

FILED

June 22, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 03-51283
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BERNARDINO GARCIA-ALVAREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-03-CR-1160-ALL-PM

Before BARKSDALE, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Bernardino Garcia-Alvarez appeals his sentence for possession with intent to distribute 50 kilograms or more of marijuana, in violation of 21 U.S.C. § 841. He argues that the waiver-of-appeal provision in his plea agreement is invalid and that the court clearly erred in denying him a two-level reduction in his offense level pursuant to U.S.S.G. § 3B1.2(b).

The district court did not explain the waiver-of-appeal provision to Garcia at the guilty-plea hearing to insure that

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Garcia understood the consequences of the waiver, nor did the court ask him whether he had read the plea agreement and understood it. See United States v. Robinson, 187 F.3d 516, 517 (5th Cir. 1999). Therefore, the waiver was not knowingly and voluntarily made. See id.

The district court did not misapply the guidelines nor clearly err in determining that Garcia was not entitled to an adjustment based on his role in the offense. Garcia has not shown by a preponderance of the evidence that there was another person involved in the offense. See United States v. Brown, 54 F.3d 234, 241 (5th Cir. 1995); U.S.S.G. § 3B1.2, comment. (n.2). Nor has he provided any evidence to rebut the probation officer's finding that there was no information to substantiate or corroborate the existence of a more culpable person in this transaction. Therefore, it was not clear error for the court to adopt that finding. See Brown, 54 F.3d at 241.

AFFIRMED.