

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-1499  
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELOY RUBIO,  
a/k/a "Lloyd,"

Defendant-Appellant.

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

(CR4-91-124-A(2))

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(March 11, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:\*

Defendant-Appellant Eloy Rubio appeals the sentence imposed following his conviction, on a plea of guilty, to distribution of cocaine in violation of 21 U.S.C. § 841(a). Specifically, he

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

complains that the sentencing court erred in the quantity of cocaine considered applicable in calculating the sentence, and in denying Rubio a reduction for having a minor role in the offense. Finding no reversible error, we affirm.

## I

### PROCEEDINGS

A five-count indictment charged Felipe Guzman, Jesus Valenzuela, and Rubio with cocaine conspiracy, distribution, and distribution within 1000 feet of a playground. Rubio pleaded guilty to one count of distribution, in exchange for which the other four counts were dismissed as to him. Guzman and Valenzuela went to trial, and were found guilty.

After Rubio's PSR was completed, the court ordered a second PSR because more facts had come to light during the trial of Guzman and Valenzuela. References herein are to Rubio's second PSR, which has a preparation date of April 9, 1992.

The district court sentenced Rubio to 150 months' imprisonment and four years of supervised release. Rubio appeals his sentence.

## II

### FACTS

#### A. Rubio's Conduct

On one occasion in September, 1991, Rubio arranged a \$900 sale of one ounce of cocaine to Texas Department of Public Safety undercover officer James Vandygriff. Rubio took Vandygriff to meet Guzman, who supplied the cocaine to Rubio, who in turn sold it to Vandygriff and gave Guzman the \$900.

That same month Rubio arranged for Vandygriff to purchase two ounces of cocaine from Guzman for \$1800. Vandygriff made the purchase and gave Rubio \$100 for arranging the sale.

Vandygriff unsuccessfully sought to purchase ten kilograms of cocaine from Guzman. With Rubio participating in the negotiations, they planned a ten-kilogram sale at \$15,500 per kilogram. Vandygriff met Rubio to consummate the purchase but, to Rubio's surprise, took him to meet another undercover officer who was carrying \$200,000. Vandygriff showed the money to Rubio and handed it back to the other officer. The three men then drove to meet with Guzman. Rubio talked with Guzman and then called off the sale because of the unexpected presence of the second undercover officer. Rubio told Vandygriff that the sale would have been consummated had the unexpected person not been present.

The PSR is unclear whether it was Rubio or Guzman who called off the sale. Vandygriff, though, testified that Rubio himself called off the sale because of the presence of the extra person and because "he didn't like the way the deal looked." Vandygriff opined that at that time Rubio and Guzman possessed the ten kilograms available for delivery.

Rubio later discussed with Vandygriff a possible ten-kilogram sale. Rubio specified an amount and a price but that transaction was never consummated either.

Later in September, 1991, Vandygriff paid \$4800 to Rubio to purchase 250 grams from Guzman. The following month Rubio arranged a similar sale in which he received a kilogram of cocaine from

Guzman and \$16,500 from Vandygriff, giving the money to the former and the cocaine to the latter. This last transaction is the subject of the count to which Rubio pleaded guilty.

Guzman delivered the \$16,500 from this last sale to Valenzuela's residence. Officers later seized a total \$91,000 in cash there.

In all of the transactions, Vandygriff bought less than one and one-half kilograms of cocaine through Rubio. Vandygriff was of the opinion, however, that such amount was only a small part of the trafficking with which Rubio was involved.

At one point Vandygriff was told by Rubio that he wanted to withdraw as an intermediary and that Vandygriff should deal with Guzman directly. Rubio, however, did not withdraw. Vandygriff attributed Rubio's remaining in the scheme to his becoming comfortable with Vandygriff.

B. PSR's Calculation of the Sentence

The probation officer based Rubio's offense level on 17,328.11 grams of cocaine. The calculation began with the ten-kilogram deal that was discussed but never consummated.

