IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1330
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FELIPE GUZMAN and
JESUS VALENZUELA,

Defendants-Appellants.

Appeals from the United States District Court
For the Northern District of Texas
(CR 4 91 124)

(March 11, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Defendants-Appellants Felipe Guzman and Jesus Valenzuela appeal both their jury convictions and their sentences on drug conspiracy and distribution charges. Specifically, Valenzuela

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[*]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

challenges the sufficiency of the evidence to sustain his guilty verdict, and to support an increase in his offense level for obstruction of justice and a denial of a decrease for minimal participation; and Guzman challenges the quantity of cocaine upon which his offense level was based and the propriety of increasing his offense level for the presence of a firearm. Finding no reversible error, we affirm.

I

PROCEEDINGS

Along with co-defendant Eloy Rubio, Defendants-Appellants Guzman and Valenzuela were charged in a five-count indictment with cocaine conspiracy, distribution, and distribution within 1000 feet of a playground. Rubio pleaded guilty to one count in exchange for the government's dismissal of all remaining charges against him. Guzman pleaded guilty to the four distribution counts but went to trial on the conspiracy count, of which the jury found him guilty. Valenzuela went to trial on all five counts and was found guilty.

The district court sentenced Guzman to serve five concurrent 200-month prison terms and a combination of five and six-year terms of supervised release, all concurrent. The court sentenced Valenzuela to serve five concurrent 235-month prison terms and a combination of five and six-year terms of supervised release, all concurrent.

II

FACTS AND ANALYSIS

A. Sufficiency of the Evidence - Valenzuela

Valenzuela claims that the evidence was insufficient to prove either that he conspired to distribute cocaine or that he distributed it. On such claims, we examine the evidence in the light most favorable to the government, making all reasonable inferences and credibility choices in favor of the verdict. The evidence is sufficient if a reasonable trier of fact could have found that it established guilt beyond a reasonable doubt. Every reasonable hypothesis of innocence need not be excluded; neither need the evidence be entirely inconsistent with innocent conduct. United States v. Vasquez, 953 F.2d 176, 181 (5th Cir.), cert. denied, 112 S.Ct. 2288 (1992).

To prove the conspiracy count, the government had to show that an agreement to violate the drug laws existed, and that the defendant knew about it and voluntarily joined and participated in it. United States v. Salazar, 958 F.2d 1285, 1291 (5th Cir.), cert. denied, 113 S.Ct. 185 (1992). The evidence may be direct or circumstantial. United States v. Valdiosera-Godinez, 932 F.2d 1093, 1095 (5th Cir. 1991). The agreement may be inferred from concert of action. Id. Voluntary participation may be inferred from a collocation of circumstances. Id. Circumstantial evidence may prove guilt beyond a reasonable doubt without excluding every reasonable hypothesis of innocence. United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982), (en banc), aff'd, 462 U.S. 356

(1983). A conspirator may be held liable for the substantive acts of a co-conspirator as long as the acts were reasonably foreseeable and done in furtherance of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 647-48, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946); United States v. Maceo, 947 F.2d 1191, 1198 (5th Cir. 1991), cert. denied, 112 S.Ct. 1510 (1992).

At trial, Texas Department of Public Safety officers Vandygriff and Perry described transactions in which Vandygriff, working undercover in Fort Worth, purchased cocaine from Rubio and Guzman. After one of the purchases, officers followed Guzman, who was carrying the cash proceeds of the sale, to a house at 3136 Stanley Street. Officers observed Guzman taking a small sack into the house.

Vandygriff explained that a narcotics operation typically maintains a "dope house" and a "money house." Before distribution, the narcotics are stored at the dope house. After distribution, the proceeds are kept at a separate location, the money house, to protect the cash in case the dope house is searched.

Officers obtained a warrant to search the Stanley Street house. Valenzuela was there at the time. Officers found two notebooks in the house. The notebooks list names (including "Felipe") as well as numbers (that appear to represent quantities of drugs and amounts of money). A loose page has similar notations.

Officers also found a card bearing the handwritten name "Felipe" and a pager number. The number was that of Guzman's

pager.

A trunk or footlocker found in the house contained three sacks of cash totaling over $83,000. Valenzuela directed an officer to the keys to the trunk.

A wad of approximately 100 $20 bills was found in a shirt which belonged to Valenzuela. Another wad of money of an unspecified amount was found in a black nylon bag in a closet.

A car parked in the garage of the house contained a sack holding approximately $5,000 cash. The car was registered to Valenzuela. He had been observed driving that car two days before the search.

