

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-2255
Summary Calendar

United States of America,

Plaintiff-Appellee,

VERSUS

Billy John McDaniel,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

CR H 91 0080 02

(July 19, 1993)

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judge.

THORNBERRY, Circuit Judge*:

Billy John McDaniel appeals his sentence after pleading guilty to one count of possessing heroin with the intent to distribute and aiding and abetting the same, in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1) & (b)(1)(c). McDaniel challenges the district

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court's decision to enhance his sentence for possession of a firearm and for his leadership role in the drug operation. Finding no error, we affirm.

Facts and Prior Proceedings

The grand jury indicted McDaniel and four other defendants for conspiracy to possess and distribute heroin from February 1988 through May 3, 1991, for possession with the intent to distribute heroin, and for using a communication facility in committing the conspiracy. McDaniel was named in four of the eight counts. The charges stemmed from law enforcement surveillance and infiltration of the heroin operation.

McDaniel pleaded guilty to count two, possessing with intent to distribute heroin and aiding and abetting the same, on or about May 3, 1991. At the arraignment, the other four defendants also pleaded guilty to counts two, three or five.

The probation officer recommended that McDaniel's offense level be enhanced three levels for his managerial role in defendant Mark Yuncevich's drug enterprise. The probation officer also recommended that McDaniel's offense level be enhanced two levels for his reasonable foreseeability of the firearm found along with cash, drug ledgers and drug-cutting paraphernalia in Yuncevich's home. McDaniel objected to these enhancements claiming that his role in the operation was overstated in the presentence investigation report (PSR) and that the existence of a weapon in the drug operation was not reasonably foreseeable to him.

The district court sentenced McDaniel to 240 months imprisonment, three years supervised release, and a \$50 special

assessment. Pursuant to the plea agreement, the Government dismissed the remaining counts against McDaniel. McDaniel timely appeals his sentence to this Court.

Discussion

McDaniel argues that the district court erred in adjusting his offense level for his reasonable foreseeability of another defendant's firearm possession. Specifically, he argues that the district court violated Fed. R. Crim. P. 32(c)(3)(D) by failing to make a finding of the controverted facts concerning the firearm possession.¹ However, the portion of the sentencing transcript found in the record plainly states that the district court adopted the PSR after hearing the defendant's version of the facts. This is sufficient, because "Rule 32 does not require a catechismal regurgitation of each fact determined and each fact rejected when they are determinable from a PSR that the court has adopted by reference." **United States v. Sherbak**, 950 F.2d 1095, 1099 (5th Cir. 1992). In addition, the district court may rely upon information in the PSR which has some minimum indicia of reliability. **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). McDaniel's argument focusing on the lack of findings by the

¹ Fed.R. Crim. P. 32(c)(3)(D) in relevant part states:

If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

district court is further weakened because the record does not contain the full transcript of the sentencing hearing. Indeed, in his reply brief, McDaniel maintains that the partial transcript is sufficient for this Court's review. The partial transcript in the record reflects that the district court heard evidence from McDaniel at sentencing, and then afterwards, the district court said, "...I think Mr. McDaniel may be telling a somewhat different story to us in Court today than he told the probation officer. Based upon what he told the probation officer, though, I think the calculations made concerning his involvement are accurate, and I will adopt the pre-sentence report." When an appellant argues on appeal that a finding by the district court is unsupported by the evidence, the appellant must include a transcript in the record of all evidence relevant to the inaccurate finding. Fed. R. App. P. 10(b)(2). The record before us contains the court-adopted PSR and a partial transcript of the evidence at sentencing that McDaniel believes is relevant. Based on this, McDaniel has failed to show that the district court's ruling should be disturbed for a lack of compliance with Rule 32. **See Powell v. Estelle**, 959 F.2d 22, 26 (5th Cir.), **cert. denied**, 113 S.Ct. 668 (1992) (declining to review the district court's findings where plaintiffs failed to provide the transcript on appeal).

Even if we review the district court's ruling for error beyond McDaniel's Rule 32 violation argument, the district court's findings should not be overturned. We review the decision to apply § 2D1.1(b)(1), which permits a two level increase in the offense level, "[i]f a dangerous weapon (including a firearm) was

possessed", for clear error. **United States v. Paulk**, 917 F.2d 879, 882 (5th cir. 1990).

A district court may hold a defendant accountable for an accomplice's reasonably foreseeable possession of a firearm during the commission of a narcotics trafficking offense. **United States v. Hooten**, 942 F.2d 878, 881-882 (5th Cir. 1991); **United States v. Aguilera-Zapata**, 901 F.2d 1209, 1215 (5th Cir. 1990). This Court has held on many occasions that, "[s]entencing courts... may ordinarily infer that a defendant should have foreseen a co-defendant's possession of a dangerous weapon such as a firearm, if the government demonstrates that another participant knowingly possessed the weapon while he and the defendant committed the offense by jointly engaging in concerted criminal activity involving a quantity of narcotics sufficient to support an inference of intent to distribute." **Aguilera-Zapata**, 901 F.2d at 1215-1216. Of course, the Government must prove the weapon possession of the co-defendant by a preponderance of the evidence standard before the court can increase a sentence. **Aguilera-Zapata**, 901 F.2d at 1215. By adopting the PSR, the district court impliedly found that McDaniel should have reasonably foreseen that his accomplice, Yuncevich, would possess a weapon in the course of his drug distribution business. Clearly the PSR shows that Yuncevich admitted to having a gun in his possession and this gun was recovered during the execution of a search warrant at Yuncevich's residence.² McDaniel concedes that the record

² The fact that McDaniel's accomplice admitted to possessing a weapon, along with the seizure of that weapon during execution of the search warrant, establishes possession beyond a preponderance

establishes that a gun was found in Yuncevich's residence along with drug paraphernalia and McDaniel had access to the residence. Therefore, from these facts, McDaniel's reasonable foreseeability of Yuncevich's possession of the weapon is plausible. **Aguilera-Zapata**, 901 F.2d at 1215; **see United States v. Sherrod**, 964 F.2d 1501, 1506 (5th Cir. 1992), **cert. denied**, 113 S.Ct. 1422 (1993) ("A finding of fact is not clearly erroneous if it is plausible in light of the record viewed in its entirety."); **see also** § 2D1.1, comment (n.3) ("The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.").

McDaniel also argues that the district court clearly erred in increasing his offense level by three levels for his managerial or supervisory role in the drug organization. The district court's finding that McDaniel was a manager of the conspiracy will not be reversed absent a showing of clear error. **United States v. Alvarado**, 898 F.2d 987, 993 (5th Cir. 1990). The Sentencing Guidelines list factors that the court should consider when determining managerial or supervisory status. U.S.S.G. §§ 3B1.1(b), comment (n.3). These include, "the nature of participation in the commission of the offense, the recruitment of accomplices, ...the nature and scope of the illegal activity, and the degree of control and authority exercised over others." **Id.** The

of the evidence. **See Hooten**, 942 F.2d at 881-882 (remand to district court for failure to make an explicit determination that the PSR was accurate or make finding that defendant or co-conspirator possessed the weapon); **United States v. Pofahl**, (5th Cir. 1993) (remand to district court because possession of the weapon was disputed in objection to PSR).

court-adopted PSR gives detailed facts concerning McDaniel's role in the heroin business and support a finding that McDaniel was a manager or supervisor. **See United States v. Sherrod**, 964 F.2d 1501, 1506 (5th Cir. 1992).

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.