The probation officer added six kilograms. She arrived at that figure by taking the amount of money found at Valenzuela's home, \$91,141, and dividing it by \$15,500, the per-kilogram price that Vandygriff had discussed with Rubio. The probation officer thus determined that six kilograms of cocaine (actually, 5.88 kilograms) must have been involved in the distribution network. That brought the quantity to 16 kilograms.

To that figure the probation officer added 328.11 grams, the amount of cocaine that Vandygriff actually bought in the transactions described above. This figure excludes the one-kilogram sale for \$16,500, which was included in the six-kilogram amount derived from the cash found at Valenzuela's house. The quantity came to a total of 17.32811 kilograms, which yielded a base offense level of 34.

The probation officer 1) added two levels for the presence of firearms that were found at Valenzuela's and Guzman's homes, and 2) deducted two levels for acceptance of responsibility. The increase canceled out the decrease, leaving the recommended offense level at 34. The probation officer calculated Rubio's criminal history category as II, yielding a sentencing range of 168-210 months.

Rubio objected that he did not participate in the negotiations for the ten-kilogram amount, that the delivery of that quantity never took place, and that he was not reasonably capable of making such a delivery. The government responded by describing portions of the conversation between Vandygriff and Guzman that showed Rubio's participation. The government also recounted recorded conversations in which Rubio told Vandygriff about Guzman's supply and suggested a price to Vandygriff. Rubio also assured Vandygriff after the aborted ten-kilogram sale that the transaction could still take place later. The government reprinted a conversation showing that Rubio took a small role in Vandygriff's ten-kilogram negotiation with Guzman.

Rubio also objected to the PSR's failure to recommend that he receive a two-level reduction for taking a minor role in the offense. The government responded that Rubio's role was not minor because he was an indispensable member of the distribution scheme.

Rubio further objected that the six-kilogram figure derived from the amount of money in Valenzuela's house should not be attributed to him because he had no connection with Valenzuela. The government responded that such amount was within the scope of the conspiracy and Rubio should have known that.

C. Sentencing

At sentencing, Vandygriff testified about Rubio's conduct. Rubio's counsel and the AUSA argued the merits of the PSR's calculation.

The court found that Rubio did participate in the discussion of the ten-kilogram amount. The court explained that, although Rubio did not speak during some of the discussion, he did participate, was aware of what was transpiring, and did have some input. The court stated that even though Rubio contends "that he was sort of just standing around," Rubio was "pretty active in these events." The court also found that, at the aborted ten-kilogram sale, Rubio knew that the amount of cocaine to be delivered actually existed and would have been delivered had the unexpected person not been present.

The court further found that the aborted ten-kilogram transaction was part of the same course of conduct as that involved in the offense of conviction. Both transactions were found to be

part of one common scheme. The findings were expressly based not only on a preponderance of the evidence but also on clear and convincing evidence. The court also found that the conspiracy involving Rubio and his co-defendants exceeded the relatively small amount of cocaine that was actually seized.

Rubio asked for a two-point reduction for minor participation on the ground that he had sought to withdraw from the transactions but had been convinced by Vandygriff to stay in. Finding that Rubio had more than a minor role, the district court denied the reduction.

The court found the offense level to be 32 rather than 34. With a criminal history category of II, the 150-months' sentence imposed lies in the middle of the sentencing range of 135-168 months.

### III

#### ANALYSIS

Rubio appeals his sentence. 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 at 1133.

A. Quantity of Cocaine

Rubio argues that the undelivered ten-kilogram amount should not have been attributed to him for sentencing purposes. The gravamen of his argument is, "Only if one is convicted of conspiracy is one liable for amounts negotiated but not delivered."

