

No. 19-

IN THE
Supreme Court of the United States

RODOLFO RIVERO GARCIA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

APPENDIX VOLUME

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50756
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
November 28, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

RODOLFO RIVERO GARCIA, JR.,

Defendant–Appellant.

Appeal from the United States District Court
for the Western District of Texas
No. 4:17-CR-11-1

Before SMITH, WIENER, and WILLETT, Circuit Judges.

PER CURIAM:*

Rodolfo Rivero Garcia, Jr., entered a conditional guilty plea to aiding and

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 17-50756

abetting the possession with intent to distribute 100 kilograms or more, but less than 1,000 kilograms, of marihuana. He appeals the denial of his motion to suppress the fruits of a warrantless stop of his vehicle by Border Patrol agents in Balmorhea, Texas, contending that there was no reasonable suspicion for the stop. Finding no error, we affirm.

We review the district court's legal conclusions, including whether there was reasonable suspicion, *de novo*. See *United States v. Cervantes*, 797 F.3d 326, 328 (5th Cir. 2015). The evidence presented at a suppression hearing is viewed in the light most favorable to the prevailing party, here the government. See *id.* Factual findings are reviewed for clear error. See *id.*

In determining whether reasonable suspicion exists in the context of roving Border Patrol stops, we examine the totality of the circumstances and weigh the factors in *United States v. Brignoni-Ponce*, 422 U.S. 873, 884–85 (1975). *Cervantes*, 797 F.3d at 329. The factors include (1) the area's proximity to the border; (2) the characteristics of the area; (3) usual traffic patterns; (4) the agents' experience in detecting illegal activity; (5) the driver's behavior; (6) characteristics of the vehicle; (7) recent illegal trafficking of aliens or narcotics in the area; and (8) the number of passengers and their appearance and behavior. *Id.*

In this case, although the important proximity-to-the-border factor is not present, given that the stop occurred between 50 and 100 miles from the Mexico-United States border, a careful examination of the remaining factors supports the determination that the agents had a reasonable suspicion of illegal activity sufficient to make the traffic stop. See *id.* at 330. As articulated by the district court, the testimony showed that the characteristics of the area, the agents' experience, and information about recent illegal alien and narcotics smuggling in the area contributed to reasonable suspicion. Indeed, the agents

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who stopped Garcia's vehicle had a combined Border Patrol experience of 30 years and, on the night in question, had been briefed about a significant increase in activity in the Marfa and Alpine areas to the south. *See United States v. Ramirez*, 839 F.3d 437, 440 (5th Cir. 2016) (stating that experience is entitled to "significant weight"). In addition, the agents had been informed by their supervisor, after running a search of the Treasury Enforcement Communications System database, that both registered owners of the vehicle had "a lot" of alerts for narcotics smuggling.

Also weighing in favor of reasonable suspicion were the usual traffic patterns, the driver's behavior, and the vehicle's characteristics. Although Garcia contends his behavior was consistent with safe driving habits, he ignores the agent's testimony that he tapped his brakes and reduced his speed even though the merge onto the interstate was gradual, and further, that he failed to take the most direct route to Tyler, Texas (where the vehicle was registered). *See United States v. Zapata-Ibarra*, 212 F.3d 877, 883–84 (5th Cir. 2000). "Factors that ordinarily constitute innocent behavior may provide a composite picture sufficient to raise reasonable suspicion in the minds of experienced officers." *United States v. Jacquinot*, 258 F.3d 423, 427–28 (5th Cir. 2001). Finally, the vehicle's darkly tinted windows contributed to reasonable suspicion because they prevented the agents from allaying their other suspicions. *See United States v. Guerrero-Barajas*, 240 F.3d 428, 433 (5th Cir. 2001).

Considering the totality of these circumstances and the *Brignoni-Ponce* factors collectively, there was reasonable suspicion to stop Garcia's vehicle. The judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

FILED

AUG 24 2017

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY [Signature]
DEPUTY CLERK

UNITED STATES OF AMERICA

v.

Case Number: 4:17-CR-00011-LY(1)

USM Number: 83719-380

RODOLFO RIVERO GARCIA, JR.

