IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2212

UNITED STATES,

Plaintiff-Appellee,

versus

DONALD RAY BRICK,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-91-00158-01)

(October 7, 1993)

Before JOHNSON, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Convicted on a guilty plea of aiding and abetting the possession of more than 500 grams of cocaine with intent to distribute,[1] Defendant-Appellant Donald Ray Brick challenges his

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1]21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 18 U.S.C. § 2.

sentence, alleging that the district court erred in finding that he was reasonably capable of producing the ten kilograms of cocaine that he negotiated to sell. Brick also complains that the district court violated his due process rights by failing to hold an evidentiary hearing on disputed sentencing facts. Based on our determination that the district court's finding was not clearly erroneous and that it did not plainly err in failing to hold an evidentiary hearing, we affirm Brick's sentence.

I.

FACTS

On August 29, 1991, two undercover officers were introduced by a confidential informant to Brick and Jeffrey Kirk Thomas. While inside Brick's limousine, Brick and one of the undercover officers, Detective Chamblee, negotiated for the delivery of one kilogram of cocaine for $20,000. Brick stated that if the first transaction went well, he would deliver an additional nine kilograms of cocaine for $15,000 per kilogram that same day. Brick displayed a firearm and warned that he would "waste" anyone who interfered with the drug transaction. Brick then "cooked" and smoked "crack" cocaine in the officers' presence. Detective Chamblee displayed $20,000 to Thomas, who counted the money. Chamblee arranged to meet with Thomas and Brick at another location within the hour.

When they secured the cocaine, Thomas and Brick paged the undercover officers who drove to the prearranged location. There they observed Steven Smolko and another individual arrive in a Chevrolet Camaro. Smolko exited the Camaro and asked Detective

Chamblee if he had brought the money for the cocaine. Simultaneously, Brick drove into the parking lot and told the detective to get into the limousine. Brick then parked next to the Camaro.

As the detective entered the limousine, he saw a nine millimeter pistol lying beside Thomas. Smolko joined Brick, Thomas, and the detective in the limousine and displayed a kilogram of cocaine. Smolko then told the detective to retrieve the money. As the detective approached the undercover vehicle, Brick maneuvered the limousine behind the undercover vehicle, blocking it from pulling out of the parking lot. Smolko, Thomas, and Brick were immediately arrested. The individual in the Camaro fled.

The officers seized a kilogram of cocaine and a loaded .22 caliber pistol found under the armrest in the front seat of Brick's limousine. The kilogram seized was between 84 and 87 percent pure cocaine.

Brick admitted his involvement and confessed that he had been abusing cocaine and other narcotics for several months prior to his arrest. He asserted, however, that he had merely acted as a broker between the officers and the owner of the cocaine, Smolko.

Brick was indicted with co-defendants Thomas and Smolko on two counts: conspiracy to possess with intent to distribute more than five kilograms of cocaine[2] and aiding and abetting the possession with intent to distribute more than 500 grams of cocaine.[3] The

[2]21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846.

[3]21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 18 U.S.C. § 2.

government dismissed the first count against Brick and filed a motion for downward departure in exchange for Brick's plea of guilty to the second count and his cooperation in providing information about his co-defendants.

At sentencing, Brick objected to the Presentence Report ("PSR") because the recommended base offense level was calculated by the weight under negotiation, ten kilograms, rather than the one kilogram seized. Brick did not attempt to controvert the fact that he had negotiated for the additional nine kilograms; rather, he contended that he was not reasonably capable of producing the ten kilograms he negotiated to sell to the undercover officers. He argued that based on his plea of guilty to aiding and abetting the possession of more than 500 grams of cocaine with intent to distribute, the proper base offense level was 26.

The district court overruled Brick's objections and adopted the PSR's findings and recommended offense level of 32.[4] In accord with the government's § 5K motion, however, the district court departed downward and sentenced Brick to ninety-six months imprisonment and four years of supervised release.

II.

ANALYSIS

In this appeal, Brick asserts two points of error: (1) that the district court erred in finding that Brick was reasonably capable of producing the ten kilograms he negotiated to sell; and

[4]The guideline sentencing range for an offense level of 26 is 78-97 months. An offense level of 32 translates into a sentencing range of 151-188 months.

(2) that the district court erred in failing to hold an evidentiary hearing on disputed sentencing facts.

