

FILED

November 15, 2004

Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 04-50348
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSHUA KANE FARIAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(3:03-CR-1797-ALL-DB)

Before JONES, BARKSDALE, and PRADO, Circuit Judges.

PER CURIAM:*

Joshua Kane Farias appeals his sentence, following his guilty plea convictions for conspiracy to possess and possession with intent to distribute 50 kilograms or more of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 846. He contends the district court erred in imposing a two-level enhancement pursuant to U.S.S.G. § 3B1.4 for using his two minor children to avoid detection of his offenses.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

The district court's application of the Sentencing Guidelines is reviewed *de novo*; its factual findings for clear error. *E.g.*, ***United States v. Ocana***, 204 F.3d 585, 588 (5th Cir. 2000). Farias admitted that he was instructed to take his children on drug-smuggling trips to avoid detection by law enforcement, and his children accompanied on two such trips. He failed to provide any other plausible explanation for taking his children with him on those trips. The district court did not clearly err. *See* ***United States v. Alarcon***, 261 F.3d 416, 423 (5th Cir. 2001).

Farias also contends, for the first time on appeal, that the increase of his sentence due to drug quantity was improper under ***Blakely v. Washington***, 124 S. Ct. 2531, 2537 (2004), because those facts were not alleged in the indictment and not found beyond a reasonable doubt by the district court or admitted by him. As Farias concedes, this contention is foreclosed by ***United States v. Pineiro***, 377 F.3d 464, 473 (5th Cir. 2004), *petition for cert. filed*, (U.S. 14 July 2004) (No. 04-5263).

AFFIRMED