

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

January 9, 2019

Lyle W. Cayce
Clerk

No. 16-50841
Summary Calendar

Consolidated with 17-50040

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARCO ANTONIO DELGADO,

Defendant-Appellant

Appeals from the United States District Court
for the Western District of Texas
USDC No. 3:12-CR-2106-1

Before JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM:*

A jury convicted Marco Antonio Delgado of one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956. The district court sentenced Delgado to 240 months of imprisonment and three years of supervised release. This court vacated Delgado's sentence and remanded for resentencing. *See United States v. Delgado*, 608 F. App'x 230 (5th Cir. 2015).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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On remand, the district court recalculated the guidelines range and resentenced Delgado to 192 months of imprisonment, below the advisory range of 210 to 240 months. Delgado challenges his sentence on appeal.

As an initial matter, Tiffany Talamantez, who was appointed after the Federal Public Defender withdrew from representing Delgado, has filed a motion to withdraw as counsel. Delgado has filed an opposition to Talamantez's motion to withdraw, with an incorporated motion to proceed pro se on appeal. A panel of this court previously denied a request by Delgado to proceed pro se on appeal, and Delgado offers no compelling reason for the court to reconsider its decision. Delgado's contention that Talamantez has refused to assist his pursuit of various issues does not warrant relieving appointed counsel. *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983); *United States v. Fields*, 483 F.3d 313, 351-53 (5th Cir. 2007). Similarly, counsel has not shown "that there is a conflict of interest or other most pressing circumstances or that the interests of justice otherwise require relief of counsel." *See FIFTH CIRCUIT PLAN FOR REPRESENTATION ON APPEAL UNDER THE CRIMINAL JUSTICE ACT* § 5(b); *see also* 18 U.S.C. § 3006A(c). Given that briefs have been filed on Delgado's behalf by both the FPD and Talamantez, and the Government has filed a responsive brief, the issues raised in the pending motions do not suggest the existence of a conflict that risks compromising Delgado's representation. *See Fields*, 483 F.3d at 350; *cf. United States v. Wagner*, 158 F.3d 901, 902-03 (5th Cir. 1998). Accordingly, the pending motions are DENIED.

In the briefs filed by the FPD and Talamantez, Delgado argues that the district court erred by concluding that he abused a position of trust in a manner that warranted a two-level increase to his offense level pursuant to U.S.S.G. § 3B1.3 (2013). He also argues that the district court erred by finding that he held an aggravating role in the offense that warranted a three-level increase

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pursuant to U.S.S.G. § 3B1.1(b). Finally, he challenges the substantive reasonableness of his sentence.

This court reviews the district court's interpretation and application of the Guidelines de novo and its factual findings for clear error. *See United States v. Juarez-Duarte*, 513 F.3d 204, 208 (5th Cir. 2008). Regarding Delgado's challenge to the substantive reasonableness of his sentence, the district court's decision is reviewed under the abuse of discretion standard, and his below-guidelines sentence is presumed reasonable. *See Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Murray*, 648 F.3d 251, 258 (5th Cir. 2011); *United States v. Campos-Maldonado*, 531 F.3d 337, 338 (5th Cir. 2008).

The Guidelines provide a two-level offense level increase “[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense.” § 3B1.3. As an attorney, Delgado occupied a position of public trust. *See United States v. Harrington*, 114 F.3d 517, 519 (5th Cir. 1997). He used that position to significantly facilitate the commission of the offense, as he prepared false settlement documents for a co-conspirator to tender to law enforcement officials to explain the source of \$1 million dollars, used his law firm email address to transmit documents, used his law firm's bank account to wire money, provided misrepresentations regarding the number of employees in his law firm, appeared at an arbitration hearing in Houston, Texas, and arranged a meeting with a lawyer in the Turks and Caicos Islands. Thus, the district court did not clearly err in applying § 3B1.3. *See* § 3B1.3; *United States v. Roussel*, 705 F.3d 184, 199 (5th Cir. 2013); *United States v. Ollison*, 555 F.3d 152, 164-65 (5th Cir. 2009).

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A three-level increase is warranted where “the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive.” § 3B1.1(b). When assessing whether an organization is “otherwise extensive,” all persons involved during the course of the entire offense are to be considered. § 3B1.1 (comment. (n.3)). While Delgado disputes the district court’s application of § 3B1.1(b) and contends that he did not exercise control over anyone other than co-conspirator Victor Pimentel, he does not refute the considerable facts set forth in the PSR that establish that the money laundering scheme was extensive and involved five or more participants. Accordingly, the district court’s application of § 3B1.1(b) was not clear error. *See* § 3B1.1(b) (comment. (n.3)); *United States v. Cabrera*, 288 F.3d 163, 173 (5th Cir. 2002).

With regard to Delgado’s challenge to the substantive reasonableness of his sentence, the district court provided detailed reasons for Delgado’s sentence, clearly explaining its rationale at length and in light of the sentencing considerations set forth in 18 U.S.C. § 3553(a). While Delgado relies upon a guidelines amendment to challenge the substantive reasonableness of his sentence, he also concedes that the guidelines amendment that he relies upon did not apply retroactively. Delgado’s challenge to substantive reasonableness is essentially a request that this court reweigh the § 3553(a) factors, which this court will not do. *See Gall*, 552 U.S. at 51. Given the significant deference that is due to the district court’s sentencing decision, Delgado has failed to rebut the presumption of reasonableness that applies to his below-guidelines sentence. *See United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009); *Campos-Maldonado*, 531 F.3d at 339.

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The judgment of the district court is AFFIRMED. All pending motions are DENIED.