

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1606
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES E. WEBSTER,
a/k/a Little Man,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. CR-2-90-0034(1)
- - - - -

March 16, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Charles E. Webster argues that the district court committed reversible error because it failed to make a specific finding as to the reliability of the hearsay testimony Agent Jones provided during the resentencing hearing. Webster also argues that the district court denied him due process because he had no opportunity to confront those declarants Jones did not mention were unavailable.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Although Webster alleges that he objected to the hearsay testimony, the transcript of the resentencing hearing does not reflect that he did so. After Jones testified, Webster's attorney acknowledged that the court could consider hearsay in a sentencing hearing but urged the court to disregard much of the evidence Jones provided. Those comments do not amount to a timely objection. See United States v. Navejar, 963 F.2d 732, 734 (5th Cir. 1992) (contemporaneous objection rule applies to sentencing hearings). Furthermore, Webster did not object to the district court's failure to find that the hearsay evidence was reliable. Webster, however, did object to the finding that he knew or reasonably should have foreseen that the conspiracy involved more than two kilograms of cocaine. Because Webster did not preserve the specific error he now raises, this Court must review the record merely for plain error. Navejar, 963 F.2d at 734.

As support for his argument that a district court must make a specific finding as to the reliability of hearsay, Webster relies on United States v. Fortier, 911 F.2d 100 (8th Cir. 1990). In Fortier, the Eighth Circuit held that hearsay statements admitted against a defendant during sentencing violate the Confrontation Clause unless a court finds that the declarant is unavailable and that there are indicia of reliability supporting the truthfulness of the hearsay statements. Id. at 103. The Eighth Circuit, however, overruled this holding in United States v. Wise, 976 F.2d 393 (8th Cir. 1992) (en banc). In that case the Eighth Circuit expressly held that the Confrontation Clause

does not apply to sentencing hearings. Id. at 401. That holding agrees with those of this Court. See, e.g., United States v. Marshall, 910 F.2d 1241, 1244 (5th Cir. 1990), cert. denied, 111 S. Ct. 976 (1991). Nevertheless, due process does require that information relied upon when determining an appropriate sentence have "some minimal indicium of reliability" and bear "some rational relationship" to the decision to impose a particular sentence. United States v. Angulo, 927 F.2d 202, 204 (5th Cir. 1991).

The record reflects that the evidence the district court heard during the resentencing hearing had a minimum indicium of reliability and bore some rational relationship to the decision to impose the sentence Webster received. See id. In any case, Webster did not present any evidence at the resentencing hearing to controvert the evidence Agent Jones provided. Overall, ample evidence supports the district court's finding that Webster knew or reasonably should have known that the conspiracy involved more than two kilograms of cocaine.

The district court's failure to make a specific finding as to the reliability of the hearsay evidence Agent Jones provided during the resentencing hearing does not amount to error, plain or otherwise. Likewise, Webster's argument that the district court denied him due process because he could not confront all the declarants also lacks merit.

AFFIRMED.