

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2480
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PHANOR GOMEZ-RODRIGUEZ,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(CR-H-91-0126-01)

(February 19, 1993)
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Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.*

GARWOOD, Circuit Judge:

Defendant-appellant, Phanor Gomez-Rodriguez (Gomez), appeals his sentence for three counts of money laundering and aiding and abetting money laundering and one count of conspiracy to money launder on the ground that the district court erred in enhancing his sentence for leading or organizing five or more people in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

criminal activity. We affirm, holding that the district court did not err in sentencing Gomez.

Facts and Proceedings Below

Gomez laundered money for the "Cali" cocaine cartel and also may have been involved in distributing cocaine for the cartel.¹ Gomez was caught as the result of a successful DEA sting operation.

Posing as money couriers for the Cali cartel, an informant and an undercover DEA agent met with Gomez in March 1990, to discuss the transfer of \$1,000,000 from Gomez to a Cali cartel representative in Miami. At this meeting Gomez said that he did not have all of the money together yet, but that he would contact them when he was ready. Gomez said that he had four or five individuals working for him who handled cocaine distribution and that one of his workers was on his way to pick up the money. Two days later, Gomez's associate, Vicente Gallego-Tabares, delivered \$1,000,000 to the agent and the informant. The agent marked the money and then delivered it to the Cali cartel representative in Miami.

Using Gallego-Tabares to drop off the money, Gomez made two more substantial deliveries to the agent and the informant that month. Over the next few months, the agent and the informant spoke to Gomez about the possibility of additional transactions, but no other deliveries took place.

The DEA's surveillance of Gomez continued. On September 27,

¹ After Gomez pleaded guilty to money laundering, the United States dropped charges against him for conspiring to possess and distribute cocaine.

1990, Gomez met with a man named Mario Alberto Jaramillo and then drove Jaramillo home after their meeting. Soon thereafter, a DEA search of Jaramillo's house revealed \$125,335 in cash.

Through a wiretapped conversation of Gomez's, the DEA learned that Hernan Villamil was also involved in Gomez's operation. On October 22, 1990, agents watched as Villamil and Mario Alfonso Perez placed a small box under the hood of Perez's car near the firewall. A subsequent search of the box revealed \$21,800.

Soon after these transactions occurred, Gomez was indicted and arrested. Gomez pleaded guilty, without the benefit of a plea agreement, to three counts of money laundering and aiding and abetting and to one count of conspiracy to money-launder.

Over Gomez's objections at sentencing, the district court adopted the fact-findings of the presentence report and sentenced him based on the recommendation therein. Gomez was sentenced to 235 months, the highest allowable under the applicable sentencing range. In part, Gomez's sentence was so high because it was enhanced four offense levels under section 3B1.1(a) of the Sentencing Guidelines based on the district court's adoption of the presentence report's finding that Gomez was the organizer or leader of a criminal activity that involved five or more people or was otherwise extensive. Gomez appeals, claiming that the district court erred in enhancing his sentence on this basis.

Discussion

The sole issue before us in this case is whether the district court erred in enhancing Gomez's sentence under section 3B1.1(a) of the Sentencing Guidelines. Section 3B1.1(a) provides: "If the

defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase [the offense level] by 4 levels."

Gomez contends that neither the district court nor the presentence report provided a sufficient factual basis to establish that Gomez was a leader or organizer or that five or more people were involved.

We disagree. The district court had a sufficient basis for its finding that Gomez was a leader or organizer. The district court may rely on information contained in presentence reports, as long as the information has "some minimum indicium of reliability." *United States v. Vela*, 927 F.2d 197, 201 (5th Cir.), cert. denied, 112 S.Ct. 214 (1991)(citation omitted); *United States v. Alfaro*, 919 F.2d 962, 966 (5th Cir. 1990). Section 3B1.1(a) applies equally to kingpins and mid-level managers. U.S.G.S. § 3B1.1 comment 3 (1992). While Gomez may have taken his orders from the Cali cartel leadership in Miami, Gomez still was an organizer or leader of his own group of people in Houston. The presentence report expressly found that Gomez controlled the timing and delivery of money from his Houston organization to the courier. In a taped conversation, Gomez specifically admitted that he was the leader of a group of five or more people. He said that he had four or five individuals working for him in the cocaine business and that one of his workers would pick up the money. This admission shows that Gomez was using his cocaine employees in his money laundering business.

