

IN THE
SUPREME COURT OF THE UNITED STATES

ENRIQUE SERRATO-NAVARRO,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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DATE SENT VIA UPS Delivery: June 7, 2018

A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 9 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ENRIQUE SERRATO-NAVARRO,

Defendant-Appellant.

No. 17-10002

D.C. No.

2:16-cr-00074-SRB-2

District of Arizona,

Phoenix

ORDER

Before: WALLACE, RAWLINSON, and WATFORD, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

Judge Rawlinson and Judge Watford have voted to deny the petition for rehearing en banc, and Judge Wallace has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are
DENIED.

B

NOT FOR PUBLICATION**FILED**

UNITED STATES COURT OF APPEALS

JAN 23 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 16-10529

Plaintiff-Appellee,

D.C. No.

v.

2:16-cr-00074-SRB-1

JOSE ANGEL CORTEZ-LUNA,

MEMORANDUM*

Defendant-Appellant.

UNITED STATES OF AMERICA,

No. 17-10002

Plaintiff-Appellee,

D.C. No.

v.

2:16-cr-00074-SRB-2

ENRIQUE SERRATO-NAVARRO,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, PresidingArgued and Submitted January 9, 2018
San Francisco, California

Before: WALLACE, RAWLINSON, and WATFORD, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendants Jose Angel Cortez-Luna and Enrique Serrato-Navarro appeal from the district court's order denying their motion to suppress evidence of methamphetamine discovered by Border Patrol agents during a search of a vehicle Defendants had been driving. Defendants also challenge the district court's imposition of certain supervised release conditions as part of their sentences. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review a district court's denial of a motion to suppress evidence de novo, and the district court's underlying factual findings for clear error. *United States v. Job*, 871 F.3d 852, 859 (9th Cir. 2017) (citations omitted). Where, as here, a defendant failed to object to conditions of supervised release at sentencing, we review the imposition of those conditions for plain error. *United States v. LaCoste*, 821 F.3d 1187, 1190 (9th Cir. 2016) (citation omitted).

The district court did not err in denying Defendants' motion to suppress. The district court plausibly found that the initial encounter between Agent Gatewood and Defendants, including Gatewood's request to examine Defendants' identification, was voluntary. *See United States v. Drayton*, 536 U.S. 194, 201 (2002) (explaining that a law enforcement officer may pose questions and ask for identification without implicating any Fourth Amendment interest, so long as the officer does not induce cooperation by coercion). The district court also properly concluded that Defendants' responses during their encounter with Agents

Gatewood and White, combined with the results of Agent Gatewood's record checks, gave rise to reasonable suspicion to seize Defendants at approximately 10:50 am, when Gatewood retained control of Defendants' identification documents. *See United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997) ("When a law enforcement official retains control of a person's identification papers . . . longer than necessary to ascertain that everything is in order, and initiates further inquiry while holding on to the needed papers, a reasonable person would not feel free to depart."). Finally, once the agents seized Defendants for Fourth Amendment purposes, the agents acted with reasonable diligence in summoning a drug-sniffing dog from a nearby Border Patrol checkpoint to conduct a search. Although the agent with the drug-sniffing dog took 15-20 minutes to arrive, the agents called for the dog no more than 10 minutes after the investigative detention began. This was a reasonable course of action that did not unnecessarily prolong Defendants' detention. *See United States v. Sharpe*, 470 U.S. 675, 685 (1985) (explaining that "common sense and ordinary human experience" must govern the inquiry into whether law enforcement officers unreasonably prolonged an investigative detention).

We reject Defendants' contention that Agent Gatewood was required to call a drug-sniffing dog immediately upon seeing Defendants come to a stop at the end of a single-lane access road. Although Agent Gatewood testified that certain things

seemed unusual about Defendants driving in that part of Arizona at the time in question, it was entirely reasonable for Agent Gatewood to approach Defendants, ask basic questions, and continue to run record checks before taking the more serious step of calling a drug-sniffing dog. Reasonable diligence does not require law enforcement officers to leverage every investigative tool at their disposal immediately. *Cf. id.* at 686 (explaining that in the course of an investigative detention, law enforcement agents must be permitted to “graduate their responses” according to the demands of the situation) (citation omitted). Under the circumstances presented here, Gatewood’s step-by-step investigative approach did not violate Defendants’ Fourth Amendment rights.

