

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. ) Criminal Action No. 03-47-KAJ  
 )  
 SANTIAGO RAMIREZ-GONZALES, )  
 )  
 Defendant. )

**MEMORANDUM ORDER**

This is the court's decision on the defendant's post-trial motion for judgment of acquittal. (Docket Item ["D.I."] 28.)

This matter was tried on September 26, 2003. The defendant was charged with violating 8 U.S.C. §§ 1326(a) and (b)(2) by illegally reentering the United States following deportation (D.I. 1), and the jury convicted him of that offense. (See Transcript at 194.) The defense moved pursuant to Fed. R. Crim. P. 29 for judgment of acquittal following the Government's case at trial. That motion was denied, and the defendant renewed his motion following trial. It is again denied.

**Governing Standard**

On a motion for judgment of acquittal, I am required to "sustain the verdict if there is substantial evidence, viewed in the light most favorable to the government, to uphold the jury's decision." *United States v. Beckett*, 208 F.3d 140, 151 (3d Cir. 2000). I am not to weigh evidence or determine the credibility of witnesses in determining the sufficiency of the evidence. *Id.* On the contrary, I must "credit all available inferences in favor of the government." *United States v. Gambone*, 314 F.3d 163, 170 (3d Cir.), *cert. denied*, 124 S.Ct. 67 (2003). "[R]eview of the sufficiency of the evidence is governed by

strict principles of deference to a jury's findings ... ." *United States v. Anderskow*, 88 F.3d 245, 251 (3d Cir. 1996) (citations and internal quotes omitted). A verdict will be overturned "only if no reasonable juror could accept evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." *Id.* (citations and internal quotes omitted).

### Discussion

The defendant presented no evidence at trial, nor did he contest four of the five elements of the offense in any manner.<sup>1</sup> The sole basis of the defense motion is the assertion that the Government failed to prove beyond a reasonable doubt the final element of the offense, namely that prior to returning to the United States the defendant had not obtained appropriate permission for reentry. The basis of the defendant's contention is the change in law effected by the Homeland Security Act of 2002 (Pub.L.No. 107-296, 116 stat. 2135) (the "Act"). According to the defendant, the Act altered the offense of conviction because the Act transfers authority for immigration control to the Secretary of Homeland Security, acting through the Under Secretary for Border and Transportation Security. See 6 U.S.C. §§ 202, 251. Thus, by the defendant's logic, where the precise language of 8 U.S.C. § 1326(a) states that it is unlawful for an alien to enter, or attempt to enter the United States, "unless ... prior to his reembarkation at a place outside the United States or his application for admission

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<sup>1</sup>The elements of the offense are (1) that the defendant is an alien, (2) that the defendant had been deported from the United States, (3) that after deportation the alien was again found in the United States, (4) that the alien knew that he was in the United States, and (5) that prior to returning to the United States no appropriate official of the United States had expressly consented to the alien's readmission to the country. See 8 U.S.C. § 1326.

from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission[,]" the law now actually requires consent to be given by the Under Secretary for Border and Transportation Security. (See, e.g., D.I. 32 at 5 n.3 (stating that "[e]ven if the Attorney General retains the power to give permission, complete proof on this element would require a showing that the Under Secretary did not give permission."))).

The government counters the defendant's argument by noting that despite the transfer of personnel and assets from the former Immigration and Naturalization Service to the Department of Homeland Security, the requirements and processes associated with immigration control, as set forth in controlling regulations, have remained the same. (D.I. 33 at 3-4.) Moreover, according to the government, the evidence adduced at trial was sufficient for a rational fact-finder to determine beyond a reasonable doubt that no authorized United States official had consented to the defendant's reentry. I am compelled to agree that there was ample evidence from which the jury could determine that *no* authorized official had consented to the defendant's reentry into this country.

First, the jury could readily credit the Certificate of Nonexistence of Record (Gov't Ex. 5), which was submitted signed by a records custodian and demonstrated that a search of the defendant's so-called "alien file" or "A-file," the only place the government would keep a record of an authorization for him to reenter the country (see Transcript at 153-54), showed that no such authorization was of record. See *United States v. Scantleberry-Frank*, 158 F.3d 612, 616-17 (1<sup>st</sup> Cir. 1998), *cert. denied*, 525 U.S. 1158 (1999) ("An INS A-file identifies an individual by name, aliases, date of birth, and

citizenship, and all records and documents related to the alien are maintained in that file.”)

Second, the case agent, Michael Deshaies, testified that he had reviewed the defendant’s A-file and found no record that the defendant had ever applied to any government official or agency for permission to reenter the country. (See Transcript at 83-86, 96-100, 151-52.) Since the A-file is the central repository within the entire United States government for information about the alien in question, see *Scantleberry-Frank*, 158 F.3d at 616-17, and since no record of an application to reenter the country was found, “the jury could reasonably infer from the lack of an application in the INS A-file that no such application existed.” *United States v. Blanco-Gallegos*, 188 F.3d1072, 1075 (9<sup>th</sup> Cir. 1999).

Finally, Agent Deshaies testimony about the defendant’s admissions was very telling. The unrebutted testimony of Agent Deshaies was that the defendant admitted to illegally reentering the United States after his deportation, to crossing the border near San Diego, California, without proper authorization, and to deliberately evading immigration authorities. (See Transcript at 80.) The jury could certainly conclude from that testimony that the defendant did not have authority from any official of the United States to lawfully reenter the country. Perhaps singly, but surely in combination, the foregoing items of proof provided substantial evidence to support the jury’s finding the defendant guilty beyond a reasonable doubt.

Conclusion

Accordingly, it is hereby ORDERED that the defendant's motion for judgment of acquittal (D.I. 28) is DENIED.

Kent A. Jordan  
UNITED STATES DISTRICT JUDGE

December 2, 2003  
Wilmington, Delaware