Rubio's argument is based on U.S.S.G. § 2D1.4 (1991). That section was deleted by consolidation effective Nov. 1, 1992. U.S.S.G. App. C, ¶ 447 (1992). But Rubio was sentenced May 29, 1992, before the deletion. 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." U.S.S.G. § 2D1.4 (1991).

Application Note 1 to § 2D1.4 began by referring to a conspiracy conviction. U.S.S.G. § 2D1.4, comment. (n.1) (1991). It then referred to a conviction "of an offense involving negotiation to traffic in a controlled substance." Id. We have held that such reference meant that § 2D1.4 was not limited to attempts and conspiracies. United States v. Garcia, 889 F.2d 1454, 1456-57 (5th Cir. 1989), cert. denied, 494 U.S. 1088 (1990).

Furthermore, Application Note 12 to § 2D1.1 specifically cross-referenced both § 1B1.3(a)(2) on relevant conduct and § 2D1.4. U.S.S.G. § 2D1.1, comment. (n.12) (1991). According to that note, 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 considered § 2D1.4 because Rubio participated in the negotiation for the sale of the ten kilograms. His presence at and verbal contributions to the negotiation support that finding.

The district court also found that the ten kilograms were part of the same course of conduct as the offense of conviction, making § 1B1.3(a)(2), the relevant conduct section, applicable. The closeness in time of the offense of conviction and the aborted sale, as well as the fact that Rubio, Guzman, and Vandygriff played the same roles in both transactions and that the object of both transactions was the sale of cocaine, support that finding.

Relevant conduct includes "quantities of drugs not specified in the count of conviction if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction." United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990); U.S.S.G. § 1B1.3(a)(2). "One of the clear purposes of § 1B1.3 of the guidelines is to include different transactions that are relevant to the charged conduct, particularly if they are part of a 'common scheme or plan.'" United States v. Woolford, 896 F.2d 99, 104 (5th Cir. 1990). Accordingly, Rubio's base offense level properly included relevant conduct.

Additionally, the district court found that the amount of cocaine seized did not reflect the scale of the offense. The discussions and nearly completed sale of the ten-kilogram amount support that finding. The district court estimated the quantity of the undelivered amount as ten kilograms pursuant to Application

note 2 to § 2D1.4, which provided for such an estimation.

Rubio also argues that the district court clearly erred in finding that ten kilograms were actually available for delivery. Rubio went to some lengths, though, to give Vandygriff the impression that he was able to deliver ten kilograms. Rubio's stated reason for canceling the sale was the presence of the unexpected undercover agent, not the unavailability of the drugs. The district court's finding is plausible in light of the circumstances.

In sum, the Guidelines, as construed by this court, provided for the inclusion of the ten kilograms. The district court did not err in including them.

B. Minor Participation

Rubio argues that he should have been granted a two-level reduction for playing a minor role in the offense. He states, "Eloy Rubio's entire role in the offense was to contact Felipe Guzman."

Section 3B1.2 of the Guidelines, captioned "Mitigating Role," provides for a four-level reduction for a minimal participant and a two-level reduction for a minor 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).

A minor participant is one who is less culpable than most

other participants but whose role is more than minimal. U.S.S.G. § 3B1.2, comment. (n.3). A person having a minor role is not merely less involved than other participants; he must be peripheral to the furtherance of illegal endeavors. United States v. Thomas, 932 F.2d 1085, 1092 (5th Cir. 1991), cert. denied, 112 S.Ct. 887 (1992).

The defendant bears the burden of proof of mitigating factors. United States v. Cuellar-Flores, 891 F.2d 92, 93 (5th Cir. 1989). A district court's determination that a defendant did or did not play a mitigating role is a factual finding. United States v. Badger, 925 F.2d 101, 104 (5th Cir. 1991).

Rubio functioned as an intermediary. He was essential to Guzman's supplying drugs to Vandygriff. His role was not peripheral. The district court's finding was not clearly erroneous.

For the foregoing reasons, Rubio's sentence is, in all respects,  
AFFIRMED.