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United States Court of Appeals
Tenth Circuit

October 25, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MAGDALY SULEYDY PEREZ-VELASQUEZ,

Defendant - Appellant.

No. 19-2118

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JENIFER MILADIS ALVARADO-DIAZ,

Defendant - Appellant.

No. 19-2134

Appeals from the United States District Court
for the District of New Mexico
(D.C. No. 2:19-PO-00044-RB-KRS-1)
(D.C. No. 2:18-PO-04579-RB-GJF-1)

Gia McGillivray, Assistant Federal Public Defender (Margaret Katze, Federal Public Defender, and Stephanie Lynne Wolf, Assistant Federal Public Defender, with her on the briefs), Las Cruces, New Mexico, for Defendants-Appellants.

Dustin C. Segovia, Assistant United States Attorney (Fred J. Federici, United States Attorney, with him on the briefs), Las Cruces, New Mexico, for Plaintiffs-Appellees.

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **MORITZ**, Circuit Judges.

TYMKOVICH, Chief Judge, Circuit Judge.

In this consolidated appeal, Jenifer Miladis Alvarado-Diaz and Magdaly Suleydy Perez-Velasquez appeal the district court's affirmance of their convictions for entering the United States in violation of 8 U.S.C. § 1325(a)(1). They contend they did not illegally "enter" the country, within the meaning of § 1325(a)(1), because they were under continuous surveillance and because they did not intend to evade inspection. We reject these arguments and affirm the judgments of the district court.

I. Background

The relevant facts are not in dispute, and they are substantially similar for each Defendant. Alvarado and Perez crossed the U.S.-Mexico border into New Mexico by walking around a fence, miles away from the nearest designated port of entry. Alvarado was stopped by a border patrol agent after she made it about 180 yards past the border, and a border patrol agent saw Perez just as she walked into the country.

Each was detained. Alvarado and Perez admitted to the agents that they were nationals of El Salvador and Guatemala, respectively, and had no authorization to enter the country. They were arrested and charged with illegal entry in violation of 8 U.S.C. § 1325(a)(1). Section 1325(a)(1) provides criminal punishment to "any alien (1) who enters or attempts to enter the United States at any time or place other than

as designated by immigration officers . . . .” 8 U.S.C. § 1325(a)(1). They then faced bench trials before magistrate judges, where they were convicted.

Alvarado and Perez appealed their convictions in the New Mexico District Court, contending their convictions should be overturned because they had not illegally “entered” the country in violation of the statute. They contended “enter” is a term of art that requires more than a physical intrusion; it also requires “freedom from official restraint” and “inspection or intentional evasion of inspection.” Alvarado ROA 162; Perez ROA 278.

The district court affirmed the convictions because, even assuming freedom from official restraint is required for an “entry,” the Defendants were not under official restraint. The Defendants argued they were under official restraint because they had been continuously surveilled, but the court noted that continuous surveillance alone does not equate to restraint.

On appeal, the Defendants make similar arguments.

II. Analysis

In requesting that we overturn their convictions, Alvarado and Perez urge us to reconsider our decision in *United States v. Gaspar-Miguel*, 947 F.3d 632 (10th Cir. 2020), and hold that (1) “enter” requires freedom from official restraint and inspection or intentional evasion of inspection, and (2) continuous surveillance alone can constitute official restraint. *See* 947 F.3d at 632. We decline to do so.

