

FILED

United States Court of Appeals
Tenth Circuit

MAR 26 1991

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROBERT L. HOECKER
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSE NOVOA OCHOA,
Defendant-Appellant.

No. 90-4055
(D.C. No. 89-CR-162S)
(D. Utah)

ORDER AND JUDGMENT*

Before HOLLOWAY, Chief Judge, LOGAN, Circuit Judge, and BRETT,
District Judge.**

The defendant, Jose Novoa Ochoa, appeals his conviction for distributing cocaine in violation of 21 U.S.C. § 841(a)(1). We affirm.

The government's chief witness in the case against defendant was an informant by the name of Quintana--after Quintana informed police that defendant was selling drugs, Quintana purchased cocaine from defendant at the government's behest. While testifying, Quintana denied ever illegally using or dealing drugs. When

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** The Honorable Thomas R. Brett, United States District Judge for the Northern District of Oklahoma, sitting by designation.

defense counsel called witnesses and asked whether they had seen Quintana deal drugs, the district court repeatedly sustained the government's Fed. R. Evid. 608(b) objections. The court indicated that it would only permit testimony that contradicted what happened in the specific drug transaction at issue in the case.

Defense counsel informed the court that it intended to call several witnesses, including Quintana himself, to develop the theory that Quintana was a major drug trafficker. Defense counsel further informed the court that some of these witnesses would testify that they had seen Quintana deal drugs. See III R. 117, 129. IV R. 7. The district court responded that it would only allow reputation or opinion testimony as to Quintana's tendency towards veracity.

Defendant first argues that the district court erred when it sustained the government's Fed. R. Evid. 608(b) objections. Under that rule, extrinsic evidence of specific instances of the conduct of a witness ordinarily is inadmissible. Citing United States v. Calle, 822 F.2d 1016 (11th Cir. 1987), however, defendant argues that 608(b) does not bar the admission of such evidence when offered to contradict the material testimony of a prior witness. Defendant argues that the excluded evidence should have been admitted to contradict Quintana's testimony that he had never used or dealt drugs.

In Calle, a government informant unwittingly sold cocaine to an undercover policeman. Upon being arrested, he claimed that the defendant (Calle) was the supplier of the cocaine and offered to testify against him in return for lenient treatment. At trial,

the most damaging evidence implicating Calle was the informant's testimony; without the testimony, "there would have been no other evidence upon which [the jury] could have based a guilty verdict." Id. at 1021. When Calle attempted to rebut this testimony with evidence that the informant was a major drug dealer, the trial court sustained the government's Rule 608(b) objection. The Eleventh Circuit reversed, however, holding that the proffered external evidence was admissible. It was not offered simply to attack the informant's testimony--it was offered to show that the informant (and not Calle) was the dealer and that he had a motive to testify falsely, to "shift the major part of the blame in th[e] case from himself to Calle." Id.

After reviewing the record on appeal, we conclude that defense counsel did not make an offer of proof sufficient to bring the instant case within Calle's exception to Rule 608(b). Defense counsel did not suggest that he had witnesses who would testify that Quintana had somehow tricked defendant into unwittingly delivering the cocaine. Defense counsel simply informed the trial court that he had witnesses who had seen Quintana deal drugs. III R. 117, 129; IV R. 7. Such testimony does not go to the material testimony of Quintana; it goes only to his credibility. Unlike the informant in Calle, Quintana was buying drugs at the government's behest. Moreover, the evidence against the instant defendant, unlike the defendant in Calle, is overwhelming. Accordingly, the district court did not abuse its discretion when it sustained the government's Rule 608(b) objections.

Defendant next argues that the trial court's rulings precluded defendant from calling witnesses and thus deprived him of his right to due process. We disagree. The trial court did not preclude defendant from calling any witnesses. Rather, the court simply warned defendant that his witnesses would not be permitted to offer testimony regarding specific instances of Quintana's past conduct. Since we already have ruled that the district court properly excluded such testimony, we reject this argument.

AFFIRMED.

Entered for the Court

James K. Logan
Circuit Judge