

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

FEB 26 1988

ROBERT L. HOECKER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN LUJAN-MIRANDA,

Defendant-Appellant.

No. 86-2737
(D.N.M.)
(D.C. No. 86-220)

ORDER AND JUDGMENT

Before **McKAY** and **TACHA**, Circuit Judges, and **ALLEY**, District Judge.*

Juan Lujan-Miranda appeals his conviction for violation of 21 U.S.C. § 841(a)(1), possession with intent to distribute cocaine in excess of one kilogram.

On July 9, 1986, Officers Frisk and Denton, each in separate patrol cars, were traveling west on County Road 21 in southwestern New Mexico. They had been informed that narcotics were being transported by airplane to that vicinity and were looking for evidence of aircraft landings. At approximately 10:00 a.m., they observed a red pickup truck followed closely by a blue pickup truck approaching them. Officer Frisk testified that the blue pickup was weaving erratically between the shoulder and the middle of the road. Suspecting an intoxicated driver, Officer Frisk

* Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

turned around to follow the blue pickup.¹ This action prompted the driver of the red pickup to substantially increase his speed. Officer Denton, who had also turned around, activated his emergency equipment, passed Officer Frisk and the blue pickup, and pursued the red pickup. As he passed the blue truck, Officer Denton noticed that it contained a number of packages which he thought were drugs. He continued to pursue the red truck at a high rate of speed -- he testified that at one point his speedometer registered 100 miles per hour.

Lujan finally stopped shortly after turning onto a side road. He seemed nervous and appeared to be intoxicated. Officer Denton requested permission to search the vehicle and found a pair of binoculars and a set of reflectors with dirt-encrusted footings. He believed that these items had been used to land a plane.

Meanwhile, Officer Frisk had stopped the blue pickup. When the driver of that truck reached for a gun, Officer Frisk radioed Officer Denton for help. At this point Denton asked Lujan to accompany him back to the blue pickup. A search of that vehicle revealed over 1100 pounds of cocaine.

After both men had been arrested, officers obtained search warrants to get urine samples for drug testing.

Lujan raises several issues on appeal. First he argues that he was denied effective assistance of counsel because his attorney did not ask the court to hold separate trials for Lujan and his

¹ Lujan's codefendant, Ruben Rodriguez-Pando, was driving the blue pickup. We deal with his appeal of his conviction on the same charge in a separate opinion. United States v. Rodriguez-Pando, No. 86-2738, slip opinion (10th Cir. February 26, 1988).

codefendant, Pando, and also because the attorney did not "discover and present" certain alibi evidence. Second, he contends that all evidence seized subsequent to the initial stop should have been suppressed. Finally, he argues that the court erroneously admitted the results of the urinalysis at trial. In this regard, he attacks the validity of the warrant used to obtain the sample; he also claims that the prejudicial impact of the evidence outweighed its probative value.

Ineffective Assistance of Counsel

To succeed on his ineffective assistance of counsel claim, Lujan must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984).

The record reveals that counsel was aware of the potential problems posed by the joint trial and brought them to the attention of the court on the first day of trial suggesting that severance might become necessary. Although he did not formally move for severance, he continued to voice concerns throughout the trial. We find no error "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

Counsel's decision not to present certain witnesses is a trial strategy decision which Lujan has not shown to be an error so serious as to deprive him of the effective assistance of counsel. Even if counsel was not aware of the alibi evidence, we cannot say that his performance was constitutionally inadequate.

The record reveals that counsel was fully prepared for trial and presented a substantial defense on behalf of his client. He exercised the skill, judgment, and diligence of a reasonably competent defense attorney.

Suppression of Evidence

Lujan's next contention is that all evidence seized subsequent to the initial stop should have been suppressed. He argues that the stops of both his and Pando's trucks were improper.

We hold that the initial stops of both vehicles were based on articulable suspicion and were therefore justified. United States v. Sharpe, 105 S. Ct. 1568, 1573 (1985). The district court found that Pando's truck "was moving from side to side and left the paved portion of the road once in a while. It also weaved over the center of the road." Erratic driving of this nature justified the officer's belief that Pando was driving while intoxicated and made the investigative stop proper. Lujan attempted to elude the officers. The district court found that he "was traveling at a high rate of speed." This provided sufficient basis for the investigative stop of Lujan.

Urinalysis

Finally, Lujan raises several objections to the use of the urinalysis results at trial. He argues first that the affidavit used to obtain the search warrant was insufficient to establish probable cause. The affidavit stated:

[Lujan was] [d]riving a vehicle in which a twenty dollar bill believed to containe [sic] cocaine residue was found lying beside where vehicle had been parked. Subject showed signes [sic] of withdrawal from

intoxicating substances. Red watery eyes, stuporous condition.

We hold that these facts were "sufficient to allow a neutral magistrate to reasonably conclude that probable cause" existed. United States v. Marcello, 570 F.2d 324, 325 (10th Cir. 1978).

Lujan next asserts that the facts listed in the indictment were erroneous and that in relying on these facts the magistrate "did not exercise independent judgment." In particular, Lujan argues that "red, watery eyes, and [a] stuporous condition" are not symptoms of cocaine use or withdrawal. Before Lujan may attack the veracity of the facts in the indictment, he must make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," and the allegedly false statement must be "necessary to the finding of probable cause." Franks v. Delaware, 438 U.S. 154, 155-56 (1978). Lujan has not made a substantial showing that the affidavit contained intentionally false statements. Indeed, an expert for the defense testified that "bloodshot" eyes are sometimes an indication of cocaine intoxication.

Lujan raises two more issues regarding the urinalysis. He argues that the urinalysis evidence was tainted because the initial stop was unlawful. We have already held that the stop was valid. Finally, Lujan claims that the prejudicial impact of the evidence outweighed its probative value. "A trial court has broad discretion to determine whether the probative value of evidence outweighs the risk of prejudice." United States v. Primrose, 718 F.2d 1484, 1492 (10th Cir. 1983). We cannot say that the district

court abused its discretion by holding the evidence admissible. Lujan's defense was that he was not involved with Pando nor the cocaine. His own use of cocaine at the relevant time casts doubt on this story and is therefore probative. Lujan argues, however, that any probative value is vitiated by the lack of reliability inherent in the tests used. The question of how much weight should be given to this evidence was properly left to the jury. See United States v. Watson, 594 F.2d 1330, 1335 (10th Cir. 1979).

AFFIRMED.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge