IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2446
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID PHILLIP ISCHY,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(CR-H-89-0204-05)

(January 25, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Davis Phillip Ischy, defendant, and others engaged in a conspiracy to import cocaine from Mexico. Ischy flew to Mexico to see the airstrip where the cocaine would be picked up. On June 4, 1989, Ischy along with the pilot of the plane flew to Mexico and loaded the plane with 500 kilograms of cocaine. They then flew back to Texas where Ischy and two others, defendants Brown and Hall, unloaded the cocaine into Hall's vehicle. Shortly

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

thereafter, the police stopped the vehicle; arrested Ischy, Brown, and Hall; and seized the cocaine. At the time of arrest, Hall and Brown were both carrying firearms, and a shotgun was found behind the seat of the truck.

As a result of the foregoing, a three-count superseding indictment was returned against Ischy and six others. Count one charged all seven with conspiracy to possess with intent to distribute in excess of five kilograms of cocaine. Count two charged the defendants with aiding and abetting each other in the possession with intent to distribute the cocaine. Count three charged Ischy, Brown, and Hall with knowingly and intentionally carrying firearms during the commission of a drug-trafficking crime. Ischy pled guilty to the charges pursuant to a plea agreement with the government. The district court sentenced Ischy to 18 years of imprisonment on both counts one and two with the two terms of confinement to be served concurrently. Ischy received a five-year prison sentence on count three, to be served consecutively to the other terms.

I

Ischy complains that the Government breached the plea agreement by not remaining silent at sentencing. The pertinent portion of the plea agreement is as follows:

> Upon fulfillment of this promise to cooperate and/or testify fully, completely, and honestly in any case requested by the Government, the Government agrees to file a motion with the Court recommending departure

> under §5K1.1 from the application of the Sentencing Guidelines. Further, the Government agrees to make my cooperation known to the Court prior to sentencing. Finally, the Government agrees to stand silent at the time of sentencing as to the sentence the Court should impose against me.

R. 1, 211 (emphasis supplied).

In arguing Ischy's case, his counsel stated that the Government had brought the gun count against Ischy to put pressure on him. Counsel stated that he had been an assistant U.S. attorney in the Southern District of Texas and knew "full well how that game, as such, is played." When called upon to speak, the Assistant U.S. Attorney (AUSA) reported to the district court that Ischy had fully cooperated. The AUSA also admitted that there had been a proposed agreement to recommend a sentence of 18 years on counts one and two in return for that cooperation. After stating this, the AUSA said "and to correct a misrepresentation or misstatement on the part of [defense counsel] -- the government did not subsequently file gun counts against the various individuals who were charged as a means of pressure." The AUSA went on to describe the reasons for bringing the gun count later and stated that he had informed defense counsel that there was a high probability that the charges would eventually be brought. Defense counsel called the statements of the AUSA "hypertechnical pettifoggery" and stated that it would not take "any Phi Beta Kappa or rocket scientist" to comprehend that the charge was brought as a means of applying pressure.

Ischy cites U.S. v. Melton, 930 F.2d 1096, 1098 (5th Cir. 1991) for the proposition that the Government must stand behind the agreements made during the plea bargaining process. In Melton, the government agreed to send a transmittal letter recommending departure if the defendant cooperated. The defendant in Melton did cooperate, but no letter was forthcoming. This court remanded the case to the district court to determine if in fact there had been a breach of the plea agreement. 930 F.2d at 1098-99.

Ischy contends that the AUSA's explanation regarding the gun count was a breach of the agreement to stand silent at sentencing. It was not. In U.S. v. Block, 660 F.2d 1086, 1091 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 907 (1982), the Court held that

> an agreement to stand mute or take no position prohibits the Government from attempting to influence the sentence by presenting the courts with conjecture, opinion, or disparaging information already in the court's possession. Efforts by the Government to provide relevant factual information or to correct misstatements are not tantamount to taking a position on the sentence and will not violate the plea agreement.

The Court went on further to state that the Government has a duty to the court not "to stand mute in the face of misstatements or [agree] to withhold relevant factual information from the court." Id. at 1092. This position was recently reaffirmed in U.S. v. Goldfaden, 959 F.2d 1324, 1328 (5th Cir. 1992).

In this case, defense counsel made the statement that the gun charge was brought simply as a means of applying pressure to Ischy.

The AUSA responded specifically to this statement and prefaced his response by stating that it was made in order to "correct a misrepresentation or misstatement." This action was required of the AUSA under the holding in both Block and Goldfaden and was not a breach of the plea agreement.

II

Ischy contends that the district court was clearly erroneous in finding that he was a manager or supervisor of the criminal activity and increasing the base offense level by three levels accordingly.[1] At sentencing, the district court specifically noted the objection to the increase and stated that the court was in agreement with the presentence investigation report (PSR). The district court's finding is a factual determination that enjoys the protection of the "clearly erroneous" standard of review. U.S. v. Thomas, 870 F.2d 174, 176 (5th Cir. 1989).

In U.S. v. Liu, 960 F.2d 449, 456 (5th Cir.), cert. denied, 113 S.Ct. 418 (1992), the Court quoted the commentary to sentencing guideline § 3B1.1(b) for the factors to be used to determine if a defendant was a manager or supervisor of criminal activity.[2]

> "Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of

[1]Ischy erroneously asserts that the district court did not make a specific finding.

[2]The Court noted that it was not controlled by the language of the commentary to the sentencing guidelines. 960 F.2d at 456.

> accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others."

Id. (citation omitted). On appeal, Ischy does not challenge any of the factual information contained in the PSR relevant to his conduct. The PSR shows that Ischy was involved in the conspiracy from its outset, that he went to Mexico to inspect the landing strip, that he inspected the landing strip in Texas, that he obtained expense money for the transaction, that he flew to Mexico to get the cocaine, that he brought the cocaine back into this country, and that he and two others[3] unloaded it at the airfield in Egypt, Texas. Given all of these facts, the district court was not clearly erroneous in finding that Ischy had operated as a manager or supervisor of the criminal enterprise. The increase in the offense level associated with this finding is affirmed.

For the reasons set forth herein, the conviction and the sentence of David Phillip Ischy is

A F F I R M E D.

[3]These two others were Brown and Hall, both of whom had been brought into the conspiracy as friends of Ischy's.