

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40486
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SAUL ANTONIO PORRAS, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. L-01-CR-663-ALL

March 19, 2003

Before REAVLEY, SMITH and STEWART, Circuit Judges.

PER CURIAM:*

Saul Antonio Porras, Jr., appeals his sentence upon his guilty-plea conviction of possessing methamphetamine with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1). We AFFIRM.

For the first time on appeal Porras contends that, in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), § 841(a) and (b) are unconstitutional. Porras concedes that his argument is

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

foreclosed by United States v. Slaughter, 238 F.3d 580 (2001), and he presents the claim only to preserve it for Supreme Court review.

Porras argues, also for the first time on appeal, that because under Apprendi the type of controlled substance involved is an element of the offense, the factual basis was insufficient to support his plea since he admitted only that he intended to possess marijuana. The court recently rejected this argument in United States v. Gamez-Gonzalez, ___ F.3d ___ (5th Cir. Jan. 27, 2003, No. 02-40297), 2003 WL 168650 at *3-*4.

Porras contends that the district court erred by denying his request for a two-level downward adjustment under U.S.S.G. § 3B1.2(b) because of his minor role in the offense as a mere courier. The record refutes Porras's assertion that he requested and was refused a § 3B1.2 adjustment in the district court, thereby preserving the issue for review; and the district court's not making the adjustment did not constitute plain error. See United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994)(en banc).

The judgment of the district court is AFFIRMED.