

July 18, 2007

Elisabeth A. Shumaker  
Clerk of Court

PUBLISH

**UNITED STATES COURT OF APPEALS**  
**TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

No. 06-4144

ELSA CONTRERAS, also known as  
Elsa Juaregui, also known as Elisa  
Juarequi, also known as Elsa Taurequi,

Defendant-Appellant.

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**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
(D.C. NO. 2:04-CR-716-DKW)**

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Submitted on the briefs:

Roger K. Scowcroft, Salt Lake City, Utah for the Defendant-Appellant.

Brett L. Tolman, United States Attorney, and Stephen J. Sorenson, Assistant  
United States Attorney, Salt Lake City, Utah for the Plaintiff-Appellee.

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Before **McCONNELL**, **TYMKOVICH**, and **BALDOCK**, Circuit Judges.\*

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\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

**McCONNELL**, Circuit Judge.

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This case considers a matter of first impression for this circuit: whether the Sentencing Guidelines enhancement for obstruction of justice, United States Sentencing Guidelines Manual § 3C1.1 (2002), applies when a defendant's obstructive conduct occurred during the prosecution of state charges preceding the federal indictment, but both federal and state charges were based on the same underlying conduct. We hold that, in this case, it does. We also hold that the search of Ms. Contreras's car did not violate her constitutional rights. Accordingly, we affirm both the conviction and the sentence.

### **I. Background**

On October 2, 2004, Elsa Contreras was stopped on Interstate 15 in Beaver County, Utah, for following the car ahead of her too closely. The officer, Sergeant Bauer, observed that Ms. Contreras was pale and shaking badly. While he was examining Ms. Contreras's license and rental car agreement, he asked about her travel plans. She said that she had left Nebraska on September 30 and driven to Las Vegas to visit a brother and a relative visiting from Mexico. Although both the officer's testimony and the district court order state that Ms. Contreras told the officer that she arrived in Las Vegas on the morning of October 2, that statement is unsupported by the videotape of the encounter. Instead, the recording reflects that Ms. Contreras told the officer only that she had left

Nebraska on September 30, driven to Las Vegas, and was now, two days later, on her way back to Nebraska. She explained to the officer that she did not like to fly. The location of the traffic stop was about a three-hour drive from Las Vegas.

Sergeant Bauer told the defendant that he was not going to give her a ticket and to “drive save.” Then, still standing at her car window, he asked, “You wouldn't mind opening your trunk real quick before I let you go, would you?” The defendant agreed, and the officer opened the trunk and began to search. He noticed that the spare tire was not sitting properly in its well and asked Ms. Contreras if he could check it. She agreed. Further inspection revealed that the tire contained something other than air. Through a series of negotiations, Sergeant Bauer convinced Ms. Contreras, however reluctantly, to accompany him to a service station to check the tire. At the service center, the officer broke down the tire and found seven packages of methamphetamine.

Ms. Contreras was arraigned on state charges and held at the Beaver County Jail for five days. She was released on bond on October 7, after which she fled to Mexico. The federal government indicted her on October 20, 2004, on one count of possessing 500 grams or more of methamphetamine with an intent to distribute, a violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2. The following day, a federal warrant was issued for her arrest. No testimony or evidence indicates that the federal government took any additional action to

investigate the crime or to bring Ms. Contreras into custody, other than the issuance of the indictment and arrest warrant.

In November, the state court issued a warrant for failure to appear when Ms. Contreras missed a court date. Eight months later, in July 2005, she was stopped crossing the border, the federal warrant was discovered, and she was arrested and placed in federal custody. On March 20, 2006, Ms. Contreras pleaded guilty to violating §§ 841(a)(1) and (b)(1)(A), preserving her right to appeal.

The Presentence Report (PSR) recommended a sentencing enhancement under United States Sentencing Guidelines § 3C1.1 for obstruction of justice. As a basis for the enhancement, the PSR cites Ms. Contreras's failure to appear at her state-court hearing. The PSR calculated a total offense level of 25 and a criminal history category of I, resulting in a sentencing range of 57-71 months. Without the enhancement for obstruction of justice, the range would have been 46-57 months.

