

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-1099
Summary Calendar

United States of America,

Plaintiff-Appellee,

VERSUS

John Joseph Adams,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas

(CR3 91 081 R)

(December 29, 1992)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge*:

John Joseph Adams plead guilty to possession with intent to distribute a controlled substance and to a violation of firearms law. In his appeal, he challenges the decision of the trial court to increase his sentence level by three for his managerial role,

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

and its finding that he did not accept personal responsibility for his criminal conduct. We affirm.

Facts and Prior Proceedings

John Joseph Adams plead guilty to an indictment charging possession with intent to distribute a controlled substance and to an information charging violation of firearms laws. The Presentence Report (PSR) recommended a base offense level of 26, however, because a dangerous weapon was involved, the PSR recommended a 2-level increase. In addition, an increase by 3 levels was recommended because Adams was considered the manager of a criminal activity involving five or more persons. A downward adjustment of 2 levels was recommended for Adams' acceptance of responsibility. The total sentence recommended was between 87 and 108 months. The government objected to the PSR's recommended reduction for acceptance of responsibility, and Adams objected to the recommended increase for manager status. The district court did not award the 2-level reduction for acceptance of responsibility, but did increase the offense level by 3 for Adams' managerial role. The district court sentenced Adams to 120 months imprisonment and 5 years supervised release. Adams timely appealed.

Discussion

1. Acceptance of Responsibility

Adams argues that he should have been given a 2-level

reduction for acceptance of responsibility. Whether a defendant has accepted responsibility under U.S.S.G. § 3E1.1(a) is a factual finding subject to the clearly erroneous standard of review. **U.S. v. Alfaro**, 919 F.2d 962, 964 (5th Cir. 1990). In addition, the defendant bears the burden of proof as to mitigating or sentence-reducing factors. **U.S. v. Cuellar-Flores**, 891 F.2d 92, 93 (5th Cir. 1989). The appellate court heavily defers to the trial court's decision regarding acceptance of responsibility because of its ability to weigh the defendant's credibility and contrition. **U.S. v. Brigman**, 953 F.2d 906, 908-09 (5th Cir. 1992). The district court's decision to deny Adams the 2-level decrease for acceptance of responsibility is not clearly erroneous. The record indicates that at the sentencing hearing, Adams' cooperation in naming drug customers and suppliers was not confirmed by Agent Juvrud. In addition, Adams admitted that he had failed to reveal to the DEA agent or to the prosecutor that he had hidden amphetamine oil around a farmhouse where he was setting up a lab. A defendant must accept responsibility for all conduct related to the criminal activity. **Alfaro**, 962 F.2d at 968. The failure to recognize or admit involvement in criminal activities can undermine a defendant's credibility. **See Id.** Further, when a defendant fails to disclose significant information, the sentencing court may disregard a defendant's assertion that he fully cooperated. **U.S. v. Gonzalez-Basulto**, 898 F.2d 1011, 1013-14 (5th Cir. 1989). "...[T]he 2-level reduction is not automatically available simply because a defendant says at the sentencing hearing that he is sorry

and that he accepts personal responsibility for his criminal conduct. His statements and actions, both before and during the sentencing hearing, must convince the trial judge that the defendant's remorse and acceptance of responsibility are sincere." **Alfaro**, 919 F.2d at 968.

Adams bore the burden of proof since he was seeking a decrease in the sentence level. **See Cuellar**, 891 F.2d at 93. In reviewing the record as a whole, we cannot say that the district court committed clear error by finding that the defendant did not demonstrate an acceptance of personal responsibility given the testimony of Agent Juvrud and Adams' own admission that he failed to reveal other related criminal activity.

2. Managerial Role

Adams argues that the district court erred in finding that he was the manager of the criminal activity which resulted in his offense level being increased by 3 levels.¹ Adams claims the evidence is insufficient to support a finding that he was a manager. He alleges that the PSR's recommendation of managerial status was supported only by unsubstantiated hearsay admissions

¹ U.S.S.G. § 3B1.1(c); A 3B1.1 enhancement is authorized if the defendant acts as "an organizer, leader, manager, or supervisor" in the offense. Among the considerations suggested by § 3B1.1(c)'s commentary in determining whether the defendant had a managerial role are planning, organizing, recruitment of accomplices, and the scope of the illegal activity. § 3B1.1, comment (n.3). We have interpreted this section to apply only if four other individuals are involved in the specific offense to which the defendant pleaded guilty. **Alfaro**, 919 F.2d at 967. Each participant is not required to have committed each element of the offense, but should have played some role in bringing about the offense charged. **Id.**

offered by the case agent; that the PSR recommendation was also based on statements of his codefendants which are no more credible than his own testimony; and finally that the number of participants in the criminal activity was calculated based on "customers" as opposed to participants. We review the district court's factual findings for clear error. **U.S. v. Alfaro**, 919 F.2d 962, 964 (5th Cir. 1990).

A reviewing court will affirm an upward departure that is within statutory limits so long as the departure does not constitute a gross abuse of discretion. **U.S. v. Murillo**, 902 F.2d 1169, 1171 (5th Cir. 1990) (citation omitted). When the district court departs from the guidelines, the court must give reasons justifying the upward departure. **Id.** at 1172. If the reasons are "acceptable" and "reasonable," this court will affirm. **Id.** (citations omitted). A district court may consider hearsay evidence when making sentencing determinations, so long as the evidence has "sufficient indicia of reliability to support its probable accuracy." **Cuellar-Flores**, 891 F.2d at 93 (internal quotations and citation omitted); U.S.S.G. § 6A1.3(a). Further, the PSR is reliable evidence at a sentencing hearing. **U.S. Billingsley**, 92-8195 (5th Cir. Nov. 18, 1992) (citations omitted).

The district court based its finding in part on the PSR but also on the testimony of Agent Juvrud. The court noted that all those involved in the criminal activity consistently stated that John Adams was one of the leaders. Further, despite Adams' assertion that he was not the manager of a 5-person drug operation,

he signed a factual resume confirming the he "used" several others to distribute the amphetamine. While Adams denied a supervisory role in the criminal activity as indicated by his objections to the original PSR, Adams' offers only his own testimony denying that he was a manager or supervisor. Adams offers no other evidence. In addition, Agent Juvrud testified during the sentencing hearing that he had interviewed most of those involved with the drug activity and that this information led him to conclude that Adams was one of the managers or supervisors.²

Adams has failed to demonstrate that the information in the PSR was materially untrue, and further, the district court's reliance on the testimony of Agent Juvrud and the PSR, rather than Adams own testimony, is a credibility question best left for the trial judge. **Alfaro**, 919 F.2d at 967. It is clear from the wealth of support listed above that the district court's judgment to upwardly depart was not clearly erroneous.

Conclusion

We affirm the sentencing decision of the trial court.

² Juvrud testified that Wimbush, Grimes and Lewis indicated that they were the distributors; that Hays and Brown guarded the laboratory; and that Calvery and Palmer's exact roles in the operation were not clarified. Including Adams and his co-organizer, Walker, in the number of participants, it is apparent from the record that the enterprise involved at least five persons.