

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60002
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

HERIBERTO G. TORRES,

Defendant-Appellant.

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

(93-CR-88-1)

(December 15, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

The Appellant, Heriberto Torres, appeals his conviction for being an accessory after the fact in violation of 18 U.S.C. § 3. Finding no reversible error, we AFFIRM.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS AND PROCEDURAL HISTORY

Torres and Cesar Cuellar were employed as criminal investigators for the county attorney's office of Zapata County, Texas. A paid informant, Jorge Carcano, told Drug Enforcement Agency officers and county officials that Cuellar was stealing narcotics from confiscated drug shipments. Cuellar was arrested during a sting operation and charged with several narcotics violations. Torres was charged as an accessory after the fact. Cuellar pleaded guilty pursuant to a plea bargain and testified for the Government at Torres's trial. The jury convicted Torres, and the court sentenced him to a forty-one month term of imprisonment. Torres raises several issues on appeal.

I. The Sufficiency of the Evidence

Torres contends that the evidence is insufficient to support his conviction. The standard for evaluating the sufficiency of the evidence is that enunciated in U.S. v. Bell, 678 F.2d 547 (5th Cir. 1982) (en banc), aff'd, 462 U.S. 356 (1983):

It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

Id. at 549 (footnote omitted). This Court must view the direct and circumstantial evidence adduced at trial, as well as all inferences reasonably drawn from it, in the light most favorable to the verdict. U.S. v. Sanchez, 961 F.2d 1169, 1173 (5th Cir.), cert. denied, 113 S. Ct. 330 (1992).

Cuellar testified that he and Torres had stolen approximately sixty pounds of marijuana in a previous drug "skimming" operation.¹ Cuellar stated that he, Torres, and Jose Barrera, Sr., had planned to steal five hundred pounds of marijuana from Carcano during the "sting" transaction in which Cuellar and Barrera were arrested. Torres had agreed to remain in the office to cover for Cuellar while he and Barrera² picked up the drugs. Cuellar called Torres several times during the afternoon to apprise him of the status of the transaction. After Cuellar was arrested, he called Torres from the county jail to reassure Torres that Torres was not a suspect.

Cuellar was soon released on bond. According to Cuellar, Torres agreed to provide false evidence for the defense at Cuellar's trial. Cuellar and Torres decided that Cuellar needed "documentation" of his innocence. Because Cuellar no longer had access to the county investigators' offices, Torres provided blank forms on which Cuellar wrote a number of "investigative reports." When Cuellar needed more forms, Torres provided a second batch. Torres placed the completed reports in Cuellar's former desk. Cuellar hoped that the reports would exculpate him by making the authorities believe that Carcano was the subject of Cuellar's undercover investigation.

Torres admitted that he provided Cuellar with blank county forms and that he placed the completed reports in Cuellar's desk. He disclaimed any knowledge of Cuellar's illegal activities,

¹ Carcano confirmed that Torres had participated in Cuellar's earlier drug-skimming activities.

² Barrera was responsible for selling the drugs.

however, and insisted that he was merely an innocent dupe who had been taken in by his mentor, Cuellar. Torres testified that he had believed that Cuellar simply wanted to tie up loose ends by submitting reports on all of his former cases.

The foregoing evidence was sufficient for a reasonable jury to have found Torres guilty beyond a reasonable doubt as an accessory after the fact. By delivering a guilty verdict, the jury made credibility determinations against Torres and in favor of Cuellar. This Court will not disturb those determinations. See U.S. v. Garcia, 995 F.2d 556, 561 (5th Cir. 1993).

II. The Comments by the Prosecutor

Torres argues that reversible error occurred when the prosecutor (1) improperly vouched for Cuellar's credibility on redirect examination and (2) stated during closing argument that Cuellar "can not lie."

This Court will not reverse a conviction based on an improper argument by the prosecutor unless it is shown that "the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." U.S. v. Iredia, 866 F.2d 114, 117 (5th Cir.), cert. denied, 492 U.S. 921 (1989). The Court looks to see whether the challenged remarks were both "inappropriate and harmful." Id. (internal quotations and citation omitted).

When a defendant objects to prosecutorial comments, the Court considers: "1) the magnitude of the prejudicial effect of the statements; 2) the efficacy of any cautionary instruction; and 3) the strength of the evidence of the defendant's guilt." Id. at 1051. A conviction should not be "lightly overturned"

solely on the basis of improper prosecutorial remarks. U.S. v. Neal, 27 F.3d 1035, 1051 (5th Cir.), cert. denied, 63 USLW 3387 (1994).

It is improper for a prosecutor to vouch for a Government witness's credibility because it implies that the prosecutor has personal knowledge which confirms the witness's testimony, and it adds to the witness's testimony the influence of the prosecutor's official position. U.S. v. Carter, 953 F.2d 1449, 1460 (5th Cir.), cert. denied, 112 S. Ct. 2980 (1992). However, an allegedly improper prosecutorial comment must be viewed in light of the argument which engendered it. U.S. v. Thomas, 12 F.3d 1350, 1367 (5th Cir.), cert. denied, 114 S. Ct. 1861 and 114 S. Ct. 2119 (1994). The prosecutor "may even present what amounts to be a bolstering argument if it is specifically done in rebuttal to assertions made by defense counsel in order to remove any stigma cast" upon the witness. Id.