At sentencing, the government voiced its support for the enhancement:

Well, just for the record, Your Honor, I do believe that the issue here is that she was arrested and charged in this offense and it is irrelevant which sovereign pursued the investigation. She fled following her arrest and following a charge being filed in this instant offense. Under the guidelines, I do believe that that does qualify for obstruction of justice. . . .

The Court: I agree with you on that point.

The judge sentenced Ms. Contreras to 57 months, the bottom of the sentencing range.

Ms. Contreras timely appealed, objecting both to the search of her trunk and to the sentencing enhancement.

## **II. Fourth Amendment**

Ms. Contreras argues on appeal that the search of her car was illegal because reasonable suspicion was lacking and her consent was tainted. We find that the officer had reasonable suspicion to search Ms. Contreras's car, and therefore we need not reach the legality of her consent.

In reviewing the denial of a motion to suppress, we accept the factual findings of the district court unless they are clearly erroneous. *United States v. Hunnicutt*, 135 F.3d 1345, 1348 (10th Cir. 1998). The ultimate determination of reasonableness under the Fourth Amendment is a question of law, which we review *de novo*. *Id.*

An officer has reasonable suspicion to search a vehicle when he has a “particularized and objective basis for suspecting” criminal activity. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). In assessing reasonable suspicion, we defer to trained law enforcement personnel, “allow[ing] officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.” *United States v. Arvizu*, 534 U.S. 266, 273 (2002)

(internal quotation marks omitted); see *United States v. Santos*, 403 F.3d 1120, 1124 (10th Cir. 2005).

Trooper Bauer's testimony paints a convincing picture of reasonable suspicion. The officer reported that the defendant was shaking so badly that she could not hold on to the papers in her hand. More importantly, she offered an account of her travel plans that seemed suspicious at best and incredible at worst. Ms. Contreras claimed to have driven more than 1,200 miles to see her family, only to turn around within a day and begin the 1,200-mile drive back. Add the presence of food wrappers from a California restaurant and the fact that she was driving a rental car – which Trooper Bauer knew to be “often used by narcotics traffickers [because] it can't be seized,” R. Vol. 2, at 21 – and Ms. Contreras's conduct begins to strongly resemble that of a narcotics trafficker transporting a load between the West Coast and Nebraska.

We have noted numerous times that implausible travel plans can form a basis for reasonable suspicion. *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1260 (10th Cir. 2006); *United States v. Kopp*, 45 F.3d 1450, 1453-54 (10th Cir. 1995). We have also credited the idea that drug couriers often use third-party rental cars. *United States v. Williams*, 271 F.3d 1262, 1270 (10th Cir. 2001). Although we have found nervousness to be “of only limited significance in determining whether reasonable suspicion exist[s],” *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997), it does add to the overall calculus of suspicious

behavior, especially where, as here, it was extreme. Taken as a whole, Trooper Bauer's assessment that the defendant's actions created reasonable suspicion of narcotics activity is more than sufficient.

### **III. Obstruction of Justice**

#### *A. Obstruction of State-Court Charges*

\_\_\_\_ “[W]e review a district court’s factual findings for clear error, and we review its legal interpretation of the guidelines de novo.” *United States v. Norman*, 129 F.3d 1393, 1398 (10th Cir. 1997).

Section 3C1.1 of the Sentencing Guidelines requires that an offender’s offense level be increased by two levels

[i]f (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant’s offense of conviction and any relevant conduct; or (ii) a closely related offense.

U.S.S.G. § 3C1.1. The defendant in this case asserts that her conduct occurred before the investigation or prosecution of the “instant offense of conviction” was underway. We disagree.

