UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-2382

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ELUID GONZALES GUERRA,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
CR H 90 412 1

(March 31, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Defendant, Eluid Gonzales Guerra, appeals his sentence for various offenses involving his marijuana trafficking scheme. Finding no error, we affirm.

I

Law enforcement agents seized two pounds of marijuana and six narcotic notebooks during the execution of a search warrant at the residence of Efrain Gonzales Guerra ("Efrain") and Elma Flores

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Guerra ("Elma"), the defendant's brother and sister-in-law. The notebooks contained detailed records of the transactions surrounding an illicit marijuana distribution ring. Between 1984 and 1987, this illegitimate business distributed quantities of marijuana valued at over two million dollars.

Guerra pled guilty to the following offenses: filing a false income tax return, in violation of 26 U.S.C. 7206(1) (1988); reentering the United States as a deported alien, in violation of 8 U.S.C. 1326 (1988), conspiring to possess with intent to distribute in excess of 1,000 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), 846 (1988); distributing marijuana in excess of 40 pounds, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (1988); and using a communications facility in facilitating the commission of a felony under the Controlled Substance Act, in violation of 21 U.S.C. § 843(b) (1988).

The district court sentenced Guerra to 384 months of confinement, followed by three years of supervised release. Guerra appeals his sentence, contending the district court erred in: (1) assessing a four-level increase in his base offense level based upon his aggravating role in the underlying drug trafficking conspiracy; (2) refusing to grant a two-level reduction to his base offense level due to his failure to accept responsibility for his criminal conduct; and (3) finding the sum of $2,137,457 directly attributable to his understated gross income. Guerra also claims that he was denied his Sixth Amendment right to effective counsel due to his attorney's failure to file written objections to his

presentence report ("PSR") before sentencing.

II

A

Guerra argues that the district court erred in assessing a four-level increase in his base offense level based upon its finding that Guerra was a leader or organizer of the conspiracy to possess with intent to distribute marijuana. *See* Brief for Guerra at 7. Under the sentencing guidelines, a defendant's base offense level is increased by four levels if the defendant is an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. *See* United States Sentencing Commission, *Guidelines Manual,* §3B1.1(a) (Nov. 1991). We review the district court's application of the guidelines de novo, and its factual findings for clear error. *United States v. Rodriguez,* 897 F.2d 1324, 1325 (5th Cir. 1990), *cert. denied,* ___ U.S. ___, 111 S. Ct. 158, 112 L.Ed.2d 124 (1990).

Recognizing that the guidelines apply only to the offenses involving income tax returns and illegal reentry,[1] Guerra first contends that his marijuana trafficking transactions constitute "collateral conduct," and therefore, cannot be considered in assessing his aggravating role.[2] We disagree. The determination

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[1] The other offenses occurred before November 1, 1987, and therefore, are not subject to the federal sentencing guidelines.

[2] Guerra does not dispute his status as a leader or organizer of the conspiracy. *See* Brief for Guerra at 7-10. He was the most culpable participant involved in the conspiracy, and his aggravating role was supported by evidence demonstrating he was a leader of the drug distribution network. *See* PSR at 13.

of Guerra's base offense level is based upon all relevant conduct,[3] and "not solely on the basis of elements and acts cited in the count of conviction." U.S.S.G Ch.3, Pt.B, intro. comment. Moreover, an upward adjustment under §3B1.1(a) is "anchored to the transaction leading to the conviction." *United States v. Barbontin,* 907 F.2d 1494, 1498 (5th Cir. 1990). We have previously held that "[i]t is not the contours of the offense charged that defines the outer limits of the transaction; rather it is the contours of the underlying scheme itself. All participation firmly based in that underlying transaction is ripe for consideration in adjudging a leadership role under section 3B1.1." *United States v. Mir,* 919 F.2d 940, 943-44 (5th Cir. 1990). Thus, the district court, when determining an adjustment under § 3B1.1., may "consider all [relevant] conduct linked to the transaction . . ., even if it falls outside the four corners of the conviction itself." *United States v. Rodriguez,* 925 F.2d 107, 109-10 (5th Cir. 1991) Here, the unreported amounts of income which are the basis for Guerra's income tax offense were "clearly gross receipts from narcotic transactions that were part of the same common scheme and are clearly related." PSR at 11. Consequently, Guerra's role in the marijuana distribution conspiracy is relevant conduct to his income

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[3] "Relevant conduct" includes:

> all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense.

