

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

October 12, 2023

Lyle W. Cayce
Clerk

No. 22-50753

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

VICTOR RAUL LOZANO, JR.,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:22-CR-66-1

Before SMITH, SOUTHWICK, and HIGGINSON, *Circuit Judges.*

PER CURIAM:*

Victor Raul Lozano, Jr. pleaded guilty to possession of ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and was sentenced to a within-guidelines sentence of 46 months of imprisonment. On appeal, Lozano argues that the district court erred by applying an enhanced offense level under U.S.S.G. § 2K2.1(a)(4)(B) upon the finding that he constructively possessed a large-capacity handgun.

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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We review a district court’s interpretation or application of the Sentencing Guidelines de novo and its findings of fact for clear error. *United States v. Juarez-Duarte*, 513 F.3d 204, 208 (5th Cir. 2008). Clear error review is “deferential,” and a factual finding needs “only . . . to be plausible in light of the record as a whole” to be upheld. *United States v. Abrego*, 997 F.3d 309, 312 (5th Cir. 2021) (internal quotation marks and citation omitted).

The Government has the burden to demonstrate, “by a preponderance of the evidence, the facts necessary to support an elevated base offense level.” *United States v. Luna-Gonzalez*, 34 F.4th 479, 480 (5th Cir. 2022). In general, a presentence report (PSR) “bears sufficient indicia of reliability to be considered as evidence by the sentencing judge in making factual determinations.” *United States v. Nava*, 624 F.3d 226, 231 (5th Cir. 2010) (internal quotation marks and citation omitted). Therefore, a district court may adopt, without further inquiry, the facts contained in a PSR to support an offense level enhancement. *United States v. Rome*, 207 F.3d 251, 254 (5th Cir. 2000). If the defendant challenges the facts presented in the PSR, he has the burden of showing that they are “materially untrue, inaccurate or unreliable.” *Abrego*, 997 F.3d at 312 (internal quotation marks and citation omitted). Such challenges substantiated only by “unsworn assertions . . . are unreliable and should not be considered.” *United States v. Lghodaro*, 967 F.2d 1028, 1030 (5th Cir. 1992).

Based on the facts presented in the PSR, there was “at least a plausible inference that [Lozano] had knowledge of and access to” the large-capacity handgun at issue, as was the required showing here for constructive possession. *United States v. Hinojosa*, 349 F.3d 200, 204 (5th Cir. 2003) (internal quotation marks and citation omitted); *see also United States v. Prudhome*, 13 F.3d 147, 149 (5th Cir. 1994) (reviewing a challenge to the sufficiency of the evidence and stating that the evidence supported an inference of constructive possession of the firearm in the vehicle because the

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defendant “was driving, the gun was located directly under his seat, and he had three rounds of matching ammunition in his waist pouch”). Lozano’s unsworn assertions to the contrary were not sufficient to rebut the reliable evidence presented in the PSR which supported the district court’s factual findings. *Lghodaro*, 967 F.2d at 1030.

AFFIRMED.