Cuellar testified at Torres's trial pursuant to a plea agreement which provided that, in exchange for Cuellar's guilty plea to Count I (conspiracy to possess with intent to distribute marijuana), the Government would move to dismiss Count II (possession with intent to distribute marijuana) and recommend a two-level reduction for acceptance of responsibility and an eight-year sentence. The agreement provided that the Government would dismiss Counts III and IV (weapons charges) if Cuellar provided substantial assistance, and further provided that the Government would "be the sole judge of the substantial nature of [Cuellar's] cooperation." Id. at 115. Cuellar testified to the terms of the plea agreement on direct examination.

On cross-examination, defense counsel elicited the information that, if the Government refused to dismiss Counts III and IV because it determined that Cuellar had not provided substantial assistance, Cuellar could receive a mandatory minimum thirty-year sentence consecutive to his sentence for Count I. Counsel questioned whether the plea agreement gave Cuellar a reason to lie:

Counsel: It almost . . . as far as a practical matter, it's . . . as far as you're concerned, it'd be the same thing as life imprisonment?

Cuellar: Yes, sir.

Counsel: And facing life imprisonment, if you do or do not do something to someone else's satisfaction, that is a pretty good incentive to lie, isn't it, sir?

Cuellar replied by insisting that he would tell the truth regardless of the consequences.

Torres complains of the following exchange which occurred when the prosecutor attempted to rehabilitate Cuellar's testimony on redirect examination.

Prosecutor: When the plea agreement says that the Government is the sole judge of your substantial cooperation, that's because the Government, meaning the prosecutors and the agents in this case, will know if you're telling a lie or not? Is that correct?

Cuellar: That is correct.

Torres objected that the prosecutor was attempting to vouch for Cuellar's credibility, and the Court instructed the jury that:

These kind of plea bargains are not unusual at all, which I'll explain to you later,

telling a defendant that if they're willing to cooperate in some new case, that they might get some benefit in a case that's pending against them, but, ultimately, whether this defendant is telling the truth or not, in this case, is not for me to decide, not for the Government to decide, not for anybody else to decide, except you. So you have him here. You see him. You listen to him. You see whether his testimony later on is supported or contradicted by other evidence. You've heard the motivation under which he's testifying. Ultimately, it's you and you alone who will decide whether he's telling the truth or not.

After this instruction, the prosecutor continued to question Cuellar.

Prosecutor: You do know that if you lie, then the Government will not dismiss Counts Three and Four, the gun charges?

Cuellar: That is correct.

Prosecutor: And that if you get convicted for those, you will get the thirty years on top of that?

Cuellar: That is correct.

Torres's counsel again objected that the prosecutor was vouching for Cuellar's credibility. The court sustained the objection and instructed the jury "to disregard that. Because, again, the Government's opinion about who's lying or not lying is their opinion for their purposes, but, again, that's not . . . ultimately, it's you, ladies and gentlemen, who decide whether you believe this person is telling the truth or not."

Torres also urges that his conviction should be reversed because during his closing argument, the prosecutor stated that Cuellar "can not lie." Apparently, the prosecutor made this statement in response to Torres's final argument, during which

Torres's counsel asked the jury if "Mr. Cesar Cuellar [is] the kind of person who is capable of telling a lie?" Later in the argument, Torres focused on the plea agreement and stated that Counts III and IV "are mandatory minimum consecutive sentences of thirty years in prison. This is what the Government holds over Mr. Cuellar's head."

The prosecutor's questions and statements were made in response to Torres's suggestion that the plea agreement gave Cuellar a strong incentive to lie in order to convict Torres. The prosecutor's statements were thus proper because they "directly responded to defense counsel's attacks on both the prosecutor and government witnesses who testified pursuant to plea agreements. Accordingly, the comments were not improper" United States v. Thomas, *supra*, at 1367-68.

III. The Brady Claim and the Use of Cuellar's Testimony

Torres argues that the Government wrongly withheld a statement made by Cuellar at the time of his arrest in violation of Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Cuellar's statement described his activities on the day he was arrested, but did not admit any illegal conduct. Torres's attorney reviewed the statement prior to cross-examining Cuellar. We find no merit in appellant's claim that Brady was violated.

To show a Brady violation, Torres must show that the Government suppressed favorable evidence which was material either to guilt or punishment. Moore v. Illinois, 408 U.S. 786, 794-95, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972). The statement,

however, is neither material nor favorable to Torres. "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. (quotation and citation omitted). Torres was charged with aiding Cuellar's attempt to manufacture exculpatory evidence. The fact that Cuellar denied his guilt when he was arrested is irrelevant to whether Torres is guilty as an accessory after the fact.

