

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60332
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOSE LUIS ALVAREZ-ARRIAGA,

Defendant-Appellant.

No. 94-60333
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FELIPE DE JESUS RAMIREZ-MARTINEZ,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas
(93-CR-214-1 & 93-CR-214-2)

(December 13, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Jose Alvarez-Arriaga ("Alvarez") and Felipe Ramirez-Martinez ("Ramirez") appeal, on Fourth Amendment grounds, their convictions, following conditional pleas of guilty, of possessing marihuana with intent to distribute in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1). Finding no error, we affirm.

I.

Alvarez and Ramirez were charged with (1) conspiracy to possess marihuana with intent to distribute and (2) possession of marihuana with intent to distribute. Pursuant to agreements, they pleaded guilty on the possession count, reserving the right to appeal the denial of their motions to suppress evidence.

The district court denied the motions to suppress after an evidentiary hearing at which only Senior Border Patrol Agents Rosendo Hinojosa and Ray a la Torre testified. The court stated reasons in its order, which applies to both defendants.

II.

At about 6:10 a.m. on November 19, 1993, the two agents were performing "line watch" duties about 50 to 75 yards from the Rio Grande River in a residential area of Laredo, Texas, known as the

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

"Geronimo Loop" area. The officers were parked near the "food bank" area south of the neighborhood, when they received a radio dispatch that an unidentified person "had reported possible illegal alien activity" in the Loop area. The Geronimo Loop itself encompasses a one-block area near the river.

As the agents approached the Loop, about five blocks from their previous location, they received a dispatch that the informant had phoned a second time, stating "that a brown Blazer type vehicle had just approached [the Loop] area and had just stopped," and that it was "loading up." Hinojosa testified that he assumed "that the reason the call was made was because it was either aliens or narcotics." A la Torre concluded, based upon his fifteen years of patrolling in the Laredo area, that the suspect vehicle probably would travel south to Lafayette Street, an east-west artery that intersects Interstate Highway 35 (IH 35).

The agents proceeded south on Santa Maria Street. As they approached the intersection of Santa Maria and Lafayette Streets, they saw two vehicles passing the intersection going east on Lafayette. One of them was a brown Suburban, which matched the description of the vehicle given by the informant. The agents drove up behind the Suburban when it stopped at the traffic light at the intersection of Lafayette and Santa Ursula Streets or IH 35. When the light turned green, the Suburban turned south on Santa Ursula (or IH 35); the agents activated their emergency lights and siren to make the Suburban pull over. The Suburban did not stop, so a la Torre drove alongside the Suburban in order to identify its

occupants. At that time, "the driver [admittedly Alvarez] immediately pulled to the embankment there, the curve, and they both fled through the passenger side door of the vehicle." Ramirez admits that he was the passenger in the Suburban.

Alvarez left the Suburban's motor running and its passenger door open. Hinojosa apprehended the two suspects after a lengthy chase on foot. When Hinojosa started chasing the suspects, a la Torre immediately looked into the Suburban. There he saw eight duffel bags containing the marihuana, which he identified by its odor.

The district court concluded that it did not need to determine whether the defendants had standing or whether the facts supported a lawful investigatory stop of the Suburban. The court reasoned that "these Defendants abandoned the vehicle on a public street, . . . and fled on foot. Marihuana was seen and smelled by a law enforcement officer in plain view before there had been any seizure of the Defendants. The marihuana was therefore not the fruit of a seizure, legal or otherwise."

III.

Alvarez contends that the marihuana was unlawfully seized because the Border Patrol agents lacked sufficient facts to justify an investigatory stop. Therefore, he argues, he "did not voluntarily abandon the contraband, but rather relinquished it as a result of police misconduct" (quoting Comer v. State, 754 S.W.2d 656, 658 (Tex. Crim. App. 1986)). Ramirez likewise contends that

the agents lacked reasonable suspicion to stop the Suburban.

"In reviewing a district court's ruling on a motion to suppress, the reviewing court must consider the evidence in the light most favorable to the prevailing party, accepting factual findings unless clearly erroneous and reviewing questions of law de novo." United States v. Shannon, 21 F.3d 77, 81 (5th Cir.), cert. denied, 115 S. Ct. 260 (1994). "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." Rakas v. Illinois, 439 U.S. 128, 131 n.1 (1978). "[A] district court's determination that a seizure has or has not occurred is a finding of fact subject to reversal only for clear error." United States v. Valdiosera-Godinez, 932 F.2d 1092, 1098 n.1 (5th Cir. 1991), cert. denied, 113 S. Ct. 2369 (1993).

"A seizure occurs either when a suspect is physically forced to stop or when the suspect submits to the officer's show of authority." United States v. Hernandez, 27 F.3d 1403, 1406 (9th Cir. 1994) (citing California v. Hodari D., 499 U.S. 621, 626 (1991)). But "a seizure does not occur if, in response to a show of authority, the subject does not yield; in that event, the seizure occurs only when the police physically subdue the subject." United States v. Santamaria-Hernandez, 968 F.2d 980, 983 (9th Cir. 1992). "Only when an encounter is classified as seizure must [the reviewing court] determine whether there was reasonable suspicion." Hernandez, 27 F.3d at 1406.

Alvarez contends that we should find that the Border Patrol

agents lacked reasonable suspicion to believe that he had committed an offense, based in part upon his assertion of fact that the "[a]gents turned on their emergency lights, and the [S]uburban yielded to the agents [sic] show of authority." Ramirez makes the same assertion. If the agents actually had stopped the Suburban, we would need to make a reasonable-suspicion determination. See United States v. Holloway, 962 F.2d 451, 454-61 (5th Cir. 1992).

The district court found, however, that the appellants' version of the facts "is not what happened. Soon after the agents' `show of authority,' the Defendants' vehicle admittedly came to a stop, but this was hardly because the Defendant[s] were submitted to authority." The court found that "[o]n the contrary, the passenger door opened and both defendants promptly exited the vehicle . . . and fled the scene, running in a circuitous route over the course of four city blocks."

These findings are not erroneous, as they are supported by the agents' uncontradicted testimony. This testimony shows further that a la Torre discovered the marihuana in the Suburban prior to the time that the two suspects were seized by Hinojosa. Accordingly, as the district court held, "[t]he marihuana was . . . not the fruit of a seizure, legal or otherwise," within the scope of the Fourth Amendment. See California v. Hodari D., 499 U.S. at 623-29.

AFFIRMED.