

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60476
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MARIO ANDRADE-PEREZ,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CR B 91 31 3)

August 3, 1995

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Mario Andrade-Perez ("Andrade") appeals his conviction of conspiracy to possess and possession of marihuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846 and 18 U.S.C. § 2. Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Andrade, Rafael Rico-Rodriguez ("Rico"), and Ruben Rodriguez-Gonzalez ("Rodriguez") were named defendants in the two drug counts of the indictment. Rodriguez also was charged with possessing a firearm during a drug-trafficking offense and with such possession as an illegal alien. Rico pleaded guilty on the possession count; Rodriguez pleaded guilty on the possession count and of possessing a firearm during a drug-trafficking offense. Rodriguez testified for Andrade at his trial; Rico did not testify.

Border Patrol Agent Roger Kemp testified that at various points along the Rio Grande River, electronic sensors are buried in the ground beneath trails that aliens usually traverse when entering this country illegally. When someone walks in an area close to a sensor, it emits a signal to which the Border Patrol responds.

At about 8:00 p.m. on January 28, 1994, Kemp and his partner, Agent Gregory Vawter, responded to a signal emitted by a sensor beneath a footpath from the river to a parallel levee. Kemp testified that this sensor could be set off only by someone walking, not by a vehicle. On the other side of the levee is a dirt road that turns into a blacktop road, which is the only means of entrance to, and exit from, the small park in the area.

Kemp testified that smugglers generally walk up the path leading to the levee and meet a waiting vehicle in the park. Consequently, the agents went in their vehicle to the entrance of the park. At about five to ten minutes after the sensor was set

off, they saw a white Ford Tempo slowly moving up the road toward the blacktop road. There were three men in the Tempo who kept looking around. After following the Tempo a short distance, the agents stopped it after it left the park. Kemp testified that there were no other vehicles or pedestrians in the park area; Vawter, however, testified that he believed he saw one or two other vehicles there.

Rico was driving the Tempo, Rodriguez was in the front passenger seat, and Andrade was sitting in the back seat. Kemp questioned Rico while Vawter questioned the two passengers. The agents quickly learned that these two men were illegal aliens but that Rico is a United States citizen.

Andrade and Rodriguez were wet from their knees down; Vawter observed mud on their feet. The bottoms of Andrade's pants were muddy. Their water and mud marks were virtually identical, but Rico's pants were dry. At that time, the river was so low that a person could walk across it, "in some spots no more than getting your ankles wet."

The agents arrested Andrade and Rodriguez for being illegal aliens and Rico for alien-smuggling. Kemp asked Rico for permission to search the trunk of the Tempo, but Rico said he did not have a key. Kemp found the key in Rico's pocket during the search incident to his arrest. Kemp asked him whether there was any reason he did not want them to look in the trunk; Rico replied that it contained marihuana.

When Kemp opened the trunk, he smelled a strong odor of

marihuana and saw a large duffel bag. Inside the bag were five bricks of marihuana weighing 39.85 pounds, wrapped in aluminum foil, saran wrap, and black plastic bags. The individual bundles of marihuana were damp, but the duffel bag was not. Subsequently, a loaded 9 mm pistol was found under the front seat of the Tempo; Rodriguez said it was his.

When Rodriguez testified for Andrade, he denied having told the agents that he had "crossed the dope" into the United States, and he asserted that Andrade was innocent. In rebuttal, Vawter testified that Rodriguez had stated, "[W]e crossed [the marihuana] together." Vawter testified that he assumed Rodriguez was referring to Andrade, as all three of the arrestees were sitting together at the time. The parties stipulated that the substance in the duffel bag was marihuana.

II.

A.

Andrade contends that the evidence was insufficient to support his convictions of conspiracy and aiding and abetting the possession of marihuana with intent to distribute. He relies upon the facts that no fingerprints were found on the contraband; he did not smell of marihuana; he did not own the car carrying it; and he truthfully identified himself to the agents. Andrade relies upon Rodriguez's testimony, which exculpated him, and he argues that the government proved only his mere presence at the scene.

The district court denied Andrade's FED. R. CRIM P. 29 motions

for judgment of acquittal after the government rested its case and at the close of all the evidence. This court "review[s] the district court's denial of a motion for judgment of acquittal de novo." United States v. Leed, 981 F.2d 202, 205 (5th Cir.), cert. denied, 113 S. Ct. 2971 (1993).

