

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60044
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GABRIEL RENE GONZALEZ and
RAUL CARDIEL-SALINAS,

Defendants-Appellants.

Appeal from the United States District Court for
the Southern District of Texas
(CR-L-93 93-1, 02)

(May 24, 1995)

Before REAVLEY, DAVIS and DeMOSS, Circuit Judges.

PER CURIAM:*

Defendants Gabriel Rene Gonzalez and Raul Cardiel-Salinas appeal their convictions of conspiracy to possess with intent to distribute in excess of five kilograms of cocaine and attempt to possess with intent to distribute in excess of five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

846. Gonzalez also appeals his conviction of carrying a firearm during the commission of the conspiracy, in violation of 18 U.S.C. §§ 924(c)(1). We affirm.

BACKGROUND

Cardiel was introduced to Luis Acuna by his co-worker Norma Plasencia. Acuna was a government informant. Cardiel agreed with Acuna that he would provide purchasers to buy cocaine from Acuna. Cardiel and Acuna negotiated that Cardiel would present the money for the cocaine purchase at Acuna's house in Laredo. The cocaine would then be picked up in San Antonio by persons working with Cardiel.

Cardiel, accompanied by Gonzalez and several other persons, appeared at Acuna's apartment on April 23, 1993. Gonzalez, after entering the apartment with Cardiel, walked back outside and retrieved a bag or box containing the money from a truck. He also retrieved a pistol and placed it inside his waistband. Soon after he reentered the house, police officers rushed into the living room and arrested Gonzalez and Cardiel.

DISCUSSION

A. *Cardiel's Appeal*

Cardiel argues that the district court abused its discretion in denying his motion for a new trial based on the failure of the Government to secure the attendance at trial of Plasencia. Cardiel defended himself at trial by claiming that Plasencia had entrapped him into entering into a drug transaction with the Government's informant, Acuna. He claims that Plasencia's

presence at the trial was crucial to his defense. Cardiel claims that, after trial, he learned that the Government had known of Plasencia's whereabouts during the trial.

The Government was not hiding Plasencia, nor did it claim the right to place her behind an informant's shield. Instead, as the district court noted, this was the proverbial situation where the left hand did not know what the right hand was doing. Plasencia was periodically reporting to a unit of the United States Border Patrol which had paroled Plasencia into the United States as the girlfriend of informant Acuna. There is no evidence that the prosecution team had any knowledge of that fact. Nor is there any indication that the prosecution knew that Acuna had the means to locate Plasencia. The Government was under no duty to search for Plasencia in order to force her appearance at trial.

In any case, a defendant only holds a right to compulsory process of a witness or to disclosure by the Government of its informants where the testimony sought by the defendant would be favorable to his defense. See Pennsylvania v. Ritchie, 107 S.Ct. 989, 1000 (1987) (compulsory process); United States v. Evans, 941 F.2d 267, 272 (5th Cir.) (Government's duty to disclose informant), cert. denied, 112 S.Ct. 451 (1991). Likewise, a defendant is only entitled, under Brady v. Maryland, to receive exculpatory evidence from the Government. 83 S.Ct. 1194 (1963).

Plasencia's testimony would not have been favorable to Cardiel. The Government produced Plasencia for the hearing on

Cardiel's motion for a new trial. She denied ever having a conversation related to drug dealing with Cardiel. She testified that she introduced Cardiel to Acuna but that she was not involved in the drug business and did not seek out buyers for Acuna. Cardiel cannot turn Plasencia into a favorable witness by arguing that the jury could have found her not to be credible and therefore would have believed his entrapment story.

B. *Gonzalez's Appeal*

1. Motion to Suppress

The district court did not err in denying Gonzalez's motion to suppress a confession which he gave after being arrested and taken to the Texas Department of Public Safety ("DPS") office. Gonzalez claims that his confession was coerced, because a police officer struck him and tight handcuffs were placed upon him. A confession is voluntary "in the absence of official overreaching, in the form of either direct coercion or subtle psychological persuasion." United States v. Restrepo, 994 F.2d 173, 183 (5th Cir. 1993).

Gonzalez was struck immediately after his arrest while still at Acuna's apartment. Gonzalez provided no evidence that the contact was of any significant force or that it caused any injury or pain. This minor incident is too far removed from the confession at the DPS office approximately one hour later to make the statement involuntary. It is undisputed that Gonzalez's handcuffs were removed by the time he made his confession and so could not have created a circumstance which would cause Gonzalez

to make an involuntary statement. Gonzalez has not shown that the district court erred in finding that his confession was voluntary.

Gonzalez also claims that he requested a lawyer before he made his statement. The officers testified that he did not request a lawyer, and we must defer to the district court's credibility choice in their favor. Id. Gonzalez points to the testimony of one of the officers to the effect that Gonzalez could cooperate "with the attorney present or he could do it now." Taken in context, the use of the word "the" rather than "an" has no particular significance. The language was used in testimony explaining that Gonzalez had been advised of his rights and had not requested an attorney.

2. Insufficiency of the Evidence

Viewing the evidence in the light most favorable to the government, there exists sufficient evidence such that a rational trier of fact could have found Gonzalez guilty beyond a reasonable doubt of the crimes of which he was convicted. Jackson v. Virginia, 99 S.Ct. 2781, 2789 (1979).

In Gonzalez's confession, which we have held was properly admitted, Gonzalez admitted that he conspired with Cardiel to buy cocaine. Acuna also testified that Gonzalez participated in the negotiations for the cocaine purchase and knowingly retrieved the money for the transaction from a vehicle parked outside. Cardiel also made a statement which confirmed that Gonzalez had participated in the drug negotiations and had made the

connections to find a buyer for the cocaine. This evidence is sufficient to support the convictions of conspiracy and attempted possession. See United States v. Sanchez-Sotelo, 8 F.3d 202, 208 (5th Cir. 1993), cert. denied, 114 S.Ct. 1410 (1994); United States v. Stone, 960 F.2d 426, 433 (5th Cir. 1992).

Gonzalez contends that he did not actually use the pistol in connection with the drug trafficking and that the evidence is therefore insufficient to convict him of the firearm offense. The evidence showed that Gonzalez retrieved the firearm from a truck when he retrieved the money for the drug transaction. Gonzalez then returned to the apartment where the transaction was taking place, and the firearm was found in Gonzalez's waistband when he was arrested. The evidence is sufficient to uphold conviction on the firearm count, because it shows that the firearm could have been used to protect or facilitate the conspiracy and that the weapon was connected with the drug trafficking. See United States v. Featherston, 949 F.2d 770, 776 (5th Cir. 1991), cert. denied, 113 S.Ct. 361 (1992). 3.

Gonzalez's Sentence

The district court did not err in imposing a two-level increase in Gonzalez's base offense level for obstruction of justice, pursuant to United States Sentencing Guidelines § 3C1.1, based upon a finding that Gonzalez committed perjury at trial. The court specifically found an "egregious falsification of testimony." The court noted that Gonzalez's testimony was internally inconsistent and in conflict with the testimony of the

other witnesses. The court made adequate findings that Gonzalez committed perjury, and those findings were not clearly erroneous. See United States v. Dunnigan, 113 S.Ct. 1111, 1117 (1993); United States v. Storm, 36 F.2d 1289, 1295 (5th Cir. 1994), cert. denied, 1995 WL 36593 (U.S. Apr. 24, 1995).

The record also shows that the district court did not impose the increase simply because Gonzalez pleaded not guilty, testified on his own behalf and was later found guilty. The district court judge stated that he never imposed the increase automatically but that he found the increase necessary in this case because of the egregiousness of the perjury.

AFFIRMED.