

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8226
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACINTO GARCIA HERNANDEZ,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. MO-92-CR-72-(1)
- - - - -
(January 6, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Jacinto Garcia Hernandez appeals from the district court's implied finding that he was not under duress or coercion during his participation in the drug conspiracy. In this Circuit, "justification defenses are affirmative defenses" and thus the burden is on the defendant to demonstrate each element of the defense of duress. United States v. Gant, 691 F.2d 1159, 1165 (5th Cir. 1982).

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

To succeed in his duress defense, Hernandez had to show, inter alia, that he "was under a present, imminent, or impending threat of death or serious bodily injury." United States v. Liu, 960 F.2d 449, 454 (5th Cir. 1992). The coercion or duress defense provides a defense for a possession charge because acts committed as a result of coercion or intimidation are not done voluntarily. Id. A reasonable opportunity to escape from coercion without participating in the crime must not exist. Id.

The district court found Hernandez not guilty of the conspiracy but guilty of possession with the intent to distribute marijuana. In making his oral ruling at the close of the evidence, the district court judge remarked that he found it strange that Hernandez did not blurt out when he was arrested that he was afraid and that he thought someone was going to harm him. The district court stated that it did not "find Hernandez's story credible."

Because Hernandez was not tried by a jury and waived specific findings by not requesting them at trial pursuant to Fed. R. Crim. P. 23(c), this Court "impl[ies] findings to support the judgment if the evidence, viewed in a light most favorable to the government, so warrants." Gant, 691 F.2d at 1163. This Court reviews the district court's factual finding under the "clearly erroneous" standard. Id. at 1165. The court's implied finding that Hernandez was not under a present, imminent, or impending threat of death or serious bodily injury is not clearly erroneous. See Liu, 960 F.2d at 454. The testimony at trial revealed that Hernandez was capable of escaping, that the parties

had been friends, and the undercover law enforcement agents never witnessed Hernandez display any signs of fear or duress. For all these reasons, the judgment is AFFIRMED.