*Aliases: Rodolfo Garcia, Rodolfo R Garcia,
Rodolfo Garcia Jr., and Rodolfo Rivero Garcia*

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, RODOLFO RIVERO GARCIA, JR., was represented by Jeffrey Parras.

The defendant pled guilty to Count One of the Indictment on May 2, 2017. Accordingly, the defendant is adjudged guilty of such Count, involving the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 841 (a)(1) and 18 U.S.C. § 2	Possession with Intent to Distribute 100 Kilograms or more, but less than 1000 Kilograms of Marijuana	12/14/2016	1

As pronounced on August 23, 2017, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

Signed this 24th day of August, 2017.

[Signature]
LEE YEAKEL
United States District Judge

DEFENDANT: RODOLFO RIVERO GARCIA, JR.
CASE NUMBER: 4:17-CR-00011-LY(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **TWELVE (12) MONTHS AND ONE (1) DAY** as to count 1.

The defendant shall surrender for service of sentence at the institution on September 25, 2017 as designated by the Bureau of Prisons and the United States Marshal.

The Court makes the following recommendations to the Bureau of Prisons:

To designation the defendant to Seagoville FCI or to a federal facility as close as possible in order that the defendant may be near family members during the period of confinement.

If, for any reason, the Bureau of Prisons does not comply with any recommendation of this Court made in this Judgment and Sentence, the Bureau of Prisons shall immediately notify the Court and any reason therefor.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. TXN 10/12) Judgment in a Criminal Case

DEFENDANT: RODOLFO RIVERO GARCIA, JR.
CASE NUMBER: 4:17-CR-00011-LY(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **TWO (2) YEARS**.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court, and shall comply with the following additional conditions:

The defendant shall participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, may in consultation with the treatment provider, shall supervise participation in the program. The defendant shall pay the costs of such treatment to the extent the defendant is financially able.

The defendant shall not communicate, or otherwise interact, with Jorge Octavio Gomez, either directly or through someone else, without first obtaining the permission of the probation officer.

The defendant shall submit his or her person, property, house, office, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search shall be conducted at a reasonable time and in a reasonable manner.

AO 245B (Rev. TXN 10/12) Judgment in a Criminal Case

DEFENDANT: RODOLFO RIVERO GARCIA, JR.
CASE NUMBER: 4:17-CR-00011-LY(1)

CONDITIONS OF SUPERVISION

Mandatory Conditions:

- [1] The defendant shall not commit another federal, state, or local crime during the term of supervision.
- [2] The defendant shall not unlawfully possess a controlled substance.
- [3] The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.
- [4] The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- [5] If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et. seq.*) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.
- [6] If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.
- [7] If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.
- [8] The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.
- [9] The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

Standard Conditions:

- [1] The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- [2] After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.
- [3] The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.
- [4] The defendant shall answer truthfully the questions asked by the probation officer.
- [5] The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
- [6] The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view.

DEFENDANT: RODOLFO RIVERO GARCIA, JR.
CASE NUMBER: 4:17-CR-00011-LY(1)

- [7] The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
- [8] The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- [9] If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.
- [10] The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified, for the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- [11] The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- [12] If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.
- [13] The defendant shall follow the instructions of the probation officer related to the conditions of supervision.
- [14] If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.
- [15] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.
- [16] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.
- [17] If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally re-enter the United States. If the defendant is released from confinement or not deported, or lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

DEFENDANT: RODOLFO RIVERO GARCIA, JR.
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CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 410 South Cedar Street, Pecos, TX 79772. The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

If the defendant is not now able to pay this indebtedness, the defendant shall cooperate fully with the office of the United States Attorney, the Federal Bureau of Prisons and/or the United States Probation Office to make payment in full as soon as possible, including during any period of incarceration. Any unpaid balance at the commencement of a term of probation or supervised release shall be paid on a schedule of monthly installments to be established by the United States Probation office and approved by the Court.

	Assessment	Fine	Restitution
TOTALS	\$100.00	\$0.00	\$0.00

SPECIAL ASSESSMENT

It is ordered that the defendant shall pay to the United States a special assessment of \$100.00. Payment of this sum shall begin immediately.

FINE

The fine is waived because of the defendant's inability to pay.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(f), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.