

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60513
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELEAZAR ZUNIGA OSTIGUIN,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(M 94 CR 40 1)

(March 27, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.*

GARWOOD, Circuit Judge:

Defendant-appellant Eleazar Zuniga Ostiguin (Ostiguin) appeals his convictions, following a jury trial, of importation and possession with the intent to distribute marihuana. His sole point of error on appeal is that the evidence is insufficient to support his convictions. 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

Around 12:45 a.m. on February 20, 1994, Ostiguin, a Mexican citizen legally residing in Chicago, Illinois, drove his Ford van from Mexico into the United States Port of Entry at Hidalgo, Texas. With him were his wife, his mother, his three small children, and a friend, Tomas Garcia (Garcia). After declaring only liquor at the checkpoint, Ostiguin was directed by the inspector to the secondary inspection area, where again he declared only liquor. Customs Agent Alberto Morales (Morales) ordered a canine inspection and asked Ostiguin and the other passengers to step out of the van. Canine Enforcement Officer Richard Garza (Garza) then arrived with his dog, Bud.

While moving the van into a better position for the inspection, Garza noticed that the van's ceiling was low and showed signs of recent work. In particular, Garza observed that the ceiling was covered with a "very new" fabric different from that in the rest of the van and that the wood trim between the ceiling and floor, while normally flush, was separated, with a quarter- to half-inch gap. Garza also noticed that the ceiling sounded solid when struck, an indication that something was concealed there. Garza then instructed Morales to take Ostiguin and the other passengers to a waiting area.

The canine search began outside the vehicle. Bud immediately reacted to the van. Garza opened the driver's door and let the dog inside, where Bud began to scratch and bite, suggesting to Garza that the van was "possibly loaded . . . [with] narcotics." Ordered to pinpoint, the dog then climbed onto one of the seats and began

to tear into the upholstery lining the ceiling, revealing a package, which Garza inspected and concluded contained marihuana. Garza then informed Morales of his discovery and contacted the supervisor on duty, Henry Saenz (Saenz). Saenz entered the van and immediately noticed that the ceiling was lower than normal. When he struck the ceiling above the driver's seat, the upholstery came loose. Wedging his finger into the opened space, Saenz uncovered another package of marihuana. Around this time, agents patted down Ostiguin and Garcia and placed them in holding cells.

The officers then began a thorough inspection, removing the interior paneling and ceiling upholstery. Saenz observed that the bolts holding together the interior panels were "very loose," indicating to him that they had been "tampered with recently." The inspectors discovered and removed sixty-four duct-taped bundles of marihuana, tightly packed into the ceiling and sides of the van's interior and held in place with a system of wires and wood planks. The inspectors then dropped the van's two gas tanks, on one of which they saw indications of welding. Crammed inside this tank were twenty-nine more duct-taped packages of marihuana, bringing the total to ninety-three.¹ After stripping and searching the van, an operation that took four people two hours to complete, Saenz spoke to Ostiguin, who confirmed that the van was his and that he had purchased it two months earlier. Ostiguin was then arrested.

¹ Also in the gas tank was a pipe extending from the tank's opening, where the pump nozzle is inserted, to its base. According to Saenz and Garza, the purpose of the pipe was to prevent discovery of the marihuana with an optic scope or probe. The pipe itself was full of gas. The other tank was unaltered.

Together, the packages recovered from the van contained 558.9 pounds of marihuana, estimated to be worth considerably more than \$200,000 in South Texas. In the vehicle's center console, Morales also found documentation confirming that Ostiguin owned the van and that he purchased it on December 13, 1993, some two months earlier. Ostiguin had bought the van for \$4,050 cash from a Chicago used car dealership owned by Salaheddin Abu-Rumman (Abu-Rumman). Abu-Rumman testified that, to his knowledge, there was no marihuana in the van when Ostiguin bought it.

