UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-1398
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ERIC HARRISON,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(CR3 91 366 H)

(December 8, 1992)

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:[1]

I.

Eric Harrison was one of three defendants named in a seven-count indictment. Count 1 charged him with violation of 21 U.S.C. § 846, conspiracy to possess with intent to distribute, and to distribute, cocaine base. Counts 2 through 6 charged Him with distribution of cocaine base, in violation of 21 U.S.C § 841(a)(1). Count 7 charged him with unlawful entry into the United States, in violation of 8 U.S.C. § 1326. Harrison pleaded guilty to count

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

six, in exchange for the government's agreement to drop the other counts raised against him. He now appeals his sentence of 150 months imprisonment. We AFFIRM.

II.

Harrison admitted his involvement in the transactions detailed in counts two, three, and four of the indictment. He denied involvement, however, in the count five transaction. With regard to the count five transaction, the PSR concluded that, on August 14, 1991, an undercover government agent negotiated with Harrison to buy a quarter of a kilogram of cocaine base at noon the next day. On another occasion on August 14, the agent negotiated with one of Harrison's co-defendant's for the same sale. At noon the next day, according to the PSR, Harrison's co-defendants delivered 278.08 grams of cocaine base to the agent. The PSR recommended that the district court include the 278.08 grams of cocaine base in Harrison's relevant conduct calculation. In addition, the PSR recommended that the court not give Harrison a downward adjustment for acceptance of responsibility because he "continue[d] to deny any involvement in the 278.08 grams sale."

Harrison objected to the PSR's version of the count five transaction, claiming that he "played no part in the sale." He admitted to negotiating to sell a quarter kilo of **cocaine powder**, but claimed that the deal fell through. According to Harrison, his co-defendants were entirely responsible for the count five transaction. Harrison therefore recommended that the court not include the 278.08 grams of cocaine base in the relevant conduct calculation. He also recommended that the court grant him a

downward adjustment for acceptance of responsibility.

The district court counted 278.08 grams of **cocaine powder** in Harrison's relevant conduct calculation. This amount translated to roughly two grams of cocaine base. The court denied Harrison's request for a downward adjustment for acceptance of responsibility.

III.

On appeal, Harrison challenges the court's denial of a downward adjustment for acceptance of responsibility. In his view, the court "exonerated Harrison from any responsibility or involvement in the cocaine base transaction." In so doing, according to Harrison, the court eliminated the only possible ground for denying the downward adjustment for acceptance of responsibility. We reject Harrison's characterization of the district court's ruling; in spite of Harrison's protestations, the court adopted the PSR's finding that he was involved in the count five transaction.

The burden of proof is on the defendant to clearly and affirmatively demonstrate acceptance of responsibility. U.S.S.G. § 3E1.1(a); **see U.S. v. Fields**, 906 F.2d 139, 142 (5th Cir.), **cert. denied**, 111 S.Ct. 200 (1990). A defendant is not entitled to the reduction just because he enters a guilty plea. U.S.S.G. § 3E1.1(c); **see U.S. v. Shipley**, 963 F.2d 56, 58 (5th Cir.), **petition for cert. filed**, (Aug. 27, 1992) (No. 92-5687). However, the guilty plea will constitute "significant evidence of acceptance of responsibility" if it is not "outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility." U.S.S.G. § 3E1.1, comment. (n.3). Evidence of a

defendant's inconsistent posture includes "coyness," "lack of candor," "grudging[] cooperat[ion]," and "merely going through the motions of contrition." **U.S. v. Brigman**, 953 F.2d 906, 909 (5th Cir.), **petition for cert. filed**, (Aug. 4, 1992) (No. 92-5417). Importantly, a defendant cannot deny a part of his relevant criminal conduct and still seek a reduction for acceptance of responsibility based only on the portion admitted. **U.S. v. Kleinebreil**, 966 F.2d 945, 953-54 (5th Cir. 1992).