Defendants’ reliance on *United States v. \$191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994), *superseded by statute on other grounds as stated in United States v. \$80,180.00 in U.S. Currency*, 303 F.3d 1182, 1184 (9th Cir. 2002), is misplaced. There, we held that law enforcement agents did not act with diligence when, having suspected an individual of drug trafficking *before* the individual boarded a flight, the agents failed to have a drug-sniffing dog at the airport when the suspect landed. *Id.* at 1061. The instant case is materially different. Here, Agent Gatewood did not suspect Defendants of drug trafficking prior to speaking with them and running record checks, but rather approached them to see if there was anything that would raise suspicion. We have acknowledged that in analogous

situations of “general surveillance,” where agents are “not awaiting any particular suspect,” “it is much more reasonable for the government to summon [a drug-sniffing] dog only after acquiring reasonable suspicion.” *Id.* at 1062 (citation omitted). Given that Gatewood had no advance knowledge or suspicion of Defendants as potential suspects, it was not unreasonable to delay calling for a drug-sniffing dog.

The district court did not plainly err in imposing certain supervised release conditions on Defendants. First, given that Defendants maintained their legal status at the time of sentencing, the conditions imposed by the district court were reasonably related to “deterrence, protection of the public, or rehabilitation.” *United States v. Watson*, 582 F.3d 974, 982 (9th Cir. 2009). The district court was not required to predict the precise trajectory and outcome of Defendants’ deportation proceedings before imposing standard conditions of supervised release. Second, Defendants’ objection to two of the conditions as unconstitutionally vague fails because neither condition speaks “in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *United States v. Hugs*, 384 F.3d 762, 768 (9th Cir. 2004) (quotation and citation omitted).

AFFIRMED.

C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America

v.

Enrique Serrato-Navarro

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

No. CR-16-00074-002-PHX-SRB

Baltazar Iniguez (CJA)

Attorney for Defendant

USM#: 55361-408

ICE# A052279191

THERE WAS A FINDING OF guilty on 10/7/2016 as to Counts 1 and 2 of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 21, U.S.C. §846, 841(a)(1) and (b)(1)(C), Conspiracy to Possess with Intent to Distribute a Controlled Substance - Methamphetamine, a Class C Felony offense, as charged in **Count 1** of the Indictment; Title 21, U.S.C. §841(a)(1) and (b)(1)(C), Possession with the Intent to Distribute a Controlled Substance - Methamphetamine, a Class C Felony offense, as charged in **Count 2** of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is committed to the custody of the Bureau of Prisons for a term of **THIRTY-SIX (36) MONTHS**, which consists of **THIRTY-SIX (36) MONTHS** on Count 1 and **THIRTY-SIX (36) MONTHS** on Count 2, said counts to run concurrently, with credit for time served. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **THREE (3) YEARS**, which consists of **THREE (3) YEARS** on Count 1 and **THREE (3) YEARS** on Count 2, said counts to run concurrently.

The Court recommends that the defendant be placed in an institution in southern California, if possible, to facilitate visitation with family.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$200.00 FINE: WAIVED RESTITUTION: N/A

The defendant shall pay a special assessment of \$200.00 which shall be due immediately.

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1,

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Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$200.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Counts 1 and 2 of the Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address.

SUPERVISED RELEASE

It is the order of the Court that, pursuant to General Order 16-23, which incorporates the requirements of USSG §§5B1.3 and 5D1.2, you shall comply with the following conditions:

MANDATORY CONDITIONS

- 1) You must not commit another federal, state or local crime.
- 2) You must not unlawfully possess a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted.
- 3) You must refrain from any unlawful use of a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted. Unless suspended by the Court, 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.

STANDARD CONDITIONS

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of sentencing or 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.

SPECIAL CONDITIONS

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

- 1) If deported, you shall not re-enter the United States without legal authorization.

THE DEFENDANT IS ADVISED OF DEFENDANT'S RIGHT TO APPEAL BY FILING A NOTICE OF APPEAL IN WRITING WITHIN 14 DAYS OF ENTRY OF JUDGMENT.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or

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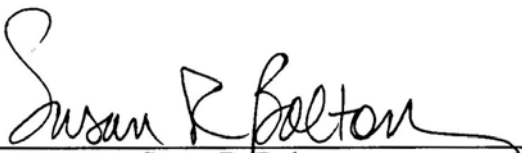
supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons.

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

Date of Imposition of Sentence: **Monday, December 19, 2016**

Dated this 21st day of December, 2016.



Susan R. Bolton
United States District Judge

RETURN

I have executed this Judgment as follows:

defendant delivered on _____ to _____ at _____, the institution
designated by the Bureau of Prisons with a certified copy of this judgment in a Criminal case.

United States Marshal By: _____ Deputy Marshal