

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2356
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOSE LUIS MAR-MONTIEL,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 91 221 01)

(December 23, 1992)

Before KING, DAVIS and WIENER, Circuit Judges.¹

PER CURIAM:

Appellant challenges his sentence on grounds that the district court erred in denying him a reduction for acceptance of responsibility. We affirm.

I.

Jose Luis Mar-Montiel (Mar) pleaded guilty to aiding and abetting the transportation of aliens. Mar was a participant in a

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

well-organized scheme of smuggling aliens into the United States from Mexico through Brownsville, Texas. Mar was observed by a Government agent at a motel coordinating the slow but systematic unloading of three illegal aliens from his van into a motel room. The motel was a location notorious for alien smuggling. Mar had rented two rooms at that motel. Later, Mar secured a cab driver to transport the three aliens from the motel to a local bus station. Mar gave the cab driver \$500 to pay for tickets to transport the aliens to New York City. The cab driver was to purchase the tickets for the aliens and retain about \$120 as a fee for his services. The taxi driver indicated that he had done this on earlier occasions for Mar.

The aliens later reported that they had been smuggled into the country with seven other people who remained back at the motel. Five illegal aliens were discovered in a later search of the motel rooms. The aliens told Government agents in later interviews that they had been picked up at a point north of a U.S. Border Patrol checkpoint near Brownsville, Texas. An accomplice, Martin Del Angel-Santiago (Del Angel), had picked up the aliens as directed by Mar. When Del Angel was arrested, he was found to possess \$1577 in cash. When Mar was arrested, he possessed \$1295 in cash.

Mar admitted that he previously had pleaded guilty to another charge of illegally transporting aliens because he had "given a ride to two illegals." Mar was on probation for that offense at the time he was arrested. Mar acknowledged that he knew that it was illegal to help aliens get into the country or transport them

around within the country.

During sentencing, Mar was "substantially in agreement" with the facts set forth in the PSR, but objected to the recommendation of the PSR that he be denied a two-level reduction for acceptance of responsibility. The district court adopted the recommendations in the PSR which determined that Mar's base offense level was 9, with two additional points for his previous conviction and two additional points for his leadership role in the transportation of illegal aliens. With a total offense level of 13 and a criminal history category of II, the district court sentenced Mar to 21 months in a guideline range of 15 to 21 months.

II.

Mar argues on appeal that the district court erred when it denied him a reduction for acceptance of responsibility.

A sentence imposed by the trial court generally will be upheld on review so long as the sentence was determined by a proper application of the guidelines to facts that are not clearly erroneous. **United States v. Buenrostro**, 868 F.2d 135, 136-37 (5th Cir. 1989), **cert. denied**, 495 U.S. 923 (1990). Mar argues that the district court erred by failing to articulate its findings underlying its denial of downward adjustment for acceptance of responsibility. Mar also argues that the district court erred because it failed to resolve the factual issue of whether Mar was dishonest in his exchange with the probation officer.

The district court may adopt factual findings and conclusions in the presentence investigation report (PSR) to resolve issues in

dispute if the district court, at least implicitly, considered the relevant arguments and decided to credit the PSR's position. **See United States v. Sherbak**, 950 F.2d 1095, 1099 (5th Cir. 1992); **see** Fed. R. Crim. P. 32(c)(3)(D).

The PSR recommended denial of a two-point adjustment for acceptance of responsibility for the following reasons: (1) Mar initially asserted that this was the first time he knowingly transported illegal aliens; (2) Mar claimed that he helped the aliens only once they were in Houston, and that he had nothing to do with their transportation; (3) Mar denied that he had previously used the same taxi driver for similar services; (4) Mar asked Del Angel (the driver) for assistance; and (5) Mar's admission of guilt was qualified by his contention that he committed the crime only to help a friend.

In responding to arguments of counsel at the sentencing hearing, the district judge explained:

THE COURT: Yes, I've looked at this pretty closely, and I don't believe Mr. Mar-Montiel has accepted responsibility, so I'm not going to give him that two point reduction. Are there any other objections or comments concerning the P.S.I.?

[GOVERNMENT]: None from the United States.

[DEFENSE COUNSEL]: None, other than the motions which we have filed, your Honor.

THE COURT: All right. I'm going to adopt the findings of facts as they are presented in the P.S.I. as my own findings, and also I'm going to adopt the application of those, of the Guidelines to the facts of the report as set forth in the P.S.I. report.

The PSR supports an inference that Mar did not accept responsibility. The PSR reported one source who identified Mar by

name as a regular smuggler known to carry on smuggling activities twice each week. The report given by that source was corroborated by a description of Mar's van and an incident that linked Mar to some "Chinese" aliens that became lost in the brush. The van parked at the motel matched the description given by the source and was registered in Mar's name. Mar's initial statement to the probation officer that this was his first offense contradicts his claim that he accepted responsibility. Such a statement is contradicted by Mar's later admission that he was previously convicted for aiding and abetting an alien. In light of the above evidence, the district court was entitled to reject Mar's denial that he was involved in transporting the aliens. A partial acceptance of responsibility will not suffice. **See United States v. Kleinebreil**, 966 F.2d 945, 953-54 (5th Cir. 1992).

The court's express adoption of the PSR was thus not "clearly erroneous." The court may rely upon information contained in the PSR which the court has adopted by reference. **See United States v. Vela**, 927 F.2d 197, 201 (5th Cir.), **cert. denied**, 112 S.Ct. 214 (1991). The district judge indicated that she "looked at this [acceptance of responsibility issue] pretty closely." The record reflects that she implicitly "weighed the positions of the probation department and the defense and credited the probation department's facts" and conclusions. **See Sherbak**, 950 F.2d at 1099. Testimony by the Government agent at the detention and probable cause hearing further established those facts. The district court's denial of a two-point adjustment for acceptance of

responsibility was therefore not clearly erroneous.

AFFIRMED.