

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CRIMINAL NO. EP-10-CR-3155DB
)	
RICARDO MAGALLANES,)	
)	
Defendant.)	

**UNITED STATES’ RESPONSE TO DEFENDANT’S
MOTION FOR ACQUITTAL, POST-VERDICT, UNDER
RULE 29(c) FEDERAL RULES OF CRIMINAL PROCEDURE**

Comes now, the United States Attorney, through undersigned counsel, and respectfully moves the Court to deny Defendant’s Motion for Rule 29 Judgment of Acquittal. Furthermore:

PROCEDURAL HISTORY

On November 16, 2010, Defendant was arrested for attempting to Import Marijuana and Possession of Marijuana With the Intent to Distribute in violation of 21 USC §§ 952(a), 960(a)(1) & 960(b)(3), 841(a)(1) and 841(b)(1)(C). On December 15, 2010, Defendant was indicted for those charges (50 kilograms or more). On February 23, 2011, Defendant was again charged by superceding indictment for the same charges but for less than 50 kilograms of marijuana.

Defendant proceeded to jury trial on May 9, 2011. At the end of the prosecution’s case-in-chief, and again after close of all the evidence, the Court denied the Defendant’s oral motion for judgment of acquittal under Rule 29, Fed.R.Crim.Pro. On May 10, 2011 the jury found Defendant guilty of both counts. The Court scheduled sentencing for July

18, 2011. The Court, *sua sponte*, scheduled a “status conference” for Friday, May 13, 2011.

At the status conference, the Court expressed its reservations about the guilty verdicts. The Court suggested the Defendant file a post-verdict motion for judgment of acquittal under Rule 29(c), indicating it would be granted.

FACTS

On Tuesday, November 16, 2010, Defendant drove his personal car, a 2007 Ford Focus, into the Dedicated Commuter Lane (DCL) at the Stanton St. bridge, attempting to enter the U.S. from Mexico. Defendant is a regular, experienced crosser at the DCL. As he approached Customs and Border Protection Officer (CBPO) Alfredo Castaneda, Castaneda said “hello”. Castaneda testified at trial that Defendant ignored this greeting and said nothing. Defendant held up his SENTRI Card, a necessary document for use of the DCL. Defendant refused to make eye contact. The CBPO at the inspection booth must compare the photograph with the occupant of the car. Despite being a regular, experienced crosser who understands the inspection process, Defendant refused to make eye contact. CBPO Castaneda thought this unusual, so he proceeded with an inspection of the car.

Defendant opened the trunk of his car upon request. CBPO Castaneda saw two tightly packed duffle bags clearly visible and readily accessible (not hidden) in the trunk and asked Defendant who owned them. Defendant, who remained seated in the car, first asked, “what bags?”, then said “my wife’s”. The CBPO used a tool to cut the plastic ties that were securing the zippers and opened the bags. Inside were plastic wrapped bundles, consistent with drug packaging as seen by Castaneda on previous occasions.

Immediately, Castaneda put Defendant in a security hold. Defendant spontaneously uttered, "The trunk was open when I got into my car this morning", or words to that effect. Castaneda checked the exterior keyhole for signs of tampering, but could see none. Defendant was detained and later transported to the Paso Del Norte Port of Entry for questioning.

Immigration and Customs Enforcement (ICE) Agent Aida Cervera questioned Defendant after he waived his *Miranda* rights. During the interview Defendant said the car was his, and used only by him and his wife. He said he was a full time UTEP student. He said he had been to Sam's Club Store in El Paso the night before and must have left the trunk of his car open. He said the trunk/door ajar alert light was on that morning as he entered the car. He said he shut the trunk, without looking inside, and drove to the port of entry.

Records subsequently obtained verified his enrollment at UTEP, his participation in the Trusted Traveler Program and DCL, and his shopping at Sam's Club in El Paso the night before.

LAW, ARGUMENT & FACTS
WHICH PROVE GUILTY KNOWLEDGE

Rule 29

In *United States v. Frye*, 489 F.3d 201, 207 (5th Cir. 2007) the Court stated the standard of review for a Rule 29 motion: to review the evidence presented against the defendant in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. To this end, the court must review the evidence and the reasonable

inferences which flow therefrom in the light most favorable to the verdict. Upon reviewing the sufficiency of the evidence, the court must not weigh the evidence or assess the credibility of witnesses, as the jury is free to choose among reasonable constructions of the evidence. *United States v. Ibarra* 286 F.3d 795, 797 (5th Cir. 2002). A court of appeals reviews a trial court's order granting a motion for acquittal *de novo*, applying the same standard as the district court. *United States v. Bethurum*, 343 F.3d 712 (5th Cir. 2003).

