

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2369
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH WAYNE WHITTAKER,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR-H-91-204-1)

(January 28, 1993)

Before POLITZ, Chief Judge, KING and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:*

Kenneth Wayne Whittaker appeals his guilty plea conviction and sentence for conspiracy to possess with intent to distribute cocaine. Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

An informant introduced Whittaker to undercover officers for the purpose of a drug transaction. After first informing that he could obtain 10 kilograms of cocaine, Whittaker called the undercover officers to advise that his source could provide only 8 kilograms of cocaine at \$12,000 per kilogram. The source, William Thomas Addison, declined to furnish the drugs until after viewing the officers' money. Whittaker arranged a meeting at which Addison pulled a gun and tried to rob the officers. Addison was killed; Whittaker was arrested.

Pursuant to a plea agreement, Whittaker pled guilty to one count of conspiracy to possess with intent to distribute over 5 kilograms of cocaine. He was sentenced to 135 months imprisonment and 5 years of supervised release. He timely appealed.

Analysis

For the first time on appeal Whittaker contends that the Houston police department used threats and psychological intimidation to coerce his confession. In addition, he claims ineffective assistance of trial counsel for failing to challenge the confession. We do not consider issues raised for the first time on appeal unless they involve purely legal questions and the failure to consider them would result in manifest injustice.¹

¹ **United States v. Garcia-Pillado**, 898 F.2d 36 (5th Cir. 1990).

Further, a valid guilty plea waives the defendant's right to challenge any non-jurisdictional defects in the proceedings leading to the conviction.² Whittaker does not challenge the voluntariness of his plea³ nor does he raise any jurisdictional defect. The challenge to the voluntariness of his confession is deemed waived. Nor may we consider the ineffectiveness claim which was not raised in the trial court.⁴

Whittaker challenges the conspiracy conviction alleging that there was no agreement between him and Addison about the object of the conspiracy. Whittaker claims that he intended to set up a drug transaction, but Addison had only the undisclosed intent to rob the purchasers. This too raises a non-jurisdictional defect waived by the guilty plea.

Challenging his sentence, Whittaker argues that his offense level should not have been based upon 8 kilograms of cocaine but rather upon 800 grams of cocaine.⁵ A defendant may be sentenced

² **United States v. Smallwood**, 920 F.2d 1231 (5th Cir.), cert. denied, 111 S.Ct. 2870 (1991).

³ Whittaker has provided no transcript of his rearraignment from which we could evaluate the voluntariness of his plea. See Fed.R.App.P. 10(b).

⁴ **United States v. Higdon**, 832 F.2d 312 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988). Our refusal to address the ineffective assistance claim is without prejudice to Whittaker's right to raise it in a proceeding under 28 U.S.C. § 2255.

⁵ We find no record support for this lesser amount. The 800 gram figure appears for the first time in Whittaker's brief.

for an incomplete conspiracy. The offense level of one convicted of conspiracy or attempt to commit a drug offense is calculated as if the object of the conspiracy or the attempt was achieved.⁶ The amount of drugs negotiated for in an incomplete transaction may be included for sentencing purposes.⁷ The quantum subject to negotiations may not be considered, however, if the defendant "did not intend to produce and was not reasonably capable of producing the negotiated amount."⁸

Whittaker did not object to the factual finding in the presentence investigation report that he told the agents that his source had 8 kilograms of cocaine available. He objected to the amount of drugs used in the sentencing guidelines calculation only on the theory that he had no control over the amount that Addison actually would sell. Whittaker, however, told the probation officer that "Addison was good at supplying drugs and could have provided the negotiated amount." From these facts, the district court reasonably could find that Whittaker was capable of making available the negotiated amount. We find no error in the sentencing of Whittaker based upon a conspiracy to possess with intent to distribute 8 kilograms of cocaine.

⁶ U.S.S.G. § 2D1.4.

⁷ **Id.**, Application Note 1 ("the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount"); see **United States v. Warters**, 885 F.2d 1266 (5th Cir. 1989).

⁸ U.S.S.G. § 2D1.4, Application Note 1.

Finally, Whittaker contends that the district court erred by failing to adjust his sentence downward because he was a minimal or minor participant.⁹ A minimal participant is one who is "plainly among the least culpable of those involved in the conduct of the group."¹⁰ Downward departure for minimal participation is seldom appropriate.¹¹ A minor participant is one who "is less culpable than most other participants, but whose role could not be described as minimal."¹²

The district court found that Whittaker had a "very culpable" role in putting together a "major drug transaction." We review the district court's findings regarding the defendant's role in the offense under the clearly erroneous standard.¹³ Whittaker's role in brokering a drug transaction involving nearly \$100,000 cannot accurately be categorized as either minimal or minor.

The conviction and sentence are AFFIRMED.

⁹ A defendant's offense level is reduced by four levels if he was a minimal participant in the criminal activity and decreased by two levels if he was a minor participant. U.S.S.G. § 3B1.2; see United States v. Bethley, 973 F.2d 396 (5th Cir. 1992).

¹⁰ U.S.S.G. § 3B1.2, Application Note 1.

¹¹ **Id.**, Application Note 2.

¹² **Id.**, Application Note 3.

¹³ **Bethley**, 973 F.2d at 401.