U.S.S.G. §1B1.3(a)(1).

tax offense, and was therefore properly considered by the district court in determining his sentence.[5]

Guerra further maintains that the government failed to identify at least five participants mandated under §3B1.1(a). *See* Brief for Guerra at 9. We disagree. Courts may infer the number of participants when applying § 3B1.1(a). *Mir,* 919 F.2d at 944. Additionally, the defendant may be counted when determining the total number of participants. *Barbontin,* 907 F.2d at 1498. Using this approach, the government identified more than five participants to the underlying conspiracy.[6] Because the district court did not clearly err in finding at least five participants to the conspiracy, and properly considered Guerra's trafficking transactions as relevant conduct, the district court did not err in assessing a four-level increase.

B

Guerra also contends the district court erred in not granting a two-level reduction in his base offense level based upon its finding that he failed to accept responsibility for his criminal conduct.[7] "Because of the district court's unique position to

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[5] Similarly, Guerra's contention that he was the only participant in the offenses within the scope of the guidelines is without merit. *See United States v. Manthei*, 913 F.2d 1130. 1136 (5th Cir. 1990) (holding that "participants" under §3B1.1 may include those not charged in the offense).

[6] The participants identified by the government include Eluid and Nilda Guerra, Efrain and Elma Guerra, Garza-Saenz, his brothers Juan Manuel and Roberto, Maurio Roberto Rameriz-Martinez, and Victor Javier Farias. *See* PSR at 6, 11.

[7] The guidelines provide for a two-level reduction in the offense level "[i]f the defendant clearly demonstrates a

assess the defendant's acceptance of responsibility," its findings in this matter are entitled to greater deference on review than that conferred under the clearly erroneous standard. *See United States v. Rodriguez,* 942 F.2d 899, 902-03 (5th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S. Ct. 990, 117 L.Ed.2d 151 (1992); *see also* U.S.S.G. §3E1.1, comment. (n.5). The district court's conclusion will stand unless the defendant proves the court's determination was "without foundation." *United States v. Buss,* 928 F.2d 150, 152 (5th Cir. 1991).

Guerra's guilty plea does not automatically entitle him to a sentencing reduction for accepting criminal responsibility. *See* U.S.S.G. §3E1.1(c). Moreover, before the defendant is entitled to a reduction for acceptance of responsibility he must first accept responsibility for "all of his relevant criminal conduct." *United States v. Mourning,* 914 F.2d 699, 705 (5th Cir. 1990). The record shows that Guerra denied involvement in any marijuana conspiracy, denied participating in a double homicide which occurred in Mexico and claimed his income was earned from legitimate sources.[8] Guerra also denied he had a leadership role in the conspiracy. *See United States v. Shipley,* 963 F.2d 56, 59 (5th Cir.), *cert denied,* ___ U.S. ___, 113 S.Ct. 348, 121 L.Ed.2d 263 (1992) (holding that "a defendant who is found to have had a leadership role in the offense

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recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S.S.G. § 3E1.1(a).

[8] Guerra insisted his income derived from the legitimate sale of farm equipment and tractor trailers, and that he reported this income on his tax returns. *See* PSR at 14-15.

does not fully accept responsibility for purposes of §3E.1.1 if, despite his admission of all elements of the offense of the conviction, he nevertheless attempts to minimize his leadership role"). Furthermore, Guerra was evasive and refused to cooperate with probation officials following the entry of his guilty plea. *See* PSR at 14; *United States v. Singer,* 970 F.2d 1414, 1420 (5th Cir. 1992) (finding defendant who refused to discuss details of his offense with probation officials not entitled to reduction for acceptance of responsibility). Accordingly, we find no error in the district court's refusal to grant a two-level reduction in Guerra's base offense level.

