

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

March 27, 2024

Lyle W. Cayce
Clerk

No. 23-10636
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RICHARD LEE ORTIZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:23-CR-1-1

Before BARKSDALE, ENGELHARDT, and WILSON, *Circuit Judges*.

PER CURIAM:*

Richard Lee Ortiz contests his sentence following his guilty-plea conviction for conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. §§ 846 (prohibiting conspiracy), 841(a)(1) (prohibiting distribution of controlled substance), 841(b)(1)(B) (outlining penalty). He asserts the district court erred in applying a two-level

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

No. 23-10636

enhancement under Sentencing Guideline § 2D1.1(b)(1) (“If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.”).

Although post-*Booker*, the Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 46, 51 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence is reviewed for substantive reasonableness under an abuse-of-discretion standard. *Id.* at 51; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed *de novo*; its factual findings, only for clear error. *E.g., United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). “The district court’s determination that § 2D1.1(b)(1) applies is a factual finding reviewed for clear error.” *United States v. King*, 773 F.3d 48, 52 (5th Cir. 2014) (citation omitted).

Where, as here, a codefendant possessed the weapon, the enhancement applies if “the defendant could have reasonably foreseen that possession”. *United States v. Hooten*, 942 F.2d 878, 882 (5th Cir. 1991). Foreseeability may be inferred “from the coparticipant’s knowing possession of the weapon”. *Id.* Additionally, a codefendant’s use of a firearm is generally considered “foreseeable because firearms are tools of the trade in drug conspiracies”. *United States v. Mergerson*, 4 F.3d 337, 350 (5th Cir. 1993) (citation omitted).

The record shows: Ortiz’ codefendants agreed to transport methamphetamine from Ortiz’ residence on his behalf; police observed Ortiz and codefendants leave Ortiz’ residence in separate vehicles; as police followed the codefendants, the police observed codefendants throwing objects, later revealed as including methamphetamine, out of their vehicle; and a shotgun was found on the back seat of codefendants’ vehicle. In the

No. 23-10636

light of this record, the court plausibly inferred the codefendants' possession of the firearm was reasonably foreseeable to Ortiz. *E.g., King*, 773 F.3d at 52–55; *Mergerson*, 4 F.3d at 350. Ortiz fails to show the requisite clear error. *See United States v. Zuniga*, 720 F.3d 587, 590 (5th Cir. 2013) (“We will find clear error only if a review of the record results in a definite and firm conviction that a mistake has been committed.” (citation omitted)).

AFFIRMED.