

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 92-2092 & 92-3058
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

IVAN ALEJANDRO GONZALEZ-RELOVA,

Defendant-Appellant.

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Appeals from the United States District Courts
for the Eastern District of Louisiana and
the Southern District of Texas
USDC Nos. 89-442 "H" (5) (E.D. La.) &
H-91-71 (S.D. Tex.)

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March 17, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Ivan Alejandro Gonzalez-Relova (Gonzalez) appeals his sentences on two grounds: 1) he was improperly denied a two-point reduction for acceptance of responsibility; and 2) the sentencing judge failed to make specific factual findings concerning the amount of cocaine involved in the Southern District of Texas conspiracy, whether Gonzalez was a leader or organizer of the Eastern District of Louisiana conspiracy, and whether Gonzalez attempted to escape from prison. The sentencing

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

judge did not fail to make factual findings regarding that amount of cocaine involved in the conspiracy or whether Gonzalez was a leader or organizer; however, the sentencing judge did err by holding as a matter of law that Gonzalez was not entitled to a two-point reduction for acceptance of responsibility.

U.S.S.G. § 3E1.1 dictates the circumstances under which a defendant may be entitled to an adjustment for acceptance of responsibility. "Conduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply." § 3E1.1, comment. (n.4).

Attempts to escape from custody before sentencing constitute the obstruction of justice under § 3C1.1. § 3C1.1, comment. (n.3(e)). The sentencing judge stated that "as a matter of law . . . an attempt to escape . . . is inconsistent with awarding a reduction for acceptance of responsibility." This was error. The sentencing judge was not completely divested of discretion by the language of the guidelines, and he could have found that Gonzalez's case was extraordinary and that Gonzalez was entitled to a reduction for acceptance of responsibility despite the escape attempt.

When a defendant alleges a factual inaccuracy in the pre-sentence report (PSR), the sentencing judge must either 1) make a factual finding as to the inaccuracy or 2) determine that no finding is necessary because the matter will not be taken into

account at sentencing. FED. R. CRIM. P. 32(d)(3)(D). Gonzalez argues that the sentencing judge failed to make findings of fact that 1) he was a leader or organizer in the conspiracy in the Eastern District of Louisiana conviction, 2) there was a conspiracy to import over 2,000 kilograms of cocaine in the Southern District of Texas conviction, and 3) he attempted to escape from prison.

The PSR bears sufficient indicia of reliability to be considered as evidence in making factual determinations. United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990). Gonzalez concedes that the probation officer determined in the PSR that he was a leader and organizer. Gonzalez nevertheless argues that the sentencing judge "must support upward departures by clearly articulated specific grounds on the record." The sentencing judge complied with Rule 32 concerning Gonzalez's status as a leader or organizer of the conspiracy.

Gonzalez argues that the sentencing judge violated Rule 32 by not giving him the opportunity to rebut the charge that he was responsible for 2,727 kilograms of cocaine and that the court foreclosed the opportunity for rebuttal by adopting the findings in the PSR without question. Gonzalez raised the issue of the quantity of cocaine at the sentencing hearing. He argued that he was not responsible for the amount of cocaine intended to be imported by the conspiracy, but was responsible for only the 337.9 kilograms of cocaine successfully imported into the United States.

The sentencing judge correctly stated that Gonzalez was

responsible for the reasonably foreseeable activity of the conspiracy and sustained the quantity finding in the PSR. See § 1B1.3 comment. (n.1) (in the case of a conspiracy, the defendant is accountable for the conduct in furtherance of the conspiracy that is reasonably foreseeable). The sentencing judge complied with Rule 32 by the specific finding that Gonzalez was responsible for the 2,727 kilograms the conspiracy intended to import.

The sentencing judge did make a finding that there was evidence that Gonzalez attempted to escape from prison; however, the sentencing judge erred in his determination that an escape attempt precludes a reduction as a matter of law.

The sentences are VACATED and the case is REMANDED for findings only on the issue of acceptance of responsibility. We express no opinion whether Gonzalez is entitled to a reduction for acceptance of responsibility; however, Gonzalez cannot be precluded from the reduction as a matter of law.