

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60244
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS ROLANDO CHAPA,

Defendant-Appellant.

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

(CR C93-225 2)

(October 18, 1994)

Before POLITZ, Chief Judge, DAVIS and DeMOSS, Circuit Judges.

PER CURIAM:*

Luis Rolando Chapa appeals his convictions for conspiracy to possess marihuana with intent to distribute and for the substantive offense. Finding no 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

In checking a milk truck driven by Martin Rivera at a checkpoint near Falfurrias, Texas, Border Patrol agents discovered 76 kilos of marihuana. Rivera was arrested. He identified as a co-conspirator his cousin Chapa, who normally drove the milk truck. Both were indicted; Rivera pled guilty and testified at Chapa's trial as a government witness, incriminating his cousin. The jury returned verdicts of guilty on both counts and Chapa was sentenced to concurrent 55-month prison terms, a period of supervised release, a fine, and the statutory assessments. He timely appealed, challenging the sufficiency of the evidence.

Analysis

In reviewing a challenge to the sufficiency of the evidence in a criminal case we view the evidence in the light most favorable to the verdict, affirming if we conclude that the evidence would allow a rational juror to find all elements of the charged offense proven beyond a reasonable doubt.¹

Chapa complains that the evidence against him is insufficient because its primary source was the testimony of an alleged co-conspirator anxious to advance his own interests in pursuit of a plea agreement. This challenge poses an essential issue of

¹**Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781; **United States v. Roberson**, 6 F.3d 1088 (5th Cir. 1993).

credibility, an issue upon which the jury is the ultimate arbiter.²

Rivera testified that he and Chapa were making a delivery in Falfurrias when Chapa was approached by a man, identified only as "Steve," for whom Rivera and Chapa had smuggled marihuana the prior month. After conversing with Steve, Chapa told Rivera that they would be smuggling marihuana through the Falfurrias checkpoint. They would deviate from the regular milk delivery route to meet Steve at a rest stop south of the checkpoint to pick up the contraband. Rivera would then drive the truck through the checkpoint; Chapa and Steve would travel in a separate vehicle. After negotiating the checkpoint they were to rendezvous and transfer the marihuana from the milk truck; at that time Chapa and Rivera would be paid.

According to Rivera things did not go exactly according to plan. Chapa and Rivera drove down to the rest stop but Steve was not there. They drove around looking for him but met, instead, Jose Cantu, the proprietor of a small store located near the rest stop, who flagged them down to purchase some milk. Chapa and Rivera then returned to the rest stop and found Steve waiting. Steve and Chapa loaded the marihuana into the milk truck; Rivera acted as lookout. Rivera then drove to the checkpoint into the arms of the authorities.

Chapa maintains that Rivera's testimony is incredible as a matter of law because he gave differing accounts when arrested, and because he had a vested interest in enhancing his plea bargain

²**United States v. Osum**, 943 F.2d 1394 (5th Cir. 1991).

position.

We are not persuaded. To prove a drug conspiracy under 21 U.S.C. § 846, the government must establish "both the existence of an agreement between two or more persons to violate the narcotics laws and that each conspirator knew of, intended to join, and participated in the conspiracy."³ These elements may be proven by the "uncorroborated testimony of an accomplice or coconspirator . . . provided that this testimony is not incredible or otherwise insubstantial on its face."⁴ That Rivera's testimony may have been contradictory or obtained as part of a plea bargain is not enough, in and of itself, to render the testimony incredible as a matter of law.⁵ To be considered incredible Rivera's testimony must contain "facts that the witness physically could not have observed or events that could not have occurred under the laws of nature."⁶ Rivera's testimony is not so tainted.

Chapa next contends that the jury should not have accepted the corroborating testimony of Joseph Cantu which placed him with Rivera during the smuggling operation. Chapa maintains that the encounter when Cantu purchased some milk was so brief that Cantu

³**United States v. Matel**, 812 F.2d 937, 940 (5th Cir. 1987). If the evidence supports a finding that Rivera and Chapa were co-conspirators in a scheme to possess with intent to distribute marihuana, Chapa will be deemed to possess the marihuana through Rivera's possession and can be charged as a principal in the perpetration of the crime pursuant to 18 U.S.C. § 2. **See Pinkerton v. United States**, 328 U.S. 640, 66 S.Ct. 1180 (1946) and **United States v. Garcia**, 655 F.2d 59 (5th Cir. 1981).

⁴**United States v. Singer**, 970 F.2d 1414, 1419 (5th Cir. 1992).

⁵**United States v. Gadison**, 8 F.3d 186 (5th Cir. 1993).

⁶**United States v. Osum**, 943 F.2d at 1405.

could not positively identify him. This, too, is a quintessential credibility call for the jury.

The record contains sufficient evidence upon which the jury could render its verdict.

AFFIRMED.