C

Guerra further contends that the district court erred in finding that he failed to report gross income of $2,137,457. *See* Brief for Guerra at 14-15. The PSR established ownership of the over $1,031,555 in unreported gross narcotic receipts, $412,133 attributable to Guerra and $619,422 attributable to Efrain and Elma. *See* PSR at 10. An additional $1,105,902 in gross narcotic receipts was found in the narcotic notebooks. *See id.* at 11. The PSR established that these additional receipts were from "narcotics transactions that were part of the same common scheme and are clearly related" to Guerra's narcotics distribution business. *Id.* The district court calculated Guerra's base offense level by considering the entire $2,137,457 involved in the narcotics

conspiracy.[9]

We review the district court's finding of fact for clear error. 18 U.S.C. §3742(e). When "determining the total tax loss attributable to the offense . . . all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates the conduct is clearly unrelated." U.S.S.G. §2T1.3, comment. (n.3) (giving as an example, the "failure to report or an understatement of . . . income from a particular business activity").

Here, the amount of $2,137,457 represents the total income from the particular business activity of drug trafficking. All the income derived from this business is considered part of the same business activity and part of the same scheme or plan. *See id.*; *see also United States v. Kaufman,* 800 F.Supp. 648, 651-52 (N.D.Ind 1992) (interpreting application note 3 of §2T1.1 to require "the court to consider all unreported income, regardless of whose pocket into which it went"). Therefore, the district court's finding that Guerra failed to report gross income of $2,137,457 was not clearly erroneous.

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[9] The district court adopted the probation department's conclusions which reported:

> the defendant understated gross income of $2,137,457. For the purpose of this guideline computation, the tax loss is 28 percent of amount by which the greater of the gross income and taxable income was understated. In this case, 28 percent of the understated gross income is $598,487.96. The corresponding offense level found in the tax table provide in §2T4.1 is 16.

PSR at 53.

D

Lastly, Guerra contends for the first time on appeal that he was denied his Sixth Amendment right to effective assistance of counsel because his attorney failed to file written objections to the PSR before sentencing. *See* Brief for Guerra at 16-18. Generally, claims of ineffective assistance of counsel not raised below cannot be resolved on direct appeal. *See United States v. Ugalde,* 861 F.2d 802, 804 (5th Cir. 1988), *cert. denied,* 490 U.S. 1097, 109 S. Ct. 2447, 104 L.Ed.2d 102 (1989). However, because the record here "is sufficiently complete to enable us to fairly evaluate the merits of the claim," *id.,* we resolve Guerra's claim on this appeal. *See, e.g., United States v. Phillips,* 664 F.2d 971, 1040 (5th Cir. 1981) (deciding ineffective assistance of counsel claim on direct appeal where record sufficiently developed on claim), *cert. denied,* 457 U.S. 1136, 102 S. Ct. 2965, 73 L.Ed.2d 1354 (1982).

To establish ineffective assistance of counsel, Guerra must prove that his attorney's performance was both objectively deficient and prejudicial to his defense. *Strickland v. Washington,* 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L.Ed.2d 674 (1984). Guerra asserts that trial counsel's failure to file written objections to the PSR constituted deficient performance of counsel.[10] We disagree.

Rule 32(a)(1) expressly provides for oral objections to

[10] The record shows that Guerra's attorney made only verbal objections to the PSR. *See* Record on Appeal, vol. 3, at 3-7.

sentencing decisions. *See* Fed. R. Crim. P. 32(a)(1) (providing "the court shall afford the counsel for the defendant . . . an opportunity to *comment* upon the probation officer's determination . . . read and *discuss* the presentence investigation . . . *speak* on behalf of the defendant") (emphasis added). Moreover, we have previously rejected any substantive distinction between written and oral assertions in the courtroom. *See Stokes v. Procunier*, 744 F.2d 475, 482 n.3 (5th Cir. 1984) (refusing to find ineffective assistance of counsel where motion for continuance made orally, rather than in writing). Because Guerra cannot show that his attorney's performance was deficient, his ineffective assistance of counsel claim is without merit. *See Strickland,* 466 U.S. at 692, 104 S. Ct. at 2067.

III

For the foregoing reasons, we **AFFIRM**.