Torres suggests that his counsel could have undermined Cuellar's credibility by pointing to the lies in the statement if the statement had been received earlier. Further, Torres argues that, because Cuellar did not mention Torres's name in the statement, this fact alone points to Torres's exculpation. This argument, however, fails because Cuellar admitted that the statement was misleading. Thus, the impact of the statement cannot be deemed to be significant. Moreover, Torres's counsel reviewed the statement before cross examination, and thus had ample opportunity to use the statement for the defense.

Torres also suggests that the district court erred when it denied his pretrial motion to strike Cuellar's testimony on the ground that it was unconscionable for Cuellar to testify against Torres because of the terms of Cuellar's plea agreement.

The district court did not err in denying the motion to strike Cuellar's testimony. A conviction may be based on the uncorroborated testimony of a witness who has made a plea bargain with the Government,³ so long as the "testimony is not incredible

³ The trial court cautioned the jury that the circumstances of Cuellar's testimony should cause it to receive his evidence

or otherwise insubstantial on its face." U.S. v. Osum, 943 F.2d 1394, 1405 (5th Cir. 1991); see also U.S. v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) (en banc), cert. denied, 484 U.S. 1026 (1988). Cuellar's testimony does not suffer from such infirmity.

V. The Increase in the Offense Level
for Abuse of a Position of Trust

Torres contends that the district court committed reversible error at sentencing when it increased his base offense level by two because he had abused a position of trust.

This Court reviews sentences imposed under the Guidelines to determine whether the sentence was imposed in violation of law, as a result of an incorrect application of the Guidelines, or if the sentence is outside of the applicable sentencing range and is unreasonable. U.S. v. Howard, 991 F.2d 195, 199 (5th Cir.), cert. denied, 114 S. Ct. 395 (1993). Application of the guidelines is a question of law subject to *de novo* review. Id.

U.S.S.G. § 3B1.3 provides that a court may increase a defendant's offense level by two points "[i]f the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense[.]" The district court's determination that § 3B1.3 applies is a "sophisticated factual determination" which must be affirmed unless it is clearly erroneous. See U.S. v. Brown, 941 F.2d 1300, 1304 (5th Cir.), cert. denied, 112 S. Ct. 648 (1991).

with caution. See U.S. v. Osum, 943 F.2d 1394, 1405 n.8 (5th Cir. 1991).

To determine whether a defendant's position of trust "significantly facilitated" the commission of the offense, the court must decide whether the defendant's job placed him in a superior position relative to all people in a position to commit the offense. U.S. v. Fisher, 7 F.3d 69, 70-71 (5th Cir. 1994).

Torres argues that the commentary to § 3B1.3 states that a position of public or private trust is "characterized by professional or managerial discretion." Torres urges that his job as an investigator for the county attorney's office involved no professional or managerial discretion and that his placement of the reports in Cuellar's desk was not an abuse of trust. See U.S.S.G. § 3B1.3 cmt. 1.

Torres's position as a criminal investigator for the county attorney is characterized by professional discretion. Who and how to investigate are all decisions that criminal investigators make that are "given considerable deference." *Id.* Further, Torres was one of only three people who possessed the keys and alarm code necessary to enter the office where Torres placed the false reports. Torres, "relative to all people in a position to [place the false reports] (i.e., the public at large), was in a superior position as a result of a trust relationship." U.S. v. Brown, *supra*, at 1305 (citation omitted). Thus, the district court did not clearly err when it determined that Torres abused a position of trust when he committed the offense.

VI. Calculation of the Base Offense Level
and Downward Departure

Torres argues that the district court used an excessive quantity of marijuana to calculate his base offense level. Torres was charged as an accessory to Cuellar's distribution of 229 kilograms of marijuana. The probation officer determined that the conspiracy involved a total of 506.5 pounds of marijuana, including approximately 49.5 pounds of marijuana found in Cuellar's possession when he was arrested.⁴ Torres did not dispute the quantities involved, but he argues that his offense level should be based on only the 49.5 pounds of marijuana possessed by Cuellar. The district court overruled Torres's objection and adopted the probation officer's calculation of the quantity of drugs.

This Court reviews for clear error the district court's factual finding as to the quantity of drugs involved in the offense. U.S. v. Smith, 13 F.3d 860, 865 n.11 (5th Cir.), cert. denied, 114 S. Ct. 2151 (1994). Cuellar testified that Torres knew that Cuellar and Barrera planned to steal a five-hundred pound load of marijuana. The district court's determination that Torres's offense level should be based on the weight of the entire load of marijuana is thus not clearly erroneous.

Finally, Torres contends that the district court erred by failing to depart downward because of his cooperation with investigators. The district court rejected Torres's argument that his case presented mitigating circumstances which warranted

⁴ The rest of the marijuana was in Barrera's truck.

a downward departure. This Court will not review a district court's refusal to depart unless the refusal was in violation of law. U.S. v. Adams, 996 F.2d 75, 78-79 (5th Cir. 1993). Because there is no indication of a violation of law, this issue provides no basis for appellate review. Id. at 79.

CONCLUSION

For the foregoing reasons, the appellant's conviction is
AFFIRMED.