UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-2504
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

OSCAR SAA and LUIS CARLOS VALENZUELA,

Defendants-Appellants.

Appeal from the United States District Court
For the Southern District of Texas

CR H 91 0216 02

(June 2, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

The indictment charged appellants Oscar Saa and Carlos Valenzuela, together with Jerome Bell, Emirio Albornoz, and Gilberto Montano (a/k/a and hereinafter referred to as "Bianchi")

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

with conspiracy to possess and possession of more than five kilograms of cocaine with intent to distribute. Bell and Albornoz pleaded guilty on Count One; Bell was a principal government witness at the trial of Saa and Valenzuela. Bianchi pleaded guilty on Count Two.

At the trial, Drug Enforcement Administration ("DEA") Special Agent Keith Jones testified that in September 1991, the DEA received information from Michael Jackson, a confidential informant, that Jerome Bell was involved in drug trafficking. Consequently, on November 25, 1991, Jones had Jackson telephone Bell at his apartment in Houston. Jackson told Bell that he knew someone who wanted to purchase seven kilograms of cocaine. Jackson and Bell agreed to meet at Bell's apartment the following day.

On November 26, about 11:00 a.m., Jackson went to Bell's apartment (No. 297 at 10700 Fuqua Street) with DEA Special Agent Charlie Boise and Special Agent Blair, acting undercover. Jackson introduced Boise to Bell as his uncle, the prospective buyer. Bell said he would see what he could do for Boise. After making some phone calls, including one to a person named Rick, Bell told the others that Rick and a female would bring the seven kilograms of cocaine to the apartment. Bell decided it was taking too long for the cocaine to arrive, so that afternoon he telephoned his friend Bianchi (Gilberto Montano). Bianchi told Bell that he would call someone and find out if he could obtain the seven kilos for Bell. After Bell spoke to Bianchi, he told the others that Bianchi could handle up to ten kilograms of cocaine. Two hours later

Bianchi had not arrived, so the agents decided to leave. Bell gave Jackson a beeper and told him he would contact him when his source arrived.

At approximately 2:45 p.m., Saa, Valenzuela, Bianchi, and Albornoz arrived at Jackson's apartment complex in a white Geo Prism rental car as to which Saa was an authorized driver. Bianchi, Saa, and Valenzuela went to Bell's apartment; Albornoz remained in the car.

Bianchi asked Bell if his people still wanted the cocaine; Bell told him they did. Bianchi then made a phone call and Saa made two phone calls, using his own cellular telephone. Both men spoke in Spanish. Valenzuela was in the room when the calls were made, but he did not say anything. After making his first phone call, Saa told Bell in English that someone was going to bring five kilograms and that he was going to call someone else to try to obtain the other two. Saa made the second call, then he directed Valenzuela in Spanish to go get the two kilograms, as he told Bell; and Valenzuela left.

Valenzuela and Albornoz left Bell's apartment in the Geo Prism. Officers conducting surveillance followed them to townhouse 56 of a building complex at 12400 Brookglade Circle. Saa and Valenzuela entered the townhouse; about 15 minutes later, a man and a woman arrived and also entered it. Shortly thereafter, Valenzuela and Albornoz left. Albornoz apparently was carrying something under his jacket.

At approximately 3:30, Bell paged Jackson and told him that Bianchi had arrived and was supposed to pick up the five kilograms of cocaine. About 30 minutes after Valenzuela and Albornoz left to get the two kilograms, Saa received a call on his cellular telephone at Bell's apartment. Saa told Bell that the people with the cocaine had lost their way. Saa, Bianchi, and Bell then got into Bell's gold Datsun 280ZX and went looking for them. After locating them riding in a Ford Escort, Saa waved at the driver. The Escort then followed Bell's Datsun back to Bell's apartment.

About 4:00 p.m., the agents returned to Bell's apartment, but he was not there. They took Tracy Rambo, Bell's common-law wife, to their vehicle and showed her $200,000. The agents saw Bell, Saa, and Bianchi returning to the apartment complex in Bell's Datsun as the agents were leaving. The agents did not stop them because there were not enough agents on surveillance.

Upon returning, Bell and Bianchi entered Bell's apartment; Saa went to the Escort and spoke with its two male occupants. Inside the apartment, Bell used his bathroom. When he left the bathroom, he found a wastebasket on a table in his apartment; Saa also was there. The wastebasket contained five kilograms of cocaine.

Shortly thereafter, Jackson called Bell, who told him he had the cocaine. They agreed to do the transaction at a nearby Jack-in-the-Box restaurant. Bell and Bianchi went to the restaurant, where Bianchi introduced himself to the agents. When Agent Boise asked for the cocaine, Bianchi pointed to Bell's Datsun. Boise opened the door of the vehicle and Jackson removed a waste basket

from its trunk. After looking in the basket, Boise asked Bell where the rest of the cocaine was; Bell said the other two pounds were at his apartment. The agent then gave a prearranged signal and other law enforcement officers arrested Bell and Bianchi.

Boise, accompanied by other agents and Houston Police Department officers, immediately went to Bell's apartment. They found Rambo and Saa in the apartment. After Rambo consented to a search, the agents found an operable cellular telephone next to Saa. Records relative to that telephone showed that a call had been made from it to Bell's apartment on November 26, 1991, at 2:16 p.m. The records also revealed that two calls had been made from the phone to the Brookglade townhouse, one on November 25, 1991, at 2:58 p.m., and one the next day at 3:08 p.m.

After the search of Bell's apartment, Boise saw the Geo Prism return to the parking lot of the apartment complex. As agents approached the vehicle its occupants, Valenzuela and Albornoz, tried to run away. When they were apprehended, the agents found two kilograms of cocaine on Albornoz's person. Afterwards, Valenzuela told an agent that Bianchi had told him to get the two kilograms from the townhouse.

During a later search of the Brookglade townhouse, a narcotics-detecting dog gave a positive alert for the odor of narcotics in a dresser drawer. The cocaine which the agents recovered from Albornoz and the waste basket weighed 7018.5 grams and it was 91% pure.

OPINION

Saa contends that the evidence introduced at his trial was insufficient to support his convictions. He reasons that without Bell's testimony, there was insufficient circumstantial supporting evidence and that Bell's testimony cannot be relied on because it was incredible as a matter of law. Saa points out that Bell gave inconsistent testimony at the trial concerning his history of drug trafficking. He also asserts that Bell's testimony to the effect that Bell's role in the offense was minor was refuted by other evidence. Saa notes that Bell's testimony purported to exonerate Rambo although other evidence indicated that she was a knowing participant in the transaction. Saa also points out that Bell received a favorable plea agreement and asserts that he testified in hopes of a downward departure upon being sentenced.

"The uncorroborated testimony of an accomplice or co-conspirator will support a conviction, provided that this testimony is not incredible or otherwise insubstantial on its face." United States v. Singer, 970 F.2d 1414, 1419 (5th Cir. 1992). This rule applies even when the accomplice or coconspirator testified pursuant to a plea agreement with the Government. United States v. Osum, 943 F.2d 1394, 1405 (5th Cir. 1991).

"[T]estimony generally should not be declared incredible as a matter of law unless it asserts facts that the witness physically could not have observed or events that could not have occurred under the laws of nature." Id. Because "[t]he jury is the ultimate arbiter of the credibility of a witness," inconsistency in an accomplice's testimony is insufficient to render it incredible

as a matter of law. United States v. Lindell, 881 F.2d 1313, 1322 (5th Cir. 1989), cert. denied, 493 U.S. 1087, 496 U.S. 926 (1990).

Saa does not challenge the portions of Bell's testimony that directly implicated Saa in the offenses. Furthermore, Bell's testimony concerning Saa's participