IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1409
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EDMUNDO NUNEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
CR3 91 126 T

May 13, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Edmundo Nunez appeals his conviction and sentence following a plea of guilty of distribution of cocaine and possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1), and possession of firearms by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). We affirm the conviction but vacate and remand the sentence because of conceded error.

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

A confidential informant, Manuel Martinez, contacted Alcohol, Tobacco and Firearms ("ATF") agent Ruben Chavez and informed him that Nunez was involved in drug trafficking. In late March 1991, Martinez set up a controlled purchase of two ounces of cocaine from Nunez at Nunez's house. During this purchase, Martinez and Nunez discussed a six-kilogram transaction.

Approximately a week later, Martinez contacted Nunez and informed him that his customers were satisfied with the cocaine sample and wanted to purchase more. Although the officers wanted to complete the next purchase at Nunez's house, Martinez and Nunez arranged to meet in the parking lot of a fast food restaurant. The officers brought Martinez to the parking lot and saw Mario Raz driving Nunez's Blazer. A Lincoln Continental, which had been seen in Nunez's driveway, was also in the parking lot. Nunez and Raz were arrested at the scene, and six kilograms of cocaine were recovered from the Continental.

II.

Nunez was charged in a four-count indictment with distributing two ounces of cocaine (count 1); possession of six kilograms of cocaine with intent to distribute (count 2); possession of heroin with intent to distribute (count 3); and possession of firearms by a felon (count 4). He pleaded guilty to counts 1, 3, and 4.

The probation officer preparing the presentence investigation report ("PSI") recommended using the six kilograms of cocaine from

the dismissed count to calculate Nunez's base offense level. Nunez objected to this calculation because the six kilograms had not been included in the factual resume. He also moved to withdraw his guilty plea, alleging that when he pleaded guilty the government had assured him that the six kilograms would not be used to calculate his base offense level. The district court denied the motion and overruled his objections to the PSI. Nunez was sentenced to concurrent terms of 168 months' imprisonment on counts 1 and 3, and a concurrent term of 120 months' imprisonment on count 4; five years' supervised release; and a $150 special assessment.

III.

A.

Nunez argues that the district court erred in denying his motion to withdraw his guilty plea. The district court may permit a defendant to withdraw his guilty plea before sentencing for any fair and just reason. Fed. R. Crim. P. 32(d). We review the denial of a motion to withdraw for an abuse of discretion. United States v. Bounds, 943 F.2d 541, 543 (5th Cir. 1991). The defendant has the burden of demonstrating that withdrawal of the plea is justified. United States v. Daniel, 866 F.2d 749, 752 (5th Cir. 1989).

Nunez contends that he should have been permitted to withdraw his plea because the government failed to abide by its unwritten promise that the six kilograms of cocaine would not be used to determine his base offense level. At the guilty plea hearing,

however, Nunez informed the district court that he had not received any promises outside the plea agreement. The written plea agreement does not include any promises with respect to sentencing. The record does not support Nunez's contention that he pleaded guilty pursuant to unwritten government promises; the district court did not abuse its discretion by denying the motion to withdraw.

B.

Nunez next argues that the district court improperly considered the six kilograms of cocaine to determine his base offense level. He contends that the district court was not permitted to consider the drug quantities in the dismissed count; that if the court could consider the six kilograms from the dismissed count, the finding had to be supported by clear and convincing evidence; and that there was no clear and convincing evidence to support the six-kilogram finding.

The district court may consider the drugs in dismissed counts to determine a defendant's base offense level. United States v. Ponce, 917 F.2d 846, 848 (5th Cir. 1990), cert. denied, 111 S. Ct. 1398 (1991). We review the district court's factual findings under the "clearly erroneous" standard, and the quantities of drugs outside the count of conviction must be supported by a preponderance of the evidence. United States v. Sherbak, 950 F.2d 1095, 1100 (5th Cir. 1992).

The district court's finding attributing the six kilograms of cocaine recovered from the Continental to Nunez was not clearly erroneous. The evidence established that the initial two-ounce sale was a sample to test the cocaine before making a larger purchase; that Nunez negotiated the terms of the six-kilogram transaction with Martinez, the confidential informant; that Nunez was present when Martinez attempted to purchase the six kilograms of cocaine; and that the six kilograms were recovered from the Continental, which had been parked in Nunez's driveway on numerous occasions and Martinez had seen Nunez driving. Nunez argues that the district court should not have relied upon this evidence because Martinez is an inherently unreliable witness because he admitted keeping $500 of government money. Credibility determinations, however, are within the province of the factfinder. United States v. Pologruto, 914 F.2d 67, 70 (5th Cir. 1990). The evidence is sufficient to support the district court's finding.

C.

Nunez also argues that he was improperly sentenced to five years' supervised release because the statutory maximum for a class C felony is three years' supervised release. The government concedes that the statutory maximum supervised release term was three years, see 18 U.S.C. §§ 3559(a)(3), 3583(b)(2), and therefore that his sentence must be vacated and the case remanded for resentencing. United States v. Kelly, 974 F.2d 22, 24-25 (5th Cir. 1992).

D.

For the first time on appeal, Nunez argues that he was denied effective assistance of counsel. An ineffective-assistance-of-counsel claim cannot be raised on direct appeal unless it has been raised in the district court. United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988). We decline to consider the issue, without prejudice to Nunez's right to raise it in a proper proceeding pursuant to 28 U.S.C. § 2255.

The judgment of conviction is AFFIRMED. The judgment of sentence is VACATED and REMANDED for resentencing.