Whether a defendant has accepted responsibility is a factual issue. Such a finding, however, is entitled to even *greater* deference by this Court than that given under a clearly erroneous standard. **See Brigman**, 953 F.2d at 909. Such deference is justified, in part, by the district court's unique vantage point from which it may determine whether acceptance of responsibility has occurred. **Id.**; **see** U.S.S.G. § 3E1.1, comment. (n.5). Although Harrison contends that the district court's finding on this issue is entitled to "no more deferential a standard ... than the deference accorded to any other factual finding," this Court has repeatedly held otherwise. **E.g.**, **Kleinebreil**, 966 F.2d at 953; **Shipley**, 963 F.2d at 58; **Brigman**, 953 F.2d at 909; **U.S. v. Fabregat**, 902 F.2d 331, 334 (5th Cir. 1990).

Our examination of the record reveals that the court's denial of a downward departure for acceptance of responsibility rested on the fact that Harrison was not entirely forthcoming about his involvement in the count five transaction. In recommending against acceptance of responsibility, the PSR noted Harrison's denial of involvement in the count five transaction. At sentencing, Harrison

introduced a transcript of a recorded telephone conversation with the undercover agent the night before, setting up a quarter kilogram deal for the next day at about the same time as the count five transaction. Harrison relied on the fact that the ultimate telephonic agreement was for cocaine powder, not cocaine base. Harrison asserted that the co-indictees were involved in a separate deal which underlay count five. In contrast, he argued, he "was not involved in that transaction and didn't know anything about it."

In its judgment the court adopted the factual findings and guideline application of the PSR, with the exception of the following:

> The Court sets the base offense level of 32 based on 120 grams of cocaine base. The Court does not find that the drugs delivered on 8/15/91 were cocaine base. Therefore, the offense level of 34 is not appropriate.

So the court found that the count five transaction involved the sale of cocaine powder, not base. It therefore included Harrison's involvement in the count five transaction as relevant conduct only to the extent of two grams of cocaine base (the rough translation of 178 grams of cocaine powder). However, the district court found that Harrison was involved in the count five transaction when it adopted the PSR with only the abovementioned exception. Thus Harrison mischaracterizes the district court's ruling when he says that the district court exonerated him of involvement in the count five transaction.

The transcript of the sentencing hearing supports our reading of the district court's ruling. The district court ascertained

that, if Harrison were involved in a transaction dealing with cocaine powder, not cocaine base, his base offense level would be 32, not 34. After further discussion, the district court made its ruling:

> Well, the testimony before me is that it is cocaine and not cocaine base . . . . I am going to take it as an offense level of 32 and a criminal history category of 1. I will not give the acceptance of responsibility and I think that takes care of the objections that you had.

The evidence supports the district court's conclusion that Harrison was involved in the count five transaction. The telephone transcript revealed that Harrison had discussed delivery of roughly the same amount, a "quarter kilo," of "cocaine powder." The delivery of the cocaine base was at the time negotiated by Harrison, and to the same undercover agent. The only difference was that the substance was "cocaine base" and not "cocaine powder." Harrison had indicated that he could have dealt in either substance.

Neither party argues on appeal that the court clearly erred when it determined that the count five transaction involved a delivery of cocaine powder. And neither party argues that the district court improperly applied the relevant conduct guideline.

Harrison argues that the court did not comply with Fed. R. Crim. P. 32(c)(3)(D) when it gave no reasons for denying the reduction for acceptance of responsibility. By adopting the PSR, the court adequately explained its denial of the downward adjustment. Adoption of the PSR will suffice as a resolution of disputed issues. **See U.S. v. Sherbak**, 950 F.2d 1095, 1099 (5th

Cir. 1992). The district court counted Harrison's involvement in count five as relevant conduct only to the extent of two grams of cocaine base (the rough translation of 278 grams of cocaine powder). But the court still credited the PSR's position that Harrison was involved in the count five transaction, and that he had denied that involvement. The finding that Harrison was not entirely forthcoming about his involvement in the count five transaction supports the district court's denial of a downward adjustment for acceptance of responsibility. **U.S. v. Mourning**, 914 F.2d 699, 706 (5th Cir. 1990).

Furthermore, a detailed explanation supporting the district court's determination to deny adjustment for acceptance of responsibility is not mandatory. "Although we believe it is always the better course for the district court to enunciate the reasoning behind . . . decisions [denying such adjustments], we are unwilling to impose that obligation absent an explicit statutory command." **U.S. v. Hardeman**, 933 F.2d 278, 283 (5th Cir. 1991).

AFFIRMED.