No cocaine or drug paraphernalia was found in the house. Valenzuela was arrested at the time of the search.

After informing Valenzuela of his Miranda[1] rights, an officer asked him if he sold cocaine or was involved in cocaine trafficking. The officer testified, "He replied that he didn't sell cocaine; that he just took care of the money." The officer stated that Valenzuela admitted keeping watch over the trunk but said that others had placed the money there. Valenzuela did not know the amount of money contained in the trunk. One of the persons who put money into the trunk was named Felipe.

The officer further testified that he was told by Valenzuela that he lived in the house rent-free in exchange for taking care of the money. According to the officer, Valenzuela said that his

[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

father-in-law let him live there and also paid him an allowance for food and clothing.

Valenzuela himself testified at trial that he lived in the house rent-free as part of his compensation as an employee of his father-in-law's satellite antenna business. The cash found in the house belonged to his father-in-law, he stated. Valenzuela testified that he was not there to guard the money and that Guzman did not put any money into the trunk. Valenzuela also denied at trial that any money was in a shirt at the time of the search.

Despite Valenzuela's denials, the evidence was more than sufficient to show the existence of a conspiracy. The physical evidence found in the search, as well as Valenzuela's statements at the time of the search, showed that he knew about the conspiracy and voluntarily participated in it. The evidence of Valenzuela's guilt on the conspiracy count was sufficient.

The large amounts of cash found in the house, in addition to the drug ledgers, showed a reasonable foreseeability that, in furtherance of the conspiracy, Valenzuela's co-conspirators would distribute drugs. The evidence of Valenzuela's guilt on the distribution counts, therefore, was also sufficient.

B. Sentencing Guidelines Issues

The remaining issues related to the Sentencing Guidelines. We review a Guidelines sentence to determine whether the district court correctly applied the Guidelines to factual findings that are not clearly erroneous. United States v. Manthei, 913 F.2d 1130, 1133 (5th Cir. 1990). A clearly erroneous finding is one that is

not plausible in light of the record viewed in its entirety. Anderson v. City of Bessemer City, 470 U.S. 564, 573-76, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Legal conclusions regarding the Guidelines are reviewed de novo. Manthei, 913 F.2d 1133.

1. Obstruction of Justice - Valenzuela

Valenzuela argues that the district court should not have increased his offense level for obstruction of justice based on his perjury at trial. Valenzuela relies on a Fourth Circuit case holding that such an increase is improper. United States v. Dunnigan, 944 F.2d 178, 182-85 (4th Cir. 1991), cert. granted, 112 S.Ct. 2272 (1992). The Supreme Court heard argument in Dunnigan on December 2, 1992. 1992-93 PREVIEW 152 (WESTLAW SCT-PREVIEW).

This circuit, however, has expressly rejected Dunnigan. United States v. Collins, 972 F.2d 1385, 1414 (5th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3446, No. 92-964 (Dec. 7, 1992). We are in agreement with the overwhelming majority of circuits. Id. As we have decided that an obstruction of justice increase may be based on perjury at trial, this issue has no merit.

2. Minimal Participation - Valenzuela

Valenzuela briefly argues that he should have been given a reduction for minimal participation. Section 3B1.2 of the Guidelines, captioned "Mitigating Role," provides for a four-level reduction for a minimal participant. U.S.S.G. § 3B1.2. A minimal participant is among the least culpable of those involved. Ignorance of the scope and structure of the criminal operation and

of the activities of others are indicia of minimal participation, as is the performance of a single, isolated act of little significance. U.S.S.G. § 3B1.2, comment. (nn.1-2). The defendant bears the burden of proof of mitigating factors. United States v. Cuellar-Flores, 891 F.2d 92, 93 (5th Cir. 1989). The district court's determination is a factual finding. United States v. Badger, 925 F.2d 101, 104 (5th Cir. 1991).

Valenzuela's sole basis for his claim to the reduction is that his insufficient evidence argument shows that he was a minimal participant. His continuous participation in the conspiracy by holding the object of the conspiracy--money--shows that he was not merely a minimal participant.

Valenzuela also briefly argues that his sentence should have been reduced because the evidence was insufficient. If the evidence were insufficient, however, the remedy would be reversal of the conviction, not reduction of the sentence. At any rate, we have already determined that the evidence was not insufficient.

3. Quantity of Cocaine - Guzman

Guzman argues that his sentence was based on too large an amount of cocaine. He insists that the sentence should have been based on only 1,328.11 grams of cocaine, which was the amount that he actually sold to Vandygriff. He claims that the district court should not have considered an undelivered ten-kilogram amount or an amount estimated on the basis of cash found in Valenzuela's house.