Knowledge was the one element at issue in the trial

Defendant is charged with two counts; Importation and Possession With Intent to Distribute Marijuana in violation of 21 USC §§ 952(a), 960(a)(1) & 960(b)(3), 841(a)(1) and 841(b)(1)(D). Guilty knowledge was the one element at issue in the case. For these counts, the prosecution must prove the Defendant knowingly possessed and knowingly imported, respectively, marijuana into the U.S. *United States v. Diaz-Carreon*, 915 F.2d 951 (5th Cir 1990), Fifth Circuit Pattern Jury Instructions 2.87. Defendant stipulated to the type and weight of illegal drugs in the car—marijuana weighing 49 kilograms. Jurisdiction or venue was not an issue in this case. Guilty knowledge was the one element at issue.

This is a case in which the drugs were “readily accessible”

Cases involving drug-laden vehicles fall into different categories: (1) drugs are clearly visible or readily accessible; or (2) drugs are in secret compartments. *United States v. Pennington*, 20 F.3d 593, 598 (5th Cir. 1994)(emphasis added), quoting *United States v. Richardson*, 848 F.2d 509, 513 (5th Cir. 1988); see also *United States v. Almanzar*, 176 F.3d 479, 1999 WL 155663 (C.A. 5 (Tex.))(unpublished, EP-97-CR 358-

1- DB).

The *Pennington* Court explained the threshold question is whether the marijuana was clearly visible or readily accessible, or “hidden.” Only in “hidden,” or secret compartment cases is the government required to produce further evidence of knowledge, beyond simply control of the vehicle. *Id.* at 598 (emphasis added). Defendant’s brief fails to recognize this crucial distinction and makes an unwarranted assumption that drugs located in the trunk of a vehicle is the equivalent of a secret compartment or “hidden” drugs case. The *Pennington* case clearly states otherwise, putting “clearly visible” and “readily accessible” into the same category under which ownership and possession/control are highly probative of guilty knowledge.

Ownership and possession of a car may suggest guilty knowledge. *United States v. McDonald*, 905 F.2d 871 (5th Cir. 1990). The knowledge element in a possession case can be inferred from control of the vehicle in some cases. *Pennington* at 598. Ownership alone is sufficient to support the inference of knowledge if the drugs are “readily accessible.” *United States v. Garza*, 990 F.2d 171, 174, FN10 (5th Cir. 1993)(emphasis added), quoting *Richardson*. Clearly, ownership and/or control becomes powerful evidence in a case in which the drugs are readily accessible. Here, the duffle bags containing the bundles was “readily accessible” because they were found in the trunk and not in a hidden compartment. In fact, they were visible once the trunk door was opened.

Defendant cites to several *secret compartment* cases. Among the types of behavior recognized as circumstantial evidence of guilty knowledge *in secret*

compartment cases are: (1) nervousness; (2) absence of nervousness; (3) failure to make eye contact; (4) refusal or reluctance to answer questions; (5) lack of surprise that contraband is discovered; (6) inconsistent statements; (7) implausible explanations; (8) possession of large amounts of cash; and (9) obvious or remarkable alterations to the vehicle, especially when the defendant has been in possession of the vehicle for a substantial period of time. *United States v. Ortega Reyna*, 148 F.3d 540 (5th Cir. 1998). The behavior/factors appearing in the *Ortega Reyna* case are not exhaustive and each case turns on its particular facts, as argued *infra*. In the case at bar, ownership and control of the 2007 Ford Focus and the open, readily accessible nature of the drugs within the trunk is an important part of the evidence and is conspicuously absent from the *Ortega Reyna* list because it is a secret compartment case (drugs found inside of tires of a loaned truck). Such is not the case here.

Guilty Knowledge Evidence from the Prosecution's case-in-chief

At trial, the evidence illustrating guilty knowledge included:

1. Defendant ignored the customary greeting of the CBPO; the CBPO said "hello" and Defendant ignored him (nervousness);
2. Defendant held up his SENTRI Trusted Traveler Card, but refused to make eye contact with the CBPO (nervousness);
3. After initial contact with the CBPO, Defendant continued to avoid eye contact and showing his face so the CBPO could verify his identity as that person appearing on the SENTRI Card (nervousness);
4. In response to the CBPO's question, "whose bags?", Defendant first said, "what bags?", then, "my wife's [bags]" (false statement/nervousness/shifting blame to his wife);
5. As Defendant was detained/handcuffed, he spontaneously uttered, "the trunk of my car was open this morning" (or words to that effect)(implausible explanation/shifting blame);
6. No visible damage or tampering to the exterior of the trunk lock/keyhole area (no obvious or remarkable alterations);

7. During the interview with ICE agents several hours later, Defendant confirmed his earlier statement that the trunk open alert light was on that morning and he closed it and drove to the port of entry without checking to see if anything was missing, or had been placed in the trunk (implausible explanation/shifting blame);
8. During the interview with ICE agents, he confirmed that the 2007 Ford Focus was his personal vehicle and he and his wife are the only ones who use the car (ownership/possession/control);
9. During the interview with ICE agents, he said he had been to Sam's Club Store the night before and used the trunk--subpoenaed records confirm the \$44 purchase of four items-- milk, detergent, toilet paper and fish fillets; he said he may have left the trunk open (a token or symbolic trip for the purpose of establishing a legitimate reason for why the trunk was left open);
10. Defendant was a regular, experienced border crosser in the DCL and rarely subjected to a thorough inspection (knowledge/opportunity);

Guilty Knowledge Evidence from Defendant & Prosecution's Rebuttal

11. Defendant testified and denied any unusual or nervous behavior in his interaction with CBPO Castaneda (he denied ignoring the greeting, denied avoiding eye contact, and denied turning his face away)(false testimony shows guilty knowledge);
12. Defendant testified that he asked, and was allowed, to inspect the two mysterious bags (CBPO Castaneda testified in rebuttal he did not allow Defendant to take over the inspection process, nor would he ever allow a suspect to do so for, *inter alia*, officer safety reasons)(false testimony shows guilty knowledge);
13. Defendant maintained the implausible story of his trunk being open that morning and he did not check inside before driving away from his house(implausible explanation/shifting blame);
14. Defendant gave numerous incredible and implausible reasons for why he failed to check his open trunk before driving away from his house: (1) he was preoccupied by final exams two weeks away; (2) the door/trunk ajar light is often lit because he regularly loads his car with books and/or musical instruments and he fails to shut the doors properly while loading; (3) he may have accidentally hit the trunk release button on the remote control; and (4) he was not at all concerned that someone had taken the items in the trunk which included a metal tool box filled with tools, a jack, a crowbar, jumper cables and an umbrella (implausible explanation/shifting blame);

15. Defendant testified that in the weeks/months prior to his arrest he had been inspected at the DCL about once per week. And his admissions and crossing records show he was crossing the border almost every day. This creates a situation in which he had about a 1 in 7 chance of trunk inspection, or only about a 14% chance of getting caught (opportunity to commit the crime);
16. The totality of coincidences that would need to occur simultaneously for Defendant to be an unknowing courier: (a) he left his trunk open, or an unknown drug trafficking organization (DTO) member opened his trunk, placed the marijuana in the trunk, then left the trunk open; (b) Defendant failed to look inside of his open trunk after it was parked on the public street in Juarez, Mexico, currently the most dangerous and crime-ridden city in the world; (c) an unknown, mysterious DTO knew of Defendant's regular crossing patterns; and (d) the same DTO knew of Defendant's parking patterns and believed they could secretly retrieve the drugs from Defendant's car in a busy, UTEP parking garage.

Under the totality of the circumstances, and even if it were a hidden compartment case, there is ample evidence from which a reasonable jury could find guilt beyond a reasonable doubt as to each element. *United States v. Frye*, 489 F.3d 201, 207 (5th Cir. 2007). The jury is free to choose among reasonable constructions of the evidence. *United States v. Ibarra* 286 F.3d 795, 797 (5th Cir. 2002). The jury heard the prosecution's case, and heard from the Defendant himself on direct and cross-examination. The jury studied the demeanor of the witnesses and weighed the evidence. The jury did not believe Defendant or his defense theory of the case, as illustrated by the guilty verdicts.

The outcome in other DCL cases is not relevant to Defendant's guilt or innocence

In inviting Defendant Magallanes to file a Rule 29 Motion for Judgment of

Acquittal the Court expressed concern about the conviction in light of a jury verdict of not guilty that was returned in a separate and unrelated case tried last week before Judge Martinez, *United States v. James Ivan Diaz*, EP-11-CR-298–PRM. Neither the evidence in the *Diaz* case, nor the circumstances of other cases involving the DCL, have any relevance to the case against Magallanes.

James Ivan Diaz was arrested January 12, 2011, at the Stanton St. Bridge DCL, driving a 2001 Ford Taurus containing two duffle bags in the trunk, each filled with 50 bundles of marijuana. He was the sole occupant and owner of the car, had no explanation for how the drugs got into his trunk, and he did not testify at trial. Over the Government's objection, the Court allowed Diaz to present evidence of an incident that occurred in Juarez on the day of Diaz's arrest, which was widely reported by the local media in El Paso. Doctor Opot, testified that on January 12, he asked a nurse coworker, Perez, for a ride from Juarez to El Paso because his car was having mechanical problems (Opot and Perez live in Juarez, but work in El Paso). He noticed that Perez's trunk seemed to have little extra room for his gym bag, and he commented in jest that she must be planning a trip. She expressed surprise that there was something in her trunk, and after driving to her child's school, Perez stopped to look in the trunk. Perez and Opot discovered two zippered duffle bags in the trunk, sealed with plastic ties. According to Opot, they cut open the bags and discovered bundles of marijuana. Opot suggested they take them to Mexican authorities. He was detained by authorities for several days, and eventually released without charge. Perez testified to roughly the same facts, although her testimony differed from Opot's as to some details. For

example, she said he told her she had duffle bags of marijuana in the trunk when he entered her car; he said he did not know there were duffle bags until they stopped to inspect some 15 minutes later. The duffle bags contained 50 marijuana bundles wrapped in foil and plastic, the same number and appearance as the bundles in Diaz's vehicle.

The Government would argue that whether Opot or Perez knew there was marijuana in the trunk of her vehicle has no relevance to Diaz's state of mind. If the evidence had been to the converse—that Opot or Perez had actually made arrangements to transport the marijuana to El Paso—there is no question that the evidence would have been irrelevant, and inadmissible, to Diaz's state of mind. That one person lacks knowledge of contraband in a vehicle makes it no more or less likely that a different person, in a different vehicle, at a different time, is knowingly transporting it. For this reason, the circumstances of Diaz's case, including the evidence of Opot and Perez, was not relevant to Magallanes' state of mind, and certainly has absolutely no bearing on the sufficiency of evidence proving Magallanes' guilt.

The same is true of other DCL cases in the past year. Each case had its own unique set of factual circumstances. From January 2010 to January 12, 2011 there were ten marijuana seizures at the DCL Stanton St. Bridge. Six of those cases involved bags in the trunk of the vehicle, two involved dashboard loads, one involved concealment in a quarter panel, and one involved concealment in the front doors. Of the six that involved bags in the trunk, two went to trial, one was referred to state and locals for prosecution, one prosecution was declined, and the other two pled guilty (Defendants: Michelle

Devora, and Aaron Issac Munoz).

This Court sentenced Munoz just a few days before the Ricardo Magallanes trial. Munoz was arrested several hours after Magallanes on November 16, 2010. Munoz, like Magallanes, was a UTEP student, a regular crosser at the DCL, and had two duffle bags in his trunk containing 50 bundles each of marijuana. Munoz initially denied knowledge of the bags, claiming they must belong to various family members. Munoz ultimately pled guilty and claimed he knew of the drugs, but he was threatened and forced to bring the drugs into the U.S. Devora, a UTEP student, was arrested on March 24, 2010 with 87 lbs. of marijuana in her trunk, contained within four backpacks. At the time of her arrest, she denied knowing the drugs were in her car. She cried and said her car was parked in front of her Juarez home for two days. She said she is the only one who uses the vehicle and no one else possessed it recently. She ultimately pled guilty, explaining that she had been recruited to drive marijuana in the trunk of her car to a location in El Paso in exchange for money.

The cases of Munoz and Devora are instructive because they represent defendants similarly situated to Magallanes: they initially relied on the wholly implausible contention that someone randomly selected their vehicles to transport a valuable quantity of marijuana, surreptitiously stashed bundles in the trunks, and later would miraculously locate the vehicle in El Paso and retrieve the contraband without detection. That Munoz and Devora eventually abandoned the claims to plead guilty reinforces the implausibility of their initial claims. However, the Government would not for a moment suggest that their rationality is relevant to Magallanes' state of mind. For the same

reason, Diaz's acquittal has no relevance.

As the Court is well aware, drug smuggling attempts on the border are constantly changing, adapting and reacting to inspection procedures and law enforcement activities. Justice requires that each case be judged on its own unique facts and circumstances.

CONCLUSION

The United States respectfully moves the Court, upon consideration of the above authorities, to deny Defendant's post-conviction Rule 29(c) motion. The United States submits that under applicable case law, i.e., clearly visible or readily accessible case law, there is ample evidence of the Defendant's guilt. The United States further submits that even if this were a secret compartment case, which it is not, there is sufficient circumstantial evidence supporting the jury's quick guilty verdict.

Respectfully submitted,

JOHN E. MURPHY
UNITED STATES ATTORNEY

BY: /s/ _____
RICHARD D. WATTS
Assistant U. S. Attorney
NM Bar # 9059
700 E. San Antonio, Suite 200
El Paso, Texas 79901
(915) 534-6884

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of May, 2011, a true and correct copy of the foregoing instrument was sent to: / electronically filed with the Clerk of the Court using the CM/ECF System which will transmit notification of such filing to the following CM/ECF participant:

Louis Lopez,
Attorney for defendant

/s/ _____
RICHARD D. WATTS
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

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Plaintiff,)	
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v.)	CRIMINAL NO. EP-10-CR-3155DB
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RICARDO MAGALLANES,)	
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Defendant.)	

ORDER

The Court hereby grants / denies the

UNITED STATES' RESPONSE TO DEFENDANT'S
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DAVID BRIONES
SENIOR U.S. DISTRICT JUDGE