"[T]he standard of review for sufficiency of evidence is whether any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." United States v. Martinez, 975 F.2d 159, 160-61 (5th Cir. 1992), cert. denied, 113 S. Ct. 1346 (1993). "In evaluating the sufficiency of the evidence, we consider the evidence in the light most favorable to the government with all reasonable inferences and credibility choices made in support of the verdict." United States v. Ivy, 973 F.2d 1184, 1188 (5th Cir. 1992), cert. denied, 113 S. Ct. 1826 (1993). Accordingly, "a jury may choose to believe part of what a witness says without believing all of that witness's testimony." United States v. Merida, 765 F.2d 1205, 1220 (5th Cir. 1985).

Neither the jury nor the reviewing court is required to consider each piece of evidence in isolation. See United States v. Magee, 821 F.2d 234, 239 (5th Cir. 1987). Items of evidence that would be inconclusive if they were considered separately may, upon being considered in the aggregate, be seen to constitute conclusive proof of guilt. See United States v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989). "It is not necessary that the evidence exclude every hypothesis of innocence, and `a jury is free to choose among reasonable constructions of the evidence.'" United States v.

Guerra-Marez, 928 F.2d 665, 674 (5th Cir.) (quoting United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit 1982) (en banc), aff'd, 462 U.S. 356 (1983)), cert. denied, 502 U.S. 917, 969 (1991).

Generally, proof of the defendant's mere presence at a scene of criminal activity and his association with the other defendants is insufficient to support a criminal conviction. United States v. Carrillo-Morales, 27 F.3d 1054, 1065 (5th Cir. 1994), cert. denied, 115 S. Ct. 1163 (1995). "A jury may find knowledgeable, voluntary participation from presence when the presence is such that it would be unreasonable for anyone other than a knowledgeable participant to be present." United States v. Cruz-Valdez, 773 F.2d 1541, 1546 (11th Cir.) (en banc), cert. denied, 475 U.S. 1049 (1985), cited in United States v. Henry, 849 F.2d 1534, 1536 (5th Cir. 1988).

A conviction of possessing marihuana with intent to distribute requires proof of "(1) knowing (2) possession of marihuana (3) with intent to distribute it." United States v. Diaz-Carreon, 915 F.2d 951, 953 (5th Cir. 1990). To prove guilt of an offense as an aider and abettor, 18 U.S.C. § 2, the government must establish that the defendant "(1) associated with a criminal venture, (2) participated in the venture, and (3) sought by action to make the venture successful." United States v. Fierro, 38 F.3d 761, 768 (5th Cir. 1994), cert. denied, 115 S. Ct. 1388, 1431 (1995). Accordingly, a defendant "need not have actual or constructive possession of the drugs to be guilty of aiding and abetting possession with intent to distribute." United States v. Williams, 985 F.2d 749, 753 (5th Cir.), cert. denied, 114 S. Ct. 148 (1993).

"To establish a drug conspiracy under 21 U.S.C. § 846, the government must prove beyond a reasonable doubt (1) an agreement between two or more persons to violate the narcotics laws, (2) that each alleged conspirator knew of the conspiracy and intended to join it, and (3) that each alleged conspirator did participate voluntarily in the conspiracy." United States v. Inocencio, 40 F.3d 716, 725 (5th Cir. 1994). "The jury may infer any element of this offense from circumstantial evidence." Lechuga, 888 F.2d at 1476. Thus, "[a]n agreement may be inferred from concert of action, [v]oluntary participation may be inferred from a collocation of circumstances, and [k]nowledge may be inferred from surrounding circumstances." Id. at 1476-77 (citation and quotation marks omitted).

The jury can have inferred reasonably that the sensor on the pathway was set off by Andrade and Rodriguez after they had waded across the river from Mexico. They had virtually identical water marks on their legs and mud on their shoes. The five packages of marihuana in the dry duffel bag were damp. It was reasonable for the jury to infer that Andrade and Rodriguez carried these packages with them when they crossed the river, which resulted in the dampness.

Kemp testified that no vehicle other than the Tempo, and no person other than the three codefendants, were present in the area at the relevant time. The jury was entitled to credit this testimony rather than accepting Vawter's testimony that he believed there were one or two other vehicles in the area. Merida, 765

F.2d at 1220. Vawter also misidentified the suspects' vehicle before he was shown a photograph of it. Only a few minutes after the sensor was activated, the agents saw the three suspects leaving the area in the Tempo via the sole exit road.

