

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8301
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARNOLDO GALAN, a/k/a Richardo Prado,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-92-CR-221(1))

(March 9, 1994)

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

POLITZ, Chief Judge:*

Arnoldo Galan appeals his conviction by a jury on charges of possession of marihuana with intent to distribute and possession of a false passport. We affirm the convictions but vacate and remand for resentencing.

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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 late 1992 authorities received an anonymous tip that a large quantity of marihuana could be found at the residence of William Kirby in Hays County, Texas. The house and adjacent properties were put under surveillance by state and federal officers who witnessed gunfire, armed individuals in camouflage gear patrolling the property, and various individuals driving and walking between the residence and the adjacent lot which contained potted marihuana plants under camouflage netting.

On November 16, 1992 the officers arrested an armed individual in the marihuana patch. At that time a search warrant was sought and secured from a state judge. The warrant was executed by Hays County officers working in conjunction with United States Customs, I.R.S., D.E.A., and BATF agents, and officers of the Texas Department of Public Safety. The officers encountered Galan as he exited the residence. Galan identified himself as Ricardo Prado and he was detained and frisked. In the room from which Galan had exited the officers found numerous weapons and \$200,000 in cash which Kirby admitted was purchase money for marihuana Galan had delivered.

The search uncovered a brown leather bag in an upstairs room. The bag contained marihuana, drug ledgers, numerous identification cards, and a passport in the name of Ricardo Herrera Prado bearing Galan's picture. The garage contained nearly a half-ton of marihuana baled in weights corresponding to entries in the seized ledger. The ledger corroborated Kirby's testimony that Galan had

delivered marihuana totaling 3000 pounds.

Galan was indicted for possession of marihuana with intent to distribute and possession of a false passport. The jury convicted on both counts. In sentencing, Galan's offense level was adjusted upwards for his leadership role, for use of a weapon in connection with a drug-trafficking offense, and for obstruction of justice by concealing his identity. He was sentenced to concurrent terms of imprisonment of 284 and 60 months. He timely appealed his convictions and sentences.

Analysis

Galan challenges to the validity of the search warrant, the scope of the search, and his sentence.¹ We review the district court's legal conclusions *de novo* and its factfindings for clear error.

Galan maintains that the affidavit supporting the warrant was defective and that even if the warrant was valid the search was illegal. The government counters that Galan has no standing to assert these fourth amendment claims to the brown leather bag because he did not establish a reasonable expectation of privacy therein. The prosecutor's argument is undermined by the fact that

¹ Galan also claims error urging the Posse Comitatus Act. This issue was not raised in the trial court and we will not consider it. **United States v. Garcia-Pillado**, 898 F.2d 36 (5th Cir. 1990). Even if we did it would not be persuasive. **United States v. Hartley**, 796 F.2d 112 (5th Cir. 1986). He also argues that the false passport statute does not apply to a citizen of the United States. This argument is devoid of merit.

the government presented evidence connecting Galan to the bag.² The government will not now be heard to argue the contrary.

The initial question is whether the search warrant was constitutionally valid and, if not, whether the officers acted in objective good faith in reliance thereon.³ The good faith rule applies unless the warrant is based solely upon an affidavit "so lacking indicia of probable cause as to render official belief in its existence entirely unreasonable."⁴

Galan's challenges to the adequacy of the affidavit undergirding the warrant lack persuasive force. He complains of a discrepancy in the street address but ignores the fact that the affidavit identifies the subdivision and lots upon which the residence and adjacent property are located. He complains about the asserted staleness of a 1990 tip but ignores the 1992 tip and the evidence gathered during the surveillance. We conclude that the affidavit more than adequately supports issuance of the search warrant.

Galan's complaint that the surveillance violated Texas trespass law is not persuasive. Texas law is not relevant to the constitutionality of the search⁵ and the open fields doctrine

² See **Steagald v. United States**, 451 U.S. 204 (1981) (government's attempt to tie defendant to property may concede possessory interest for purposes of standing).

³ **United States v. Leon**, 468 U.S. 897 (1984).

⁴ **United States v. Satterwhite**, 980 F.2d 317, 320 (5th Cir. 1992).

⁵ **United States v. Walker**, 960 F.2d 409 (5th Cir.), cert. denied, 113 S.Ct. 443 (1992).

announced by the Supreme Court makes the challenged observations legally acceptable.⁶

Galan next complains about the extent of the search and his detention. He misperceives controlling precedent. "[A] warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."⁷ During this valid detention the officers found evidence in the brown leather bag linking Galan to the illegal activity. Probable cause to believe Galan had committed a crime was manifest.⁸ Galan's pre-arrest detention during the officers' search of the premises was proper; after development of probable cause his arrest was proper, as was the search incident to his arrest.

We find no merit to any challenges to the validity of Galan's convictions and they are affirmed. We likewise find no merit to Galan's challenges to the computation of his offense level as it relates to the district court's findings of his leadership role and that a weapon was used in connection with a drug offense. We perceive one error, however, which the government concedes. The district court adopted the probation officer's recommendation of a

⁶ **Oliver v. United States**, 466 U.S. 170 (1984); **United States v. Pace**, 955 F.2d 270 (5th Cir. 1992).

⁷ **Michigan v. Summers**, 452 U.S. 692, 704 (1981) (footnote omitted).

⁸ **United States v. Pollack**, 739 F.2d 187, 190 (5th Cir. 1984) ("A warrantless arrest is valid if there is probable cause to believe that an offense has been committed and that the person arrested has committed the offense.").

two-level increase for obstruction of justice, finding that Galan "provided false information to law enforcement authorities" without addressing Galan's objection that his claim to be Ricardo Prado did not actually mislead the government. The government acknowledges the district court's failure to expressly rule on Galan's objection and concedes that under U.S.S.G. § 3C1.1 misrepresentations like Galan's only merit upward adjustment if they actually hinder the investigation or prosecution of the offense. Given the absence of required factual findings by the district court in support of this adjustment, we accept the government's recommendation to vacate Galan's sentence and remand for findings on the sole question whether Galan's misrepresentation significantly hindered the government's investigation or prosecution.

Convictions AFFIRMED; sentences VACATED and the matter REMANDED for resentencing.