The Guidelines direct that “[t]he term ‘instant’ is used in connection with ‘offense,’ ‘federal offense,’ or ‘offense of conviction,’ as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (*e.g.*, *an offense*

*before a state court involving the same underlying conduct).*” U.S.S.G. § 1B1.1 cmt. n.1(H) (emphasis added). Thus, if Ms. Contreras’s flight to Mexico had affected only state prosecution, it would not count for purposes of § 3C1.1.

In this case, however, Ms. Contreras committed an offense that could have been prosecuted either by state or by federal authorities. When she fled to Mexico, she did not know whether the prosecution she was obstructing was one that eventually would proceed in federal court or in state court. Indeed, the record is not clear whether, at the time she fled to Mexico, the federal indictment had yet been entered. She fled sometime after October 7, 2004; the federal grand jury indicted her on October 20. There is no doubt, however, that her five-month absence precluded federal authorities from proceeding with prosecution in her case until she returned to the jurisdiction. Thus, although we agree with defendant’s argument that the language of the guideline confines the obstruction enhancement to obstruction of the administration of justice with respect to the “instant” offense, meaning the federal prosecution, we hold that where a defendant’s obstructive conduct impedes or delays prosecution by both federal and state authorities, the enhancement is applicable.

Even if Ms. Contreras slipped across the border before the grand jury did its work, this would not make her flight any less obstructive with respect to the federal prosecution. In *United States v. Mills*, this Court upheld the application of the obstruction enhancement to a defendant—a federal prisoner—who tampered

with videotape evidence to erase the record of his conduct. 194 F.3d 1108, 1114-15 (10th Cir. 1999). We held that the defendant's action obstructed the federal investigation even though it took place before the start of that investigation. "Clearly, Mills knew that an investigation would be conducted, and he understood the importance of the tape in that investigation." *Id.* at 1115. If conduct may obstruct a federal prosecution when no investigation is underway at all, it surely must be permissible for the obstruction enhancement to apply here, where a defendant flees the country after state investigators had uncovered evidence that would warrant federal prosecution.

A contrary interpretation would have strange consequences. Many, if not most, federal drug prosecutions occur as a result of state investigations. *See, e.g.* Paul G. Cassell, *Too Severe?*, 56 *Stan. L. Rev.* 1017, 1040 (2004) (noting "the increasing trend by federal prosecutors to 'adopt' what is essentially a state investigation for federal prosecution"). It would make little sense to determine the applicability of the guideline by the identity of the officers who conduct the initial investigation rather than the nature of the ultimate prosecution. As the Fourth Circuit has noted: "The failure of the guideline to distinguish between an investigation by federal officials as opposed to state officials undoubtedly is founded in a recognition that state officers are authorized to and frequently do investigate criminal conduct that is ultimately prosecuted under federal law." *United States v. Self*, 132 F.3d 1039, 1042-42 (4th Cir. 1997).

Seven other circuits have considered whether the obstruction of a state investigation based on the same facts as the eventual federal conviction merits a § 3C1.1 enhancement. Of those circuits, six have held that obstruction of the state proceeding does qualify for the enhancement; only one held that it did not.

*United States v. Perez*, 50 F.3d 396, 398 (7th Cir. 1995) (obstruction of state proceeding does not qualify under the enhancement); *United States v. Ayers* 416 F.3d 131, 134 (2d Cir. 2005) (obstruction of state proceeding qualifies under the enhancement); *United States v. Frasier*, 381 F.3d 1097, 1099-1100 (11th Cir. 2004) (same); *United States v. Roberts*, 243 F.3d 235, 237-38 (6th Cir. 2001) (same); *United States v. Imenec*, 193 F.3d 206, 209 (3d Cir. 1999) (same); *United States v. Self*, 132 F.3d 1039, 1042-43 (4th Cir. 1997) (same); *United States v. Adediran*, 26 F.3d 61, 65 (8th Cir. 1994) (same); *United States v. Emery*, 991 F.2d 907, 910-12 (1st Cir. 1993) (same).

#### **IV. Conclusion**

Accordingly, we **AFFIRM** Ms. Contreras's conviction and her sentence.