Our court and other circuits have aptly traced the history and development of the freedom from official restraint doctrine for “entry,” so we will be brief in our

review. *See Gaspar-Miguel*, 947 F.3d at 633–34; *see United States v. Argueta-Rosales*, 819 F.3d 1149 (9th Cir. 2016) (Bybee, J., concurring in the judgment only). The doctrine is a legal fiction that began in the early 1900s in the civil immigration context, and it was used to determine whether procedural and substantive rights would be apportioned to foreign nationals. *Argueta-Rosales*, 819 F.3d at 1162–63. Those who "entered" the country were given certain rights, while those who had not "entered" could be excluded without process. *Id.* Eventually, this concept was imported into the criminal law by some circuits. *See, e.g.*, *United States v. Vasilatos*, 209 F.2d 195 (3d Cir. 1954) (holding that a ship crewmember "entered" the country under § 1326 when his request for admission was decided, not when he merely crossed the border into the United States); *United States v. Oscar*, 496 F.2d 492 (9th Cir. 1974) (reversing a conviction for aiding and abetting an illegal entry into the United States because a Honduran had not "entered" the country, despite physically crossing into American territory, because he was under official restraint).

In interpreting "entry," "we must acknowledge Congress [used] a term with a settled meaning." *Gaspar-Miguel*, 947 F.3d at 634. But this court has never required freedom from official restraint for an "entry" under § 1325(a), and we need not decide whether it is required here. Even assuming for purposes of argument that freedom from official restraint is required for an "entry," neither Alvarado nor Perez were under official restraint because, at most, they were only surveilled. Their only

argument for restraint is continuous surveillance.[1] This argument was disposed of in *Gaspar-Miguel*, where we held that continuous surveillance alone cannot constitute restraint. 947 F.3d. at 634. We cannot reconsider that decision absent en banc review by this court. *United States v. Meyers*, 200 F.3d 715, 721 (10th Cir. 2000).

Perez attempts to distinguish her situation from Gaspar-Miguel's. She notes her surveillance was different from Gaspar-Miguel's because Gaspar-Miguel was surveilled "from a distance via binoculars by an agent who could not identify whether he was observing humans or animals." Perez Br. at 22. On the other hand, Perez was observed right as she crossed the border, and the border agent saw her from a shorter distance unaided by binoculars. But these distinctions are inconsequential because they are just different forms of surveillance. Regardless of the distance of observation—or whether surveillance is aided by technologies such as binoculars—surveillance on its own cannot transform into restraint.

Finally, the Defendants also request that we require inspection or intentional evasion of inspection for § 1325(a)(1). Section 1325(a) provides three independent ways for an alien to commit an illegal entry:

> (1) enter[ing] or attempt[ing] to enter the United States at any time or place other than as designated by immigration

[1] Perez argues the magistrate court committed clear error in finding she was not under continuous surveillance. She contends that because she was seen by the border patrol agent as she crossed the border, she was surveilled for the entirety of her presence in the country until she was detained. We need not decide whether an error occurred, because even assuming she is correct, the error would be harmless since continuous surveillance alone does not constitute restraint. *See United States v. Caldwell*, 589 F.3d 1323, 1334 (10th Cir. 2009) (holding that jury verdicts will be undisturbed if the court commits a harmless error).

> officers, *or* (2) elud[ing] examination or inspection by immigration officers, *or* (3) attempt[ing] to enter or obtain[ing] entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact . . . .

8 U.S.C. § 1325(a) (emphases added).

The language of the statute provides three separate ways of committing the offense. Congress used the disjunctive "or," rather than the conjunctive "and". If we required inspection or intentional evasion of inspection for a violation of § 1325(a)(1), we would impermissibly collapse subsections (a)(1) and (a)(2).

Consequently, § 1325(a)(1) does not require inspection or intentional evasion of inspection.

Alvarado and Perez, both foreign nationals, crossed the border at a time and place other than as designated by immigration officers. And neither alleges any sort of restraint other than continuous surveillance. Consequently, they both "entered" the country within the meaning of § 1325(a)(1), so their convictions were proper.

III. Conclusion

Alvarado and Perez each "entered" the country at a time or place other than as designated by immigration officers. Inspection or intentional evasion of inspection is not required for a conviction. And even if we assumed that freedom from official restraint is required, neither can establish official restraint because they only rely on a theory of continuous surveillance, and continuous surveillance alone does not equate to restraint.

For those reasons, the judgments of the district court are AFFIRMED.