The district court was correct in admitting Rodriguez's statement, "[W]e crossed [the marihuana] together," to impeach his testimony that Andrade was innocent. See United States v. Opager, 589 F.2d 799, 802-03 (5th Cir. 1979). The circumstances support the inference that Rodriguez was referring to himself and Andrade. Andrade's reliance upon Rodriguez's testimony that Andrade "had nothing to do with the marijuana" is misplaced, because the jury determines credibility. See Ivy, 937 F.2d at 1188. There was ample evidence, albeit circumstantial, that Andrade conspired with his codefendants and at least aided and abetted possession of the marihuana with intent to distribute it.

B.

Andrade contends that the district court reversibly erred by not providing him with funds to hire an investigator. He asserts that the district court "abused its discretion in failing to conduct the requested ex parte hearing as mandated by [18 U.S.C. § 3006A(3)(1)]." Andrade filed a written motion for such relief, prior to trial.

The statute provides for an ex parte hearing on such a motion. "To justify the authorization of investigative services under § 3006A(e)(1), [however,] a defendant must demonstrate with

specificity, the reasons why such services are required." United States v. Gadison, 8 F.3d 186, 191 (5th Cir. 1993). The standard of review of a denial of a motion for appointment of a private investigator at government expense is abuse of discretion. Id.

At the final pretrial hearing on April 6, 1994, the court told Andrade's counsel that he could have an ex parte hearing on his motion. The record does not show, however, that counsel ever requested an appointment with the court for the hearing.

On April 18, 1994, the day before the trial, the defense moved for a continuance based in part upon the allegation that "[t]he Court has not approved Defendant[']s request for funds to conduct an adequate investigation." The next day, the court denied this motion. Subsequently, the court stated that "[t]he only thing that was pending that I still owed defense counsel" was to examine Rico's presentence investigation report to see whether it exculpated Andrade in any way. The court then asked, "I think that was the only thing I owed you from all your motions, is that correct?" Attorney Casas replied, "That is correct, Your Honor."

Andrade is not entitled to relief, because his counsel never arranged for an ex parte hearing and failed to bring to the court's attention that there had been no ruling on his motion. The district court did not abuse its discretion. See Gadison, 8 F.3d at 191.

C.

Andrade contends that he was denied the effective assistance

of counsel by the government's failure to provide him with the transcripts of the proceedings at which Rico and Rodriguez pleaded guilty. Andrade contends that this entitles him to reversal without needing to show prejudice. He asserts that the transcripts contain statements by his codefendants that exculpate him.

"An indigent defendant has both a constitutional and a statutory right to a free transcript of prior proceedings if it is reasonably necessary to present an effective defense at a subsequent proceeding." United States v. Pulido, 879 F.2d 1255, 1256 (5th Cir. 1989). The Supreme Court has so held relative to the transcript of prior trial proceedings of the defendant that resulted in a mistrial. Britt v. North Carolina, 404 U.S. 226, 227 (1971). Relevant factors are "(1) the value of the transcript in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." Pulido, 879 F.2d at 1256 (citing Britt, 404 U.S. at 227). The Britt court held that there was an available alternative, the court reporter's "read[ing] back to counsel his notes of the mistrial." 404 U.S. at 229.

Britt and Pulido involved prior mistrials of the defendant. We have held that there was no need to provide the defendant in a rape case with a transcript of his earlier trial for murder. Fisher v. Hargett, 997 F.2d 1095 (5th Cir. 1993). We stated that "the assumption that a requested transcript of a prior proceeding is automatically valuable does not extend beyond the narrow confines of Britt" and that on the facts of the case, production

of the transcript was not constitutionally required. Id. at 1099. We held further than "an adequate alternative to a transcript existed when full discovery was made available to the defendant, and the defendant had a copy of the transcript of the preliminary hearing" in the rape trial. Id. at 1096-97, 1099.

The transcripts of Rico's and Rodriguez's rearraignments were not sufficiently valuable to require that Andrade be provided with either the transcripts or an adequate substitute. Rodriguez having agreed to testify for the defense, Andrade's counsel could discover the relevant facts by interviewing Rodriguez or his counsel. Andrade has not suggested how Rodriguez's testimony may have been more favorable to him if counsel had had the transcript of Rodriguez's rearraignment.

Andrade contends that he was prejudiced by not having the Rico transcript, because Rico exculpated him at his rearraignment. Rico first testified that Andrade and Rodriguez "were with" him and that they knew "what was going on." Then he changed his story, saying that they had not helped him; he was only going to give them a ride to the mall. At that point, the prosecutor suggested that he might withdraw the plea agreement. In response to the court's questions, Rico then admitted that his testimony exculpating his codefendants was not true. He testified that "[t]hey crossed the weed and I went to pick up the weed." Rico said that they knew he was going to pay them after he sold the marihuana. He assured the court that this was the truth.

