gary also testified that Wissar was accompanied by an Hispanic female who appeared nervous and reluctant to answer when Gary asked about her citizenship status; however, she eventually informed Gary that she was a U.S. citizen.

Gary further testified that when Wissar was asked about the contents of the truck he stated that he had his furniture in the back. According to Gary, Wissar appeared "somewhat nervous" when questioned about the truck's contents, and he became more nervous as Gary's attention focused on those contents. Gary stated that Wissar had both hands on the steering wheel and was seated in a rigid posture. Gary also testified that in his experience,

Wissar's manner was consistent with nervous behavior.

Continuing, Gary stated that Wissar consented to Gary's looking into the back of the truck. When a key was requested, Wissar produced one to the padlock that was on the truck's rear door, and opened it. Gary observed a large mattress covering the rear entrance of the truck and blocking any view of the truck's contents. According to Gary, at that point he called Agent Art Arzate, a canine handler, and asked him to have his dog run around the exterior of the truck to see if there was any evidence of narcotics trafficking or other illegal activity. Gary also said that after the door was opened he noticed a strong odor of marijuana coming from inside the truck.

Arzate testified that he and his dog started from the front of the truck, worked his way toward the rear, and, at the rear door, the dog gave a positive indication. Arzate stated that his dog gave a second positive indication when the rear door was opened. Based on his dog's reactions, Arzate pulled the mattress out of the truck, stepped inside, and worked his way through the furniture. He testified that inside the truck he could detect a strong odor of marijuana, and that towards the front of the truck he saw some boxes. Arzate opened one of the boxes and saw what appeared to be marijuana. He then informed Gary that there was contraband inside the truck.

Gary testified that when Arzate advised him of the marijuana discovery, Gary placed Wissar under arrest. Gary stated that Wissar did not act surprised about either the discovery of the

marijuana or his arrest; and that Wissar acted "pretty much unconcerned" and did not ask any questions. Gary was of the opinion that the furniture was unusable junk.

Arzate testified that each of the 12 boxes which he and another agent unloaded from the U-Haul, along with the furniture, contained approximately 80 pounds of marijuana. The combined weight of the marijuana was 990.6 pounds. Arzate also testified that he found the rental agreement in the front of the truck and gave it to Gary.

Drug Enforcement Administration (DEA) Special Agent Jeff Atkinson testified that he and two other law enforcement officers responded to a call from the checkpoint informing of the seizure of the marijuana. Atkinson stated that he took custody of the furniture, the marijuana, Wissar, and the rental contract. Wissar did not have a driver's license among his belongings, Atkinson said, but Wissar stated that he resided in Amarillo. Atkinson identified the rental contract in court and testified that it indicated that someone named Atonia Rodriguez had rented the truck. Atkinson also testified that he did not submit the wrappings from the bundles of marijuana for fingerprint analysis; and that the seized marijuana was worth approximately \$700 per pound in El Paso. Atkinson also said that the woman with Wissar was taken into custody for immigration violations and was eventually identified as Rosa Lopez-Valles, but that he did not know if Lopez-Valles had subsequently been released.

## II

### ANALYSIS

Wissar contends that the evidence was insufficient to support his conviction for possession of marijuana with intent to distribute. He insists that the evidence was not sufficient to prove his knowledge that marijuana was hidden in the U-Haul truck that he was driving.

On a sufficiency-of-the-evidence claim, we examine the evidence in the light most favorable to the government, making all reasonable inferences and credibility choices in favor of the verdict. The evidence is sufficient if a reasonable trier of fact could have found that it established guilt beyond a reasonable doubt. Every reasonable hypothesis of innocence need not have been excluded, nor need the evidence be entirely inconsistent with innocent conduct. United States v. Vasquez, 953 F.2d 176, 181 (5th Cir.), cert. denied, 112 S. Ct. 2288 (1992).

"If the `evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged,' this court must reverse the conviction." United States v. Menesses, 962 F.2d 420, 426 (5th Cir. 1992) (quoting Clark v. Procunier, 755 F.2d 394, 396 (5th Cir. 1985)) (further citations omitted).

To convict a defendant of possession of marijuana with intent to distribute, the government must prove that he 1) knowingly 2) possessed marijuana 3) with intent to distribute it. United

States v. Gallo, 927 F.2d 815, 821-22 (5th Cir. 1991).

"[K]nowledge 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.'" United States v. Garza, 990 F.2d 171, 174 (5th Cir.), cert. denied, 114 S. Ct. 332 (1993) (citation and footnotes omitted) (drugs in burlap sacks partially concealed in trailer of truck between lime boxes and not readily accessible). "Additional evidence of guilt may come from nervousness, inconsistent statements, implausible stories, or possession of large amounts of cash by the defendants." United States v. Pennington, 20 F.3d 593, 598 (5th Cir. 1994).

Possession may be actual or constructive, may be joint among several defendants, and may be proved by direct or circumstantial evidence. United States v. Vergara, 687 F.2d 57, 61 (5th Cir. 1982). Constructive possession is ownership, dominion, or control over the contraband itself, or dominion or control over the premises or the vehicle in which the contraband was concealed. United States v. Posner, 868 F.2d 720, 722-23 (5th Cir. 1989). Constructive possession is the ability to reduce an object to actual possession. Id. at 723. Intent to distribute may be inferred from the possession of a large quantity of narcotics. United States v. Martinez-Mercado, 888 F.2d 1484, 1491 (5th Cir. 1989).

This case presents a close question as to whether Wissar had knowledge of the marijuana in the back of the truck. Wissar

clearly had control over the truck: He was not only driving the truck, but he had a key that opened the rear door of the truck. But in addition to the inference of knowledge from this fact, there must have been other circumstantial evidence demonstrating Wissar's guilty knowledge. See Pennington, 20 F.3d at 597-98 (evidence that defendants had ownership and control of trailer attached to truck they were driving not enough by itself to infer knowledge of marijuana that was hidden in trailer).

Whether enough other circumstantial evidence was presented is the key question here. The government presented evidence of Wissar's nervousness during questioning, his heightened nervousness as Gary focused attention on the back of the truck where the marijuana was hidden, and Wissar's lack of emotion when the agents discovered the marijuana and placed him under arrest. The government also contends that an inference of knowledge could be made from the large amount of marijuana, positing that it would be unlikely for the owner or source of so much contraband to entrust it to an unwitting person. The government cites United States v. Martinez-Moncivais, 14 F.3d 1030, 1034 (5th Cir.), cert. denied, 115 S. Ct. 72 (1994), which is not directly on point as the case addresses the sufficiency of the evidence in proving that a person was a knowing participant in a conspiracy to distribute narcotics. Id. at 1034-35. Still, the jury in the instant case could also have inferred Wissar's knowledge from the deduction that unless he had knowledge of its presence, it would have been unlikely for him to be entrusted with 990 pounds of marijuana. These factors,

combined with the fact of Wissar's control of the vehicle, are enough for a reasonable jury to have inferred Wissar's knowledge of the marijuana hidden in the back of the truck. Consequently, the evidence was sufficient to support Wissar's conviction for possession of marijuana with intent to distribute.

AFFIRMED.