The presentence report also presented a specific example of

how Gomez was the point man. The informant and the undercover agent would speak to Gomez about how much money would be delivered and when delivery would occur, and then Gomez would have Gallego-Tabares deliver the money. Gomez was also critical of Gallego-Tabares for overstepping his limited role by mentioning another shipment to the informant and the agent. While the presentence report shows that Gomez was involved with other people, Gomez's control of Villamil, Perez, and Jaramillo is less clear. Gomez was seen meeting with Jaramillo shortly before the DEA seized \$125,000 from Jaramillo's house. Similarly, after wiretapping Gomez's phone, the DEA was able to seize \$21,800 from Perez and Villamil. Nonetheless, since Gomez admitted that he had four or five people working for him and since Gomez planned and controlled the deliveries, it is clear that he could reasonably be deemed a leader and organizer. Gomez tendered no contrary evidence.

The district court had a sufficient basis to find that Gomez organized or controlled a group that "involved five or more participants or was otherwise extensive." A participant "is a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.G.S. § 3B1.1. comment 1 (1992). Informants and undercover officers are not participants. *Id.* The defendant organizer or leader is counted and included in determining the number of participants. *United States v. Barbontin*, 907 F.2d 1494, 1498 (5th Cir. 1990).

Gomez's prior admission showed that four or five people worked for him in his cocaine business and that one would be helping collect money for the delivery. In this conversation, Gomez said

that moving a recent shipment of cocaine had been difficult and that this would cause a slight delay in the money delivery. This admission was a sufficient basis for the section 3B1.1 enhancement. It is true that "'for purposes of measuring the size of the enterprise, ... § 3B1.1(a) focuses upon the number of *transactional* participants, which can be inferentially calculated provided that the court does not look beyond the offense of conviction to enlarge the class of participants.'" *United States v. Villarreal*, 920 F.2d 1218, 1223 (5th Cir. 1991) (citing *United States v. Barbontin*, 907 F.2d 1494, 1498 (5th Cir. 1990)). However, "[w]e do not require each 'participant' to have committed each element of the offense; rather, we require each of the participants to play some role in bringing about the specific offense charged." *United States v. Alfaro*, 919 F.2d 962, 967 (5th Cir. 1990). In *Villarreal*, 920 F.2d at 1223, we found that participants in defendant's marijuana business were transactionally related to defendant's cocaine business because money generated from the marijuana business was used to bankroll the cocaine business, so that defendant's cocaine distribution sentence could be enhanced. *Compare Barbontin*, 907 F.2d at 1494 (members of defendant's organization do not count for section 3B1.1 if not involved in transaction of conviction); *United States v. Mourning*, 914 F.2d 699, 705 (5th Cir. 1990). From Gomez's admission, the district court could reasonably infer that Gomez used his four or five employees in all of his illegal activities including the money laundering business, and that the laundered money was directly generated from, and an integral part of, his cocaine business. Since Gomez had at least four employees

and since Gomez himself counts as an additional employee, it is clear that five or more people were involved in the money laundering operation.

There was also sufficient evidence to show that Gomez's organization was "otherwise extensive" even if five people were not directly involved in it. "In assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive." U.S.G.S § 3B1.1 comment 2 (1992). In addition to the above named and unnamed individuals with whom Gomez was involved, Gomez made eighty-one recorded phone calls to known drug traffickers during the time that he was laundering money for the cartel. Gomez was directly connected to the Cali cartel and its operations in Miami and Colombia. *See United States v. Allibhai*, 939 F.2d 244, 252-53 (5th Cir.), *cert. denied*, 112 S.Ct. 967 (1992) (only four known participants, but using the unknowing services of many outsiders made organization "otherwise extensive" to justify 3B1.1(a) enhancement). The money laundering could be found to be directly related to and closely integrated with the cocaine distribution. The district court did not err in enhancing Gomez's sentence under section 3B1.1(a) of the guidelines.

Conclusion

Accordingly, the sentence of the district court is

AFFIRMED.