At trial, Ostiguin's wife, Adriana Ostiguin, testified on his behalf. According to her testimony, the family, along with Garcia, left Chicago in mid-February to visit her father, who lived two hours outside Guadalajara, Mexico.² Although conceding that the family had little money, Adriana Ostiguin testified that they bought the van to travel to Mexico.³ On the trip down, she testified, the van had some mechanical problems. Eventually, the group arrived in Guadalajara, where they stayed in a hotel for three or four days while, allegedly, the van was being fixed. During this time, Adriana Ostiguin never contacted her father. At trial, she could not recall the name of the mechanic, the mechanic's shop, or the hotel where they stayed, but she testified that Garcia, and not her husband, had spoken with the mechanics who

² Adriana also indicated that she had not seen her father since she was eight years old. At the time of trial, she was twenty-five.

³ The evidence indicated that the Ostiguins had made another trip to Mexico in December 1993, shortly after the purchase of the van.

came to the hotel to pick the van up. By the time the van was returned to them, Adriana Ostiguin claimed, the family had run out of money, requiring them to return directly to Chicago without first visiting or even telephoning her father.⁴ Finally, she testified that she could not smell marihuana and did not notice a change in the van's ceiling.⁵

The government called Garcia to the stand. He testified that Ostiguin and his wife invited him to join them on the trip so he could help drive and take care of the children. According to Garcia, Ostiguin never mentioned visiting his father-in-law and instead told him that the purpose of the trip was to visit friends in Guadalajara. Only Adriana Ostiguin ever told Garcia that the Ostiguins were planning to visit her father, but she said that trip was to take place in April, not February. On the way to Mexico, Garcia helped drive the van, which he soon noticed was stuttering and smelled of gas. When they stopped for fuel, Garcia filled both tanks, which, he testified, took approximately the same amount of time to fill. According to Garcia, when the group arrived in

⁴ She also testified that Ostiguin, the family's sole provider, had lost his job in January 1994 and was still unemployed during the events of this case.

⁵ Ostiguin's mother also testified on his behalf. She claims to have gone along on the trip to help tend to the three small children. She testified that they were travelling to visit Adriana's father, but had stayed in Guadalajara because of car trouble. Like Adriana, she could not recall the name of the hotel and claimed not to have noticed a smell of marihuana or anything different about the ceiling of the van. Finally, she testified that Garcia had told her that "he was getting the car fixed."

Other than a brief recall of one of the government's witnesses, Customs Agent Champion, Ostiguin's wife and mother were the only defense witnesses.

Guadalajara, Ostiguin obtained a room for them and arranged by himself to have the van taken away for repairs. Garcia claims that, while there, Ostiguin and his wife gave him spending money.

After a few days in Guadalajara, the group began the trip back to Chicago. Ostiguin drove the entire way to the American border. According to Garcia, they only stopped for gas once, and the station attendant fueled the van. Furthermore, he testified that the car problems they had noticed on the way to Mexico were still with them on the way back to the United States; the van continued to stutter and smell of gas. He stated that he noticed no other unusual odors and paid no attention to the ceiling.

On March 1, 1994, a federal grand jury returned a four-count indictment against Ostiguin, charging him with the following offenses: conspiracy to import into the United States 254 kilograms of marihuana in violation of 21 U.S.C. §§ 963, 952(a), 960(a)(1) and 960(b)(2) (count one); importation of 254 kilograms of marihuana in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 952(a), 960(a)(1), and 960(b)(2) (count two); conspiracy to possess with the intent to distribute 254 kilograms of marihuana in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B) (count three); and possession of 254 kilograms of marihuana in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) (count four).

A jury trial was held on May 12, 1994. After the close of the government's case, the district court granted Ostiguin's motion for a judgment of acquittal on counts one and three, but denied the motion, both then and at the close of all the evidence, on counts two and four. After the jury returned a verdict of guilty on both

counts, the district court sentenced Ostiguin to 63 months' imprisonment, 4 years' supervised release, and ordered him to pay a \$100 special assessment. This timely appeal followed.

Discussion

In this appeal, Ostiguin contends only that the evidence is insufficient to support his convictions. In reviewing challenges to the sufficiency of the evidence, we are mindful that weight and credibility assessments are for the jury alone. *United States v. Bell*, 993 F.2d 427, 429 (5th Cir.), *cert. denied*, 114 S.Ct. 271 (1993). For this reason, we view the evidence, whether direct or circumstantial, together with any inferences reasonably drawn from it, in the light most favorable to the verdict. *United States v. Nguyen*, 28 F.3d 477, 480 (5th Cir. 1994). Because Ostiguin chose to present evidence in his behalf, and followed that presentation with a renewed motion for a judgment of acquittal, we must review *all* the evidence and not restrict ourselves to that introduced in the government's case-in-chief. *United States v. Cardenas Alvarado*, 806 F.2d 566, 570 n.2 (5th Cir. 1986). So viewed, the evidence is sufficient if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Villasenor*, 894 F.2d 1422, 1425 (5th Cir. 1990). In making such a determination, "[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt." *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), *aff'd on other grounds*, 103 S.Ct. 2398 (1983).

Ostiguin argues that the jury lacked sufficient evidence to

find that he knowingly possessed the marihuana concealed in his van, an element under both counts of which he was convicted. See *United States v. Carrillo-Morales*, 27 F.3d 1054, 1064 (5th Cir. 1994). Although knowledge of the presence of narcotics often may be inferred from the exercise of control over the vehicle in which the illegal drugs are concealed, *United States v. Richardson*, 848 F.2d 509, 513 (5th Cir. 1988), in secret compartment cases, we have held that knowledge may not be inferred from temporary vehicle control alone. In such cases, often there "is at least a fair assumption that a third party might have concealed the controlled substances in the vehicle with the intent to use the unwitting defendant as the carrier in a smuggling enterprise." *United States v. Diaz-Carreon*, 915 F.2d 951, 954 (5th Cir. 1990). To satisfy the knowledge element in hidden compartment cases, therefore, this Court has normally required circumstantial evidence, beyond bare control, "that is suspicious in nature or demonstrates guilty knowledge." *United States v. Anchondo-Sandoval*, 910 F.2d 1234, 1236 (5th Cir. 1990). In this case, we find sufficient circumstantial evidence, in addition to control, from which the jury could reasonably infer that Ostiguin knew that marihuana was concealed in his van.

Recently, in *United States v. Resio-Trejo*, 1995 WL 48412 (5th Cir. Feb. 8, 1995), we faced a similar situation. There, federal agents inspected the defendant's tractor trailer at a Border Patrol checkpoint in Laredo, Texas. After a canine alerted to the truck's two gas tanks, the agents investigated the tanks and discovered newly constructed compartments containing over 325 pounds of

marihuana. The agents also found documentation tracing the defendant's ownership and continuous possession of the truck for ten months prior to the search. On appeal, the defendant argued that the evidence was insufficient to support an inference that he knew the marihuana was in his gas tanks. Rejecting this contention, we held that the defendant's possession and ownership of the vehicle for ten months prior to the search, combined with evidence that the secret compartments had been recently constructed, constituted a sufficient basis for the inference that the defendant knew of the marihuana's concealment.⁶ *Id.* at *5.

Like *Resio-Trejo*, this case is distinguishable from the garden variety secret compartment case, in which the driver of the vehicle disclaims ownership and the government does not disprove the disclaimer. See, e.g., *United States v. Gibson*, 963 F.2d 708, 711 (5th Cir. 1992) (defendant claimed she borrowed the vehicle from her aunt's boyfriend); *United States v. Anchondo-Sandoval*, 910 F.2d 1234, 1236 (5th Cir. 1990) (driver claimed he was driving the vehicle across the border for the brother of a friend). In such cases, the inference is that much more reasonable that the driver acted as an "unwitting . . . carrier in a smuggling enterprise." *Diaz-Carreon*, 915 F.2d at 954. Here, as in *Resio-Trejo*, Ostiguin's ownership and possession of the van was well established by both documentary and testimonial evidence, including Ostiguin's

⁶ Ostiguin suggests that the type of circumstantial evidence used to prove knowledge in hidden compartment cases is limited to a defendant's nervousness, implausible explanations, and inconsistent statement, or matters similar or analogous thereto. This Court has explicitly rejected this argument. See *Resio-Trejo*, 1995 WL 48412 at *4.

