

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-1997
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOHNNY JIMENEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR 243G (06))

(September 21, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:¹

Appellant pled guilty to one count of distribution of cocaine and appeals his sentence challenging the district court's determination of the amount of drugs involved in Appellant's relative conduct. We affirm.

It was undisputed that 1.1 grams of cocaine was involved in the single transaction charged in the count of conviction. The presentence report and the testimony of an ATF agent involved in the investigation of the conspiracy and drug activities which led

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to Appellant's conviction established, however, the following facts:

Having received information from a confidential informant that narcotics were being dispensed by members of the Carrillo-Zapata family, including Jimenez, from 1511 Fairview, Dallas, Texas, ATF agents began surveillance in February of 1992 and continued it for three months. It revealed a continuous pattern of activity: street vendors would negotiate with driver-customers in front of the premises and would then go to a member of the family, including Jimenez, and place the order. The family member would disappear into the house and return with the drugs which would be given to the street vendor who would deliver them to the customer. The funds would exchange hands from the street vendors to the family member. In the count of conviction two undercover agents purchased 1.1 grams of cocaine from Jimenez at this address. However, during the three month surveillance period, Appellant was observed over a period of two months regularly receiving money from street vendors, going into the house, returning to deliver cocaine to the street distributors for money the street vendors got from drive-by customers. Based upon the amount of drugs recovered in sixty arrests of customers as they left the premises during this period, and the number of sales observed, officers estimated that one kilogram of cocaine had been distributed. The sentencing court used that amount of drugs, finding it foreseeable by Appellant, and determined his base offense level accordingly.

Appellant first complains that the district court should have

based his sentence only on the amount of cocaine stipulated by the parties at the time of his guilty plea (1.1 grams). He argues that the district court accepted this stipulation and was bound by it. At Appellant's rearraignment his attorney informed the court that, although the factual statement did not reflect it, the Government had represented to defense counsel that the transaction involved approximately 1.1 grams of cocaine. The Government agreed and the district court asked Appellant "Do you agree that that is the amount that should be considered for sentencing purposes in this case, Mr. Jimenez?" Appellant responded affirmatively.

The guidelines make clear that the district court is not bound by this stipulation of the parties but may determine the facts with the aid of the presentence report and additional evidence taken at sentencing. U.S.S.G. § 6B1.4(d); United States v. Woods, 907 F.2d 1540, 1542 (5th Cir. 1990), cert. denied, 498 U.S. 1070 (1991); United States v. Garcia, 902 F.2d 324, 326 (5th Cir. 1990).

We interpret the district court's comments at rearraignment to mean simply that he acknowledged that the factual resume was supplemented with a stipulation that the offense of conviction involved 1.1 grams of cocaine, and not that he agreed to use that amount in determining the Appellant's base offense level.

Appellant next argues that the district court's finding that one kilogram of cocaine was involved in his relevant conduct is error because the Government did not prove the amount of cocaine or his connection to it by a preponderance of the evidence.

The record establishes that the estimate was based upon solid

evidence of the number of drive-bys, the average cost per buyer, and the numerous arrests made of buyers as they left the premises. Not only was this reflected in the presentence report but was testified to by one of the agents involved. Appellant's involvement in the conspiracy was likewise made clear.

The district court's findings regarding the quantity of drugs to be used in determining the base offense level are factual findings reviewed for clear error. United States v. Mitchell, 964 F.2d 454, 457 (5th Cir. 1992). The burden of proof is a preponderance of the evidence. United States v. Mergerson, 995 F.2d 1285 (5th Cir. 1993). Guidelines § 2D1.4, Comment (n.2), in effect at the time of the sentencing, provides that the sentencing court shall approximate the quantity of the controlled substance involved when the amount seized does not reflect the scale of the offense. Testimony approximating the amount sold which allows the court to fairly calculate the amount is sufficient. United States v. Buckhalter, 986 F.2d 875, 879-80 (5th Cir. 1993), petition for cert. filed, 93-5097 (July 2, 1993).

Appellant also argues that the evidence was insufficient to show that he was involved in the distribution during the entire course of the investigation. But the guidelines clearly provide that "quantities of drugs not specified in the count of conviction may be considered in determining the offense level." U.S.S.G. § 2D1.1, Comment (n.12). Relevant conduct, in the case of conspiracy, makes a defendant accountable for conduct of others that was in furtherance of the jointly undertaken criminal activity

and was reasonably foreseeable in connection with that activity. U.S.S.G. § 1B1.3(a)(1) and Comment (n.1). The evidence at the sentencing hearing and in the presentence report clearly established that the officers observed the conspiracy distributing cocaine from the stated address for a period of three months and that Appellant shuttled cocaine and money between the house and the street level sellers for two of those three months. That evidence was sufficient to show by preponderance of the evidence Appellant's involvement in the conspiracy and that the amounts sold from the house were part of the conspiracy in which he was involved.

Finally Appellant argues that the district court violated Federal Rule of Criminal Procedure 32 by failing to make adequate findings of fact regarding the amount of cocaine for which he was responsible. This Rule requires the sentencing court to make specific findings as to all contested facts in the presentence report which the court finds relevant to sentencing. The court can satisfy this requirement by rejecting a defendant's objection and adopting the report's findings by reference. United States v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992). For adopting of the presentence report to satisfy this requirement the report must specifically address the particular question at issue. United States v. Webster, 960 F.2d 1301, 1310 (5th Cir.), cert. denied, 113 S.Ct. 355 (1992). Such is the case here.

AFFIRMED.