

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-1892  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PATRICK W. CLARK,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:92-CR-169-P  
- - - - -

June 24, 1993

Before POLITZ, Chief Judge, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Patrick W. Clark challenges the denial of a reduction in his base offense level for acceptance of responsibility because he admitted the acts alleged not only in Count One of the indictment, but also those of dismissed counts, as well as acts for which he was not charged at all. The guidelines provide for a two-level reduction in the offense level "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct. . . ."

U.S.S.G. § 3E1.1(a). This reduction may be given whether the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

defendant pleads guilty or is found guilty following trial. Id. at § 3E1.1(b). Moreover, while a guilty plea entered before trial combined with truthful admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility, this evidence may be rebutted by conduct that is inconsistent with such acceptance of responsibility. Id. at comment. (n.3).

Because of the sentencing court's unique position to evaluate a defendant's acceptance of responsibility, its conclusions are entitled to greater deference on review than that accorded under the "clearly erroneous" standard. United States v. Garcia, 917 F.2d 1370, 1377 (5th Cir. 1990); see also § 3E1.1, comment. (n.5). Given the findings set forth in the Presentence Investigation Report that Clark initially denied knowing that his conduct was illegal, acknowledged only a portion of his criminal activity, and continued to participate in the criminal activity after his arrest, the district court was not clearly erroneous when it denied Clark the two-level reduction.

Clark also argues that his offense level should not have been increased seven levels based upon seven counts of the second indictment which were dismissed pursuant to the plea agreement and the total dismissal of the first indictment. This Court will uphold a sentence provided that it results from a correct application of the guidelines to factual findings which are not clearly erroneous. United States v. Sarasti, 869 F.2d 805, 806 (5th Cir. 1989).

"This Court has made clear that the guidelines allow consideration of relevant conduct of which the defendant has not been convicted." United States v. Byrd, 898 F.2d 450, 452 (5th Cir. 1990) (citation omitted). Relevant conduct includes the following:

all acts and omissions committed or aided by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense.

§ 1B1.3(a)(1).

Clark does not dispute that the items included in the PSR's loss calculation could be construed as part of the offense of conviction, but instead focuses on the fact that the Government dismissed the indictment. Because Clark need not have been convicted of tampering with the units included in the loss calculation, this argument is without merit. See Byrd, 898 F.2d at 452; see also United States v. Taplette, 872 F.2d 101, 106 (5th Cir.), cert. denied, 493 U.S. 841 (1989).

The judgment is AFFIRMED.