admission that he owned it. Moreover, the evidence strongly suggested that the marihuana was concealed in the van while it was in Ostiguin's possession. Ostiguin had owned the van for more than two months before the search, and evidence indicated there were no drugs in the van when he bought it. Furthermore, Garcia testified that, on the trip down, he had fueled the van's two tanks and that both took approximately the same time to fill. When searched, however, one of the gas tanks was crammed with marihuana and fitted from end to end with a pipe, allowing little room for fuel. Finally, both Garza and Saenz testified that the hidden compartments revealed signs of recent construction. From all this circumstantial evidence, a rational jury could at least infer that the marihuana was concealed in the van in Guadalajara and thus after Ostiguin had purchased it. See *Resio-Trejo*, 1995 WL 48412 at *4-*5; *Garza*, 990 F.2d at 174 (relying on the defendant's control and ownership of the vehicle in which the narcotics were concealed); *United States v. Olivier-Becerril*, 861 F.2d 424, 427 (5th Cir. 1988) (relying on the defendant's possession of the vehicle when the secret compartment was presumably constructed).

Given that inference, Ostiguin's theory must be that some stranger in Guadalajara hid more than \$200,000 worth of marihuana in the sides, ceiling, and gas tank of the van without his knowledge and in the hope that he would not discover it.⁷ This is implausible. Given the ample circumstantial evidence here of

⁷ This Court has also relied on the large amount and value of the drugs as circumstantial evidence of knowledge. See *Garza*, 990 F.2d at 175 & n.16.

guilty knowledge, the jury was reasonable to reject this hypothesis of innocence. In *Resio-Trejo*, 1995 WL 48412 at *5, we found "incredulous" what must have been the defendant's alternative explanation: "that someone would take Resio's truck and, without his knowledge, spend several days constructing secret compartments in the gas tanks, load these compartments with over \$130,000 worth of marihuana, and return the truck to him." We are likewise unpersuaded here.

It is implausible that whoever concealed the marihuana in the van could expect that it would not be discovered by the occupants. Both Saenz and Garza testified that, upon entering the van, they immediately noticed that the ceiling was low. Their testimony also indicated that the construction was conspicuous, given the difference in fabric between the ceiling and floor, the gaps in the wood trim, and the ease with which the marihuana was recovered from the area above the driver's seat. See *Resio-Trejo*, 1995 WL 48412 at *5 (relying on the ease of discovery). There was also testimonial and documentary evidence establishing the limited capacity of one of the gas tanks, something the driver of the vehicle would undoubtedly notice.⁸ See *id.* (relying on the gas-tank's limited capacity); *United States v. Romero-Reyna*, 867 F.2d 834, 836 (5th Cir. 1989) (same), *cert. denied*, 110 S.Ct. 1818 (1990).

Also undercutting the suggestion that the drugs were concealed

⁸ Garcia testified that when the first tank registers empty, the driver must flip a switch to transfer to the second tank, which, if filled, returns the gas gauge to full.

without Ostiguin's knowledge is evidence that the van was not actually repaired, again a fact the driver would presumably have noticed. This fact also suggests that the goal and effect of the work was not repairs, but loading the marihuana. Garcia testified that the mechanical problems observed on the way to Mexico persisted on the way back to the United States although the van had allegedly undergone three or four days of repair. Furthermore, neither Adriana Ostiguin nor Ostiguin's mother ever witnessed the van at the mechanic's shop or with a mechanic; the sum of their knowledge of the van's repair came from what they were told by either Garcia or Ostiguin, and Garcia testified that he knew nothing of the repairs except what Ostiguin, who was skilled in automotive repair, had told him. Garcia also testified that he never went to a mechanic's shop or spoke to any mechanic.⁹

This evidence, considered in light of the conflicting stories at trial, strongly suggests that the true purpose of the trip to Mexico was not to visit Adriana Ostiguin's father, but to smuggle drugs. Garcia testified that Ostiguin told him that the purpose of the trip was to visit friends and that their final destination was Guadalajara. Moreover, Adriana Ostiguin failed to contact her father while in Mexico although he was only two hours away and although they were in Mexico for several days. This explanation for the trip is plainly implausible. Given this and all the other evidence recounted above, a jury could reasonably infer that Ostiguin knew the marihuana was concealed in his van.

⁹ The jury was entitled to discredit the assertions of Ostiguin's wife and mother that Garcia handled the repairs.

We reject Ostiguin's contention that there was insufficient circumstantial evidence to support the inference that he knowingly possessed the drugs.

Conclusion

For the foregoing reasons, Ostiguin's convictions are

AFFIRMED.