

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ESMERVI CARONE RODRIGUEZ,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 19-11230
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
September 14, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ESMERVI CARONE RODRIGUEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:18-CR-128-1

Before BARKSDALE, GRAVES, and OLDHAM, Circuit Judges.

PER CURIAM:*

Esmervi Carone Rodriguez appeals his conviction for possession of, with intent to distribute, 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii). Each of the four issues presented on appeal fail.

A law-enforcement officer pulled over Rodriguez while he was driving on Interstate 40 for violating Texas Transportation Code § 545.062(a), which

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

prohibits drivers from following too closely behind other vehicles. During the course of the traffic stop, Rodriguez consented to a search of his vehicle, where law-enforcement officers ultimately discovered 30 bundles of methamphetamine in the rear-quarter panels of his vehicle.

Rodriguez first asserts the district court erred in denying his motion to suppress all statements and evidence from the traffic stop that led to his arrest. Rodriguez contends that the officer did not have a reasonable suspicion to initiate a stop of his vehicle for driving too closely in violation of § 545.062(a).

In reviewing a district court’s denial of a motion to suppress, our court reviews the court’s factual findings for clear error and its legal conclusions *de novo*. *E.g., United States v. Lopez-Moreno*, 420 F.3d 420, 429 (5th Cir. 2005) (internal citation omitted). “For a traffic stop to be justified at its inception, an officer must have an objectively reasonable suspicion that some sort of illegal activity, such as a traffic violation, occurred, or is about to occur, before stopping the vehicle.” *Id.* at 430. If the officer “can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the search and seizure, the intrusion is lawful”. *United States v. Santiago*, 310 F.3d 336, 340 (5th Cir. 2002) (internal quotation marks and alterations omitted).

The officer, who testified at the suppression hearing, provided specific, articulable facts in support of his reasonable suspicion that Rodriguez was committing the traffic violation of following too closely. Therefore, the court did not err in concluding that the stop was justified at its inception and in denying the motion to suppress. *See Santiago*, 310 F.3d at 340; *see also United States v. Inocencio*, 40 F.3d 716, 727–28 (5th Cir. 1994).

Rodriguez next asserts the admission of certain testimony at trial was in error because it constituted improper drug-courier-profile evidence. *See*

United States v. Gonzalez-Rodriguez, 621 F.3d 354, 363 (5th Cir. 2010). The district court’s decision to admit or exclude evidence is reviewed for abuse of discretion. *United States v. Gutierrez-Farias*, 294 F.3d 657, 662 (5th Cir. 2002). “A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence.” *United States v. Kinchen*, 729 F.3d 466, 470–71 (5th Cir. 2013) (internal quotation marks and citation omitted). If our court concludes that the district court abused its discretion in admitting evidence, we next review for harmless error. *Id.* at 471. When a jury hears information unfairly prejudicial to a defendant, “[r]eversal is not required unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction”. *United States v. Flores*, 640 F.3d 638, 643 (5th Cir. 2011) (internal quotation marks and citation omitted). “When other evidence of guilt is overwhelming, and the error would not have substantially influenced the jury’s verdict, the error is harmless.” *United States v. Hawley*, 516 F.3d 264, 268 (5th Cir. 2008).

It is not necessary to resolve whether this evidence was erroneously admitted. Given the evidence presented to the jury—such as the inconsistencies in Rodriguez’ story; the implausibility of his story that he traveled 1700 miles to have his vehicle repaired and yet did not have the contact information for the person who sold him the vehicle, did not speak to that person after arriving in Arizona, and decided not to have his vehicle repaired; Rodriguez’ nervousness throughout the entirety of the traffic stop; and the lack of any reaction on his part after the methamphetamine was discovered—and even assuming error in the admission of any drug-profile testimony, the error was harmless. *See Hawley*, 516 F.3d at 268.

Next, Rodriguez asserts the court erred by failing to give his requested jury instruction regarding aiding and abetting. A jury instruction is reviewed

for abuse of discretion, affording substantial latitude to the district court in describing the law to the jury. *United States v. Santos*, 589 F.3d 759, 764 (5th Cir. 2009). A district court does not err by giving a charge that tracks our circuit's pattern jury instructions and is a proper statement of the law. *United States v. Whitfield*, 590 F.3d 325, 354 (5th Cir. 2009). The given aiding-and-abetting instruction closely mirrors our court's pattern jury instructions and is a correct statement of the law. *See* 5TH CIR. PATTERN CRIM. JURY INSTR. 2.04. Consequently, Rodriguez has failed to demonstrate the court abused its discretion when it refused his requested jury instruction. *See Whitfield*, 590 F.3d at 354.