A. *Drug Quantity*

Brick insists that the district court erred in accepting the PSR's recommendation that the sentence be based on the ten kilograms he negotiated to sell to the undercover officers. He contends that the proper quantity was the one kilogram seized because he was not reasonably capable of producing the amount negotiated. Thus, he urges that the proper base offense level was 26 and not 32 as recommended by the PSR.

We review the district court's finding of fact--that Brick was reasonably capable of producing the ten kilograms he negotiated to sell to the undercover officers--for clear error.[5] A finding will not be clearly erroneous when it is plausible in light of the record read as a whole.[6] Reversal is warranted under this deferential standard only if the court is "left with the definite and firm conviction that a mistake has been committed."[7] After reviewing the record, we conclude that the district court's finding was not clearly erroneous.

In determining the base offense level under the sentencing guidelines, "relevant conduct" that the court may consider includes

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[5]United States v. Buenrostro, 868 F.2d 135, 137 (5th Cir. 1989), cert. denied, 495 U.S. 923, 110 S. Ct. 1957, 109 L. Ed. 2d 319 (1990).

[6]United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991).

[7]United States v. Mitchell, 964 F.2d 454, 457-58 (5th Cir. 1992).

"all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction."[8] A sentencing court is not limited to considering the amount of drugs seized or charged in the indictment.[9] Specifically, if an offense involves negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the offense level.[10] However, the court shall exclude the weight under negotiation in an uncompleted distribution if the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount.[11] This prevents inflation of sentences on the basis of bragging or puffery.[12] The government must prove sentencing facts by a preponderance of the evidence.[13]

In sentencing, the court may rely on information that has some indicia of reliability.[14] The district court has wide discretion in evaluating the reliability of the information and whether to

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[8]U.S.S.G. § 1B1.3(a)(2).

[9]Mitchell, 964 F.2d at 458; U.S.S.G. § 2D1.1, Commentary, Application Note 12. See § 1B1.3(a)(2) (Relevant Conduct).

[10]U.S.S.G. § 2D1.1, Commentary, Application Note 12.

[11]Id.

[12]Sentencing Commission Guidelines Manual, Appendix C, Amendment 136; United States v. Gessa, 971 F.2d 1257, 1263 n.5 (6th Cir. 1992) (en banc).

[13]United States v. Casto, 889 F.2d 569, 570 (5th Cir. 1989), cert. denied, 493 U.S. 1092, 110 S. Ct. 1164, 107 L. Ed. 2d 1067 (1990).

[14]See U.S.S.G. § 6A1.3(a).

consider it.[15] Generally, the PSR bears sufficient indicia of reliability to be considered as evidence at a sentencing hearing.[16] Thus the court may rely on information contained in the PSR.[17] The defendant bears the burden of demonstrating that information the district court relied on in sentencing is "materially untrue, inaccurate or unreliable."[18]

The PSR makes the following two specific references to quantity:

> Detective Chamblee and Donald Brick negotiated for the purchase of one kilogram of cocaine for a price of $20,000. Brick stated that if everything went well with the first transaction, Brick would deliver an additional nine kilograms of cocaine to Detective Chamblee after the initial purchase.
>
> Case agents reported that the defendants had clearly negotiated to deliver 10 kilograms of cocaine: one kilogram on the first transaction and an additional nine kilograms if the initial purchase was satisfactorily completed. *Agents further stated that it appeared the defendants were fully capable of producing the negotiated amount.*[19]

Brick argues that the last quoted sentence is the sole basis for the district court's determination that he was reasonably

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[15]United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1677, 123 L. Ed. 2d 280 (1992) (quoting United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991)).

[16]United States v. Billingsley, 978 F.2d. 861, 866 (5th Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 1661, 123 L. Ed. 2d 280 (1993).

[17]See United States v. Vela, 927 F.2d 197, 201 (5th Cir.), cert. denied, ___ U.S. ___, 112 S. Ct. 214, 116 L. Ed. 2d 172 (1991).

[18]Kinder, 946 F.2d at 366 (quoting Angulo, 927 F.2d at 205).

[19]Emphasis added.

capable of producing the negotiated amount and that it is merely conclusionary, not evidentiary. Although "[b]ald, conclusionary statements do not acquire the patina of reliability by mere inclusion in the PSR,"[20] the conclusionary nature of the statement does not affect its reliability in this instance. In United States v. Richardson,[21] the following PSR findings supported the district judge's conclusion that the defendant was a major participant in a conspiracy:

> "[t]he defendant's actions were more than that of a mere runner,
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> "Richardson's knowledge of laundering is evident,
>
> "[t]he defendant has sufficient knowledge of laundering activities to 'sell himself' as instructed. He came to New Orleans, Louisiana, on two occasions and represented himself as a willing participant in the laundering operation."[22]

The statements in the PSR were factually supported by the record in Richardson's case.[23]

Brick's appeal would be more problematical if the conclusionary statement in the PSR were the only evidence pertinent to his ability to deliver the ten kilograms negotiated. For example, in United States v. Shacklett,[24] the court based the

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[20]United States v. Elwood, No. 92-3235, 1993 WL 317082, at *2 (5th Cir. Aug. 26, 1993).

[21]925 F.2d 112 (5th Cir.), cert. denied sub nom. United States v. Boudreaux, ___ U.S. ___, 111 S. Ct. 2868, 115 L. Ed. 2d 1034 (1991).

[22]Richardson, 925 F.2d at 115.

[23]See id.

[24]921 F.2d 580 (5th Cir. 1991).

defendant's sentence on the probation officer's bald assertion that the government reliably knew of sixty-six pounds of amphetamine (rather than nine) before the defendant cooperated with the government.[25] This conclusion had no attributable source and was factually unsupported.[26] In the instant case, however, the statement was made by investigating agents and was factually supported.[27]

The thrust of Brick's appeal is that although there were negotiations for additional amounts up to ten kilograms, it was not reasonably foreseeable to him that his cohorts could produce ten kilograms of cocaine and thus he was not reasonably capable of producing the negotiated amount. Brick contends that he did not know where to obtain cocaine and insists that Thomas had only recently introduced him to Smolko as a person who could supply cocaine. Brick takes the position that he did not supervise or direct Smolko and thus he had no way of knowing or foreseeing what amounts Smolko could provide. He insists that this was their one and only criminal transaction. Brick urges that without independent evidence such as financial records, similar

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[25] Id. at 584.

[26] Id.; see also United States v. Elwood, No. 92-3235, 1993 WL 317082, at *2 (5th Cir. Aug. 26, 1993) ("[T]he PSR lent no support for the essential factual determinations about [the defendant's] alleged leadership role; the PSR merely gave a recitation of the conclusions of the DEA and the prosecutor.").

[27] See United States v. Marshall, 910 F.2d 1241 (5th Cir. 1990) (holding that district court did not err in finding that a PSR based on the results of a police investigation possessed sufficient indicia of reliability).

transactions, or a laboratory, the court cannot conclude that he was reasonably capable of producing more than one kilogram of cocaine.[28]

It is important to note again that Brick does not dispute that he negotiated for ten kilograms; he only argues that he lacked the ability to deliver. Thus the instant case is not to be compared with cases in which a defendant disputes the weight under negotiation and claims that mere braggadocio is the only evidence that a certain quantity is under negotiation.[29] Brick's complaint is even more distinguishable from situations in which a defendant denies negotiating the quantity used to determine his base offense level.

Here, the district court could reasonably infer from the price generally obtained for cocaine, the cocaine's purity level, the

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[28]The factors listed by Brick may be considered by the sentencing court in approximating the quantity of drugs if there is no drug seized or if the amount seized does not reflect the scale of the offense. These factors are found in Application Note 12 of the Commentary to U.S.S.G. § 2D1.1 and are especially relevant in the drug lab context. Application Note 12, however, specifically states that the weight under negotiation shall be used to calculate the applicable amount in an offense involving negotiation to traffic in a controlled substance. Thus, the evidence Brick demands is not required under the Guidelines.

[29]Compare United States v. Ruiz, 932 F.2d 1174, 1177 (7th Cir.), cert. denied, ___ U.S. ___, 112 S. Ct. 151, 116 L. Ed. 2d 116 (1991). The defendant, a cocaine supplier to dealers, boasted to two dealers, "And, if you want, even ten more [kilograms] I can get." When Ruiz made the statement, he had only one kilogram available for sale and was assuring the dealers that he could get a second kilogram of cocaine they had promised a buyer, who happened to be an undercover agent. The statement made to the dealers (later Ruiz's two co-defendants) was never made or relayed to the undercover agent. On these facts, a finding that ten kilograms was under negotiation was held to be clearly erroneous. Id. at 1184.

quantity sold, the prompt delivery, and Brick's involvement in both the negotiations and the completed transaction, that Brick and his confederates were reasonably capable of producing the amount negotiated.[30] Brick's reputation as a drug dealer led a confidential informant to place the undercover officers in contact with Brick. Brick played a major role in the transaction and demonstrated firsthand, genuine knowledge about the distribution scheme. Brick promised and supervised the delivery of one kilogram of 84 to 87 percent pure cocaine within an hour of the initiation of negotiations, which indicates his ability to secure significant quantities of the narcotic from a direct source of supply. He sold the one kilogram for $20,000, which is consistent with its high level of purity. Brick admits that he negotiated for the later delivery of a larger amount of cocaine if the initial, relatively small transaction--a test transaction--was successfully consummated. The record indicates that Brick negotiated to deliver the nine additional kilograms that same day for $15,000 per kilogram. He had his own supply of cocaine for personal use. Brick carried and displayed firearms and exhibited a ready willingness to use them. Brick blocked the undercover officers' path of retreat. These facts attest to his greater familiarity

[30]The purity of the cocaine is relevant because it is probative of Brick's role or position in the chain of distribution. "[P]ossession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of drugs. . . . As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved." U.S.S.G. § 2D1.1, Commentary, Application Note 9.

with the scope and goals of the venture than that of a mere broker; they belie his statements of minimal knowledge and participation and inability to produce the negotiated quantity. Finally, Brick presents no evidence to support the contrary conclusion that he was not reasonably capable of producing the ten kilograms negotiated, and was merely "puffing."

B. *Evidentiary Hearing*

Brick's complaint that the court violated his due process rights by failing to hold an evidentiary hearing at sentencing to determine whether he was reasonably capable of producing ten kilograms is even less meritorious. Generally, the refusal to grant an evidentiary hearing at sentencing is reviewed for an abuse of discretion.[31] However, Brick did not object to the district court's failure to hold a hearing and raises this issue for the first time on appeal. Review of this claim is thus governed by the plain error standard.[32] "Plain error is a mistake so fundamental that it constitutes a `miscarriage of justice.'"[33]

Brick has not demonstrated plain error. He was given "adequate opportunity to present relevant information" disputing

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[31]U.S.S.G. § 6A1.3(a). See United States v. Pologruto, 914 F.2d 67, 69 (5th Cir. 1990).

[32]FED. R. CRIM. P. 52(b); United States v. Cardenas-Alvarez, 987 F.2d 1129, 1134 (5th Cir. 1993) (citing United States v. Lopez, 923 F.2d 47, 49 (5th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 2032, 114 L. Ed. 2d 117 (1991)).

[33]United States v. Yamin, 868 F.2d 130, 132 (5th Cir.), cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989).

the findings in the PSR by filing written objections.[34] Although Brick objected to the PSR's findings, he only refuted the conclusion that he was reasonably capable of producing ten kilograms without rebutting the underlying facts.[35] Brick does not identify any additional evidence that he would present if an evidentiary hearing were held. There is no indication that the court could only resolve this disputed sentencing fact with a full evidentiary hearing.[36]

Brick also argues that the district court impermissibly delegated its fact finding authority to the PSR's author by adopting the PSR's findings and not making express findings of its own. This claim too lacks merit. First, the district court may permissibly adopt the PSR's factual findings. Second, the district court's express overruling of Brick's objections to the calculation of the base offense level, its adoption of the PSR's findings, and the sentence imposed reflect that the court did find that Brick was reasonably capable of producing the ten kilograms negotiated. No further statement by a sentencing court is necessary when its findings are determinable from a PSR that the court has adopted by

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[34]U.S.S.G. § 6A1.3(a); See United States v. Bachynsky, 949 F.2d 722, 732-33 (5th Cir. 1991), cert. denied, ___ U.S.___, 113 S. Ct. 150, 121 L. Ed. 2d 101 (1992).

[35]When a defendant objects to the PSR but does not challenge the underlying facts, the district court is free to adopt the facts in the PSR without further inquiry. See United States v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992).

[36]See Pologruto, 914 F.2d at 69.

reference.[37]

III.

CONCLUSION

We conclude that the district court did not clearly err in determining that the appropriate drug quantity on which to base Brick's sentence was ten kilograms. Neither did it deprive Brick of due process by not holding an evidentiary hearing. For the foregoing reasons, the sentence of Donald Ray Brick is AFFIRMED.

[37]Sherbak, 950 F.2d at 1099.