Thus, Rico's rearraignment transcript could not have helped

Andrade. That Casas knew this is shown by his statement to the court on April 18, 1994, that Andrade did not intend to call Rico as a witness. Casas asserts that he meant that the defense was not going to call Rico to testify at Andrade's suppression hearing, not his trial. The suppression hearing, however, had been held on April 6, 1994.

D.

Andrade contends that he is entitled to reversal on the ground that the district court's comments, rulings, and opinions "show deep seated . . . antagonism toward [him]." He relies upon the court's (1) comment during Rodriguez's arraignment that he did not believe Rodriguez's testimony that Andrade was innocent; (2) not granting Andrade's request for an investigator; (3) not providing him with "requested transcripts"; (4) denial of his motion for a continuance; and (5) not sanctioning "the Government for its behavior in this case."

In the motion that Casas filed in the district court, he asserted only that the judge should disqualify himself because he had stated that he did not believe Rodriguez's testimony that Andrade was innocent. The motion did not cite either 28 U.S.C. § 144 or § 455(a), and it was not accompanied by the affidavit of a party (Andrade) that the judge had "a personal bias or prejudice . . . against him," pursuant to § 144. See In re Cooper, 821 F.2d 833, 838 (1st Cir. 1987). Andrade would be entitled to reversal only if the judge "displayed deep-seated and unequivocal

antagonism [toward Andrade] that [rendered] fair judgment impossible." See Liteky v. United States, 114 S. Ct. 1147, 1158 (1994).

The transcript of Rodriguez's rearraignment shows that the judge acted impartially relative to Andrade in that proceeding. Although the judge told Rodriguez that he did not believe Rodriguez's testimony that Andrade was innocent, his other remarks show his impartiality. He told Rodriguez, "you have a right to say what you think is right. And I will protect that right." The judge then advised Rodriguez, "You want to measure what you are going to do [at Andrade's trial] by what your attorney recommends to you. Always remember, you understand, to tell what you perceive to be the truth." This was commendable.

Because Andrade did not assert, in the district court, his other grounds for disqualification, he has forfeited them on appeal unless there is plain error. See United States v. Maldonado, 42 F.3d 906, 909-12 (5th Cir. 1995). Under FED. R. CRIM. P. 52(b), we may correct forfeited errors only when the appellant shows the following factors: (1) There is an error (2) that is clear or obvious and (3) that affects his substantial rights. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 1266 (1995). If these factors are established, the decision to correct the forfeited error is within the sound discretion of the court, which will not exercise that discretion unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 113 S. Ct. at 1778.

Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, we may remedy the error only in the most exceptional case. Calverley, 37 F.3d at 162. The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. Olano, 113 S. Ct. at 1777-79.

First, an appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain, and that it affects substantial rights. Olano, 113 S. Ct. at 1777-78; United States v. Rodriguez, 15 F.3d 408, 414-15 (5th Cir. 1994); FED. R. CRIM. P. 52(b). Plain error is one that is "clear or obvious, and, at a minimum, contemplates an error which was clear under current law at the time of trial." Calverley, 37 F.3d at 162-63 (internal quotation and citation omitted). "[I]n most cases, the affecting of substantial rights requires that the error be prejudicial; it must affect the outcome of the proceeding." Id. at 164. We lack the authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Olano, 113 S. Ct. at 1778 (quoting FED. R. CRIM. P. 52(b)). As the Court stated in Olano:

The standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in

United States v. Atkinson, 297 U.S. 157 . . . (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Olano, 113 S. Ct. at 1779 (quoting Atkinson, 297 U.S. at 160). Thus, this court's discretion to correct an error pursuant to rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

Andrade's new grounds for disqualification have no merit; much less do they constitute plain error. Defense counsel failed to take further action after the court offered him an ex parte hearing relative to the appointment of an investigator. The arraignment transcripts would not have helped Andrade. Andrade's brief does not suggest any reason why the district court should have granted his motion for continuance. Finally, Andrade has not shown any valid basis for the district court to have imposed sanctions, sua sponte, on any representative of the government.

E.

Andrade contends that he is entitled to reversal on the ground that the prosecutor, Assistant U.S. Attorney Mark Patterson, engaged in misconduct. "This Court's task in reviewing a claim of prosecutorial misconduct is to decide whether the misconduct casts serious doubt upon the correctness of the jury's verdict." United States v. Carter, 953 F.2d 1449, 1457 (5th Cir.), cert. denied, 504 U.S. 990 (1992). Relevant factors are "(1) the magnitude of the prejudicial effect of the [conduct]; (2) the efficacy of any cautionary instructions; and (3) the strength of the evidence of

the appellant['s] guilt." Id.

Andrade complains, first, that Patterson would not allow him to review the government's file on Andrade prior to trial. As he concedes, at the April 6, 1994, hearing, the court ordered Patterson to allow this. Thus, this incident had no effect on Andrade's trial.

Andrade relies upon Patterson's statement, at Rodriguez's rearraignment, that Rodriguez would violate his plea agreement if he attempted to exculpate Andrade at the trial. At the rearraignment, however, the court made it clear to Rodriguez that he had the right to testify in accordance with what he perceived to be the truth. Since Rodriguez did his best to exculpate Andrade at the trial, Andrade was not harmed by anything Patterson said at the rearraignment.

In his third motion to dismiss, Andrade relied upon the fact that the Tempo was not available for his inspection because it probably had been sold at auction on March 26, 1994. Patterson confirmed this at the April 18 hearing. Andrade's earlier similar motion also was denied.

Andrade's counsel complains vociferously because he was not able to inspect the Tempo prior to trial. His only suggestion of how such an inspection may have helped the defense, however, is that it may have revealed that there was no mud in the vehicle. Photographs of the Tempo show that its exterior was clean, i.e., it had not been driven across the river or even on the levee. The issue at trial was whether Andrade had participated with the other

two men in bringing the marihuana to the United States.

Andrade also asserts, for the first time on appeal, that he was not "able to inspect the duffel bag or [its] contents." But he stipulated that the bag contained marihuana. Moreover, counsel's cross-examination of Vawter shows that he knew the relevant facts, including the fact that DEA Agent Councilman took custody of the marihuana after the arrests.

To justify reversal on the ground that the government has failed to reveal evidence, there must be proof (1) that the government possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it by the exercise of reasonable diligence; and (3) that the government suppressed the evidence. See United States v. Green, 46 F.3d 461, 464 (5th Cir.), cert. denied, 63 U.S.L.W. 3907 (U.S. June 26, 1995); United States v. Marrero, 904 F.2d 251, 260-61 (5th Cir.), cert. denied, 498 U.S. 1000 (1990). The defendant also must show that such suppression "undermines confidence in the outcome of the trial," i.e., that it denied the defendant a fair trial. Kyles v. Whitley, 115 S. Ct. 1555, 1566 (1995) (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)). Andrade has failed entirely to demonstrate that his trial was unfair because the defense could not examine the Tempo.

Andrade asserts that "the prosecution [i.e., Patterson] lied to keep him from finding out that [Rico] had exculpated him." This refers to a note written by Patterson that was in the government's Andrade file. Andrade raised this claim in his second and third

motions to dismiss the indictment.

At the April 18 hearing, Patterson explained that this referred to Rico's rearraignment testimony that the other two were not involved, which statement Rico retracted immediately thereafter. The court then told Casas that (having this information) he could call Rico as a defense witness if he wished. Being fully apprised of the relevant facts, Andrade did not call Rico to testify at the trial. Andrade has failed to show governmental misconduct relative to his trial.

Andrade contends that he is entitled to reversal because of questions Patterson propounded to Vawter at trial, and/or Vawter's answers. There were defense objections to some of the questions and answers, but no motion for a mistrial or motion to dismiss on the ground of prosecutorial misconduct. Accordingly, Andrade has forfeited this claim on appeal unless there is plain error. See United States v. Okenfuss, 632 F.2d 483, 485 (5th Cir. 1980).

Andrade complains, first, of the question, "Well, it is possible martians put [the marihuana] in the trunk, is that right?" Vawter answered, "Anything is possible." Defense counsel Medrano then objected, apparently on the ground that the question was improper. The objection was overruled. The next questions to which the defense objected involved Vawter's opinion that Andrade knew what was going on. Finally, Patterson asked Vawter, "Is there any reasonable possibility that you know of [that Andrade did not know]?" Vawter answered no, without defense objection. Medrano then elicited Vawter's testimony that he had no personal knowledge

that Andrade had been involved, as Vawter did not see the defendants until after the marihuana had been placed in the Tempo's trunk.

Patterson's complained-of questions to Vawter, and Vawter's answers, did not adversely affect any of Andrade's substantial rights. Accordingly, there was no plain error requiring reversal. See Calverley, 37 F.2d at 164.

AFFIRMED.