

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

---

No. 94-60157  
Summary Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOSE HERIBERTO ACOSTA,

Defendant-Appellant.

---

Appeal from the United States District Court  
For the Southern District of Texas  
(CR 93 132 01)

---

March 20, 1995

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:<sup>1</sup>

Jose Heriberto Acosta appeals his drug possession conviction.  
We affirm.

I.

Acosta was arrested when U.S. Border Patrol agents discovered approximately 241 kilograms of marijuana in the cargo trailer of Acosta's truck at a border patrol check point in Falfurrias, Texas. The agents searched Acosta's truck when they detected a strong

---

<sup>1</sup> 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

ammonia order emanating from the trailer.<sup>2</sup> The agents discovered the marijuana wrapped in garbage bags buried under three to four layers of cabbage bags. Acosta was subsequently convicted of one count of possession with the intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(B). Acosta timely appealed.

## II.

Acosta's sole contention is that the evidence is insufficient to sustain his conviction. Specifically, Acosta argues that the government failed to prove that he knew about the concealed marijuana. A conviction for possession of drugs with the intent to distribute "requires the government to prove that the defendant knowingly possessed the contraband." **United States v. Shabazz**, 993 F.2d 431, 441 (5th Cir. 1993). However, knowledge of concealed contraband may ordinarily be inferred from the exercise of control over the vehicle in which it is concealed if the government produces additional circumstantial evidence from which a rational jury could find that the defendant's possession of the drugs was knowing. **Id.** at 441-442. While Acosta concedes that he exercised exclusive control over the truck and the cargo trailer, he maintains that the government failed to produce additional circumstantial evidence showing that he knew about the hidden marijuana.

Our review of the record persuades us that the evidence is sufficient to sustain Acosta's conviction. At trial, Acosta

---

<sup>2</sup> In his brief, Acosta concedes that he consented to the search.

attempted to show that the marijuana could have been planted without his knowledge at several points between the time the cabbage was loaded and the time that Border Patrol agents discovered the marijuana. Acosta testified that he was asleep while the bags of cabbage were loaded into the truck on the afternoon of June 16, 1993 and, consequently, the workers loading the cabbage could have loaded the marijuana when they loaded the cabbage. He further testified that he left the truck unattended later that afternoon when he stopped to have a load of ice sprayed on top of the cabbage. Finally, he testified that he stopped at a rest area at approximately 7:30 p.m. that evening and slept for an hour before he departed for the Falfurrias checkpoint at approximately 8:30 p.m. He arrived at the checkpoint at approximately 9:10 p.m.

The government's evidence casts sufficient doubt on Acosta's testimony and his theory that someone else could have loaded the marijuana without his knowledge, however, that a reasonable jury could conclude that Acosta knew about the contraband. The loading dock workers testified that they did not place the marijuana in the cargo trailer and that the drugs were not in the trailer when they loaded the cabbage. The government also presented testimony by the workers who loaded the ice on top of the cabbage. These workers similarly testified that they had no knowledge of the marijuana. The jury is the ultimate arbiter of a witness' credibility and is free to chose among reasonable constructions of the evidence. **United States v. Garza**, 990 F.2d 171, 175 (5th Cir.), **cert. denied**, \_\_\_ U.S. \_\_\_, 114 S.Ct. 332 (1993). Accordingly, the jury could

have rationally concluded that the testimony of the workers was credible and that the marijuana was not loaded when the workers loaded the cabbage and ice.

Moreover, the government presented additional evidence that casts doubt on whether the marijuana was placed in the trailer by either the workers at the loading dock or the ice supply company. Border Patrol agent Jeffrey Richards testified that the marijuana was buried under approximately three to four layers of cabbage sacks and that both the top and bottom of the marijuana bundles were covered with ice. Because the ice was originally sprayed on the top layer of cabbage bags, the jury could have reasonably inferred that the presence of ice underneath the marijuana bags suggested that the marijuana was loaded after the cabbage and ice were loaded. More particularly, the jury was entitled to find that this evidence supported the government's theory that some of the ice and cabbage bags were removed to make a place for the drugs. This allowed the remaining ice to settle toward the bottom layers of cabbage and the marijuana was loaded on top of this ice. The jury was thus entitled to accept this explanation for the presence of ice surrounding the marijuana bundles.

The government also points to an inconsistency in Acosta's testimony that he stopped at a rest area near Falfurrias and slept for an hour to wait until the Falfurrias scales closed. At trial, Acosta introduced a receipt completed by the ice supply company to show that he purchased ice at 7:40 p.m. on June 16th. Acosta testified, however, that he arrived at the rest area near Falfurrias at approximately 7:30 p.m. However, according to the

government, it would have taken Acosta an hour and a half to drive from the ice supply company to Falfurrias. Thus, Acosta would not have had time to stop at the rest area for an hour and still arrive at the border checkpoint in Falfurrias at 9:10 p.m. The jury was entitled to find that Acosta was lying when he stated that he slept at the rest area and that this testimony was designed to suggest another opportunity for unknown persons to load the marijuana without Acosta's knowledge.

The evidence outlined above is sufficient to permit the jury to find that Acosta had knowledge that the marijuana was concealed in the trailer. We conclude, therefore, that the evidence is sufficient to sustain Acosta's conviction.<sup>3</sup>

AFFIRMED.

---

<sup>3</sup> Acosta filed a motion with this court for permission to file a **pro se** supplemental brief. We ordinarily do not permit a party to file a **pro se** supplemental brief after his counsel has already filed a brief on his behalf. **See** Fifth Circuit Court Policy 2c. Acosta fails to offer any explanation why supplemental briefing is necessary. We therefore deny his motion.