The sentencing court based Guzman's sentence on 15 kilograms. The court expressly included in the 15-kilogram amount the ten

kilograms that were not delivered as well as an additional amount calculated on the basis of the cash found at Valenzuela's house.

Guzman was sentenced on April 3, 1992. At that time U.S.S.G. § 2D1.4 (1991) was in effect. That section was deleted by consolidation effective Nov. 1, 1992. U.S.S.G. App C, ¶ 447 (1992). Section 2D1.4 provided, "If a defendant is convicted of a conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed."

Vandygriff testified that he discussed with Guzman the possibility of making a ten-kilogram purchase. Vandygriff and Rubio met for the purpose of consummating such a sale, but it was called off because an additional undercover officer, not expected by the defendants, was present. Rubio stated that he could consummate such a sale in the future. The district court relied on the testimony about the discussions of a ten-kilogram sale, noting that the men discussed the sale of ten kilograms and that nothing in the record indicated that the parties did not intend to consummate the sale at some time in the future.

Application Note 12 to § 2D1.1, which deals with drug trafficking, specifically cross-referenced § 2D1.4. U.S.S.G. § 2D1.1, comment. (n.12) (1991). According to that Note 12, Section 2D1.4 applied when either the amount seized did not reflect the scale of the offense or the offense involved negotiation to traffick in narcotics. Id.

The district court did not err in finding that Vandygriff had

negotiated with Guzman and Rubio for ten kilograms of cocaine. That court concluded that Guzman's offenses went beyond the cocaine that he actually delivered to Vandygriff. Accordingly, the district court did not err in considering the ten-kilogram amount.

Guzman's PSR also included six kilograms in the calculation of his sentence. The probation officer arrived at the six-kilogram amount by taking the amount of money found at Valenzuela's home, $91,141, and dividing that by the per-kilogram price that Vandygriff had discussed with Rubio and Guzman, which was $15,500. By dividing $91,141 by $15,500, the probation officer determined that approximately six kilograms (actually, 5.88 kilograms) of cocaine must have been involved in the distribution network. The district court adopted this estimate at sentencing.

Vandygriff testified that Guzman told him that a kilogram would cost $16,500 but that in large quantity the price would be $15,500. Vandygriff actually purchased one kilogram from Guzman and Rubio for $16,500.

Estimating the quantity was expressly approved. U.S.S.G. § 2D1.1, comment. (n.2) (1991). The court was instructed to consider such factors as "the price generally obtained for the controlled substance [and] financial or other records." Id. Accordingly, considering six kilograms as part of Guzman's offense was not error.

4. Presence of Firearms - Guzman

Finally, Guzman argues that his sentence should not have been increased for the presence of a firearm. The offense level is

increased by two points "[i]f a dangerous weapon (including a firearm) was possessed" during a drug trafficking crime. U.S.S.G. § 2D1.1(b)(1). "The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1, comment. (n.3). The adjustment may be applied even if the defendant did not use or intend to use the weapon or if the weapon was unloaded or inoperable. United States v. Paulk, 917 F.2d 879, 882 (5th Cir. 1990).

The government may show possession of a weapon by proving either 1) that a temporal and spatial relationship among the weapon, the offense, and the defendant existed, or 2) that the defendant could have reasonably foreseen such possession by a co-defendant. Foreseeability may be inferred from the co-defendant's knowing possession of the weapon and other circumstances. United States v. Hooten, 942 F.2d 878, 882 (5th Cir. 1991). The district court's finding is reviewed for clear error. United States v. Suarez, 911 F.2d 1016, 1018-19 (5th Cir. 1990).

Two firearms were found. A pistol was found underneath the driver's seat in the automobile that was in Valenzuela's garage. Officers also found a handgun in a dresser drawer at Guzman's residence. One and one-half grams of cocaine and $2,470 cash were also found at Guzman's home. Guzman's gun was neither loaded nor operable. The district court based the increase in Guzman's offense level on the presence of both guns.

As the gun, the cocaine, and the cash were found in Guzman's

home, the gun was plausibly related to the drug offenses. As Valenzuela had $91,141 in cash in the same house as the one to which Guzman himself took cash, Valenzuela's possession of a gun for protection was foreseeable. The increase would have been proper had it been based on either gun; it was certainly proper when based on both.

For the foregoing reasons the convictions and sentences of Guzman and Valenzuela are

AFFIRMED.