Finally, Rodriguez asserts the court erred by refusing to provide a spoliation instruction regarding a socket wrench that was discovered in Rodriguez' vehicle during the traffic stop but was lost after the stop. A district court's denial of a spoliation jury instruction is reviewed for abuse of discretion. *United States v. Valas*, 822 F.3d 228, 239 (5th Cir. 2016). “Spoliation of evidence is the destruction or the significant and meaningful alteration of evidence.” *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015) (internal quotation marks and citation omitted). An adverse inference against the spoliator is permitted only upon “a showing of ‘bad faith’ or ‘bad conduct’”. *Id.* (internal citation omitted). For a spoliation claim, bad faith “generally means destruction for the purpose of hiding *adverse* evidence”. *Id.* (emphasis added).

Rodriguez failed to allege, much less establish, that law-enforcement officers engaged in bad-faith conduct for the purpose of hiding adverse evidence. The court, therefore, did not abuse its discretion by refusing the instruction. *See id.*

AFFIRMED.

APPENDIX B

United States Court of Appeals
for the Fifth Circuit

No. 19-11230

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ESMERVI CARONE RODRIGUEZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:18-CR-128-1

ON PETITION FOR REHEARING EN BANC

(Opinion September 14, 2020, 5 Cir., _____, _____ F.3d
_____)

Before BARKSDALE, GRAVES, and OLDHAM, *Circuit Judges.*

PER CURIAM:

(V) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc

(FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

- () Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

APPENDIX C

United States District Court

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

FILED

NOV - 6 2019

CLERK, U.S. DISTRICT COURT
By *at* Deputy

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA

v.

ESMERVI CARONE RODRIGUEZ

Case Number: 2:18-CR-00128-D-BR(1)

USM Number: 57814-177

Cristy J McElroy

Defendant's Attorney

THE DEFENDANT:

<input type="checkbox"/>	pleaded guilty to count(s)	
<input type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input checked="" type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	2 of the indictment filed on October 25, 2018

The defendant is adjudicated guilty of these offenses:

<u>Title & Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii) - Possession with Intent to Distribute 500 Grams or More of Methamphetamine	10/03/2018	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s)
- Count(s) 1 dismissed on the motion of the United States on 7/16/2019.

It is ordered that the defendant must 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.

November 6, 2019

Date of Imposition of Judgment

Signature of Judge

SIDNEY A. FITZWATER
SENIOR JUDGE

Name and Title of Judge

November 6, 2019
Date

DEFENDANT: ESMERVI CARONE RODRIGUEZ
CASE NUMBER: 2:18-CR-00128-D-BR(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:
one hundred fifty one (151) months as to count 2.

The court makes the following recommendations to the Bureau of Prisons: that the defendant be assigned to serve his sentence at a facility as close to Louisville, Kentucky as is consistent with his security classification.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at a.m. p.m. on

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on 11/06/2019 to

at USM Office, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ESMERVI CARONE RODRIGUEZ
CASE NUMBER: 2:18-CR-00128-D-BR(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **five (5) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: ESMERVI CARONE RODRIGUEZ
CASE NUMBER: 2:18-CR-00128-D-BR(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must 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. You must 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 you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: ESMERVI CARONE RODRIGUEZ
CASE NUMBER: 2:18-CR-00128-D-BR(1)

SPECIAL CONDITIONS OF SUPERVISION

1. As a condition of supervised release, upon completion of his term of imprisonment, the defendant is to be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. As a further condition of supervised release, if ordered deported, the defendant shall remain outside the United States.

In the event the defendant is not deported immediately upon release from imprisonment, he shall also comply with the standard conditions recommended by the U.S. Sentencing Commission.

2. You shall not illegally re-enter the United States, if deported, removed, or allowed voluntary departure.

DEFENDANT: ESMERVI CARONE RODRIGUEZ
 CASE NUMBER: 2:18-CR-00128-D-BR(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments page.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$100.00	\$0.00	\$0.00	\$0.00	

- The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- Restitution amount ordered pursuant to plea agreement \$
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- | | | |
|---|-------------------------------|--|
| <input type="checkbox"/> the interest requirement is waived for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution |
| <input type="checkbox"/> the interest requirement for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution is modified as follows: |

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

*** 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.

DEFENDANT: ESMERVI CARONE RODRIGUEZ
 CASE NUMBER: 2:18-CR-00128-D-BR(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payments of \$ 100.00 due immediately, balance due
 - not later than _____, or
 - in accordance C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

See special condition of supervision regarding restitution, as if set forth in full.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several

See above for Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

 - Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
 - The defendant shall pay the cost of prosecution.
 - The defendant shall pay the following court cost(s):
 - The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.