

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2254
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MARK MARTIN YUNCEVICH, JR.,

Defendant-Appellant.

and

No. 92-2257
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LYDIA KAY PORTER,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas
(CR H 91 0080 01 & CR H 91 80 3)

August 31, 1993
Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM.¹

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on

Appellants Yuncevich and Porter were named with others in a multi-count indictment. Pursuant to an agreement, Yuncevich and Porter pleaded guilty to aiding and abetting possession of heroin with intent to distribute, and Yuncevich also pleaded guilty to aiding and abetting the use of a telephone to facilitate a conspiracy to possess heroin with intent to distribute. They appeal their sentences. We affirm.

We review application of the sentencing guidelines de novo and the findings of fact made in sentencing for clear error. United States v. Otero, 868 F.2d 1412, 1414 (5th Cir. 1989); United States v. Mourning, 914 F.2d 699, 704 (5th Cir. 1990).

Yuncevich and Porter complain that the district court erred in calculating their base offense levels because he overestimated the scope of the conspiracy and hence the amount of heroin involved. We disagree.

A base offense level can reflect quantities of drugs in addition to those in the count of conviction if they are part of the same course of conduct or common scheme as the count of conviction, and if supported by a preponderance of the evidence. United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990); United States v. Thomas, 932 F.2d 1085, 1091 (5th Cir.), cert. denied, 112 S. Ct. 264 (1991). The district court held an extensive hearing

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

concerning the breadth of the conspiracy and the amount of drugs, and then reviewed the presentence report in detail with the probation officers. Thereafter, he concluded that the drug amounts specified in the presentence report were reasonably accurate, and he adopted the factual findings of the report. After carefully reviewing the presentence report, the evidence, and the arguments we are firmly convinced that the district court did not err.

Porter's argument that the district court could not rely on the presentence report to determine the quantity of drugs foreseeable by her is likewise without merit. See United States v. Sherbak, 950 F.2d 1095, 1100 (5th Cir. 1992). The report fully documents her involvement. Moreover, the district court used a one to three kilo amount to calculate her level under § 2D1.1(c)(6), which resulted in a lower level because of Porter's relatively recent involvement in the conspiracy.

Yuncevich next claims that because the district court did not find as a fact that Yuncevich had control over four other persons in the activity it erred in enhancing his base offense level four points under § 3B1.1(a) for a leadership roll in an extensive criminal activity. The district court may consider all persons firmly involved in the underlying transaction. Mir, 919 F.2d at 943. The district court adopted the findings of the presentence report, which details an extensive heroin distribution network involving more than five persons and clearly reflects that Yuncevich was its leader.

Porter contends that the facts in the presentence report

support her claim that her offense level should have been reduced two to four points because she was a minor or minimal participant in the scheme. The report shows, however, that although she was not involved for as long a period of time as some, she allowed Yuncevich to use her, her name and her apartment for his illegal activities, she carried the heroin in the instant offense, and she furnished some of the money used to purchase the drugs. This fully supports the district court's finding.

Porter also argues that it was error to enhance her base offense level under § 2D1.1(b) for possession of a firearm during a drug offense. She admits that the weapon was hers and was in the apartment she shared with Yuncevich in which drug trafficking occurred. She contends, however, that the gun was in no way involved in the drug offense. Her argument is foreclosed by United States v. Hewin, 877 F.2d 3, 5 (5th Cir. 1989).

The district court declined to reduce Yuncevich's base offense level for acceptance of responsibility. We review under a standard even more deferential than clearly erroneous. United States v. Shipley, 963 F.2d 56, 58 (5th Cir.), cert. denied, 113 S. Ct. 348 (1992). A defendant who is found to have played a leadership role does not fully accept responsibility under § 3E1.1 if he attempts to minimize his leadership role. Id. at 59. That is exactly what Yuncevich has done. At his sentencing hearing, he testified that he headed no organization and that there were no multi-kilo drug deals. The district court's findings were to the contrary and are fully supported. Simply admitting to the crime is not an adequate

acceptance of responsibility for a leader.

Finally, Yuncevich and Porter contend that once they objected to portions of the presentence report, it was incumbent upon the Government to come forward with additional evidence in support of its contentions. Additionally, they argue that the district court improperly allowed the probation officer to satisfy the Government's burden of proof and to perform the sentencing court's role as fact-finder. Appellants misapprehend the law. "A presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the Sentencing Guidelines." Sherbak, 950 F.2d at 1100. By adopting the presentence report, the district court implicitly weighed the positions of the parties and credited the probation department's determination of the facts. United States v. Ramirez, 963 F.2d 693, 706 (5th Cir.), cert. denied, 113 S. Ct. 388 (1992). Based upon these considerations, the district court's findings of fact were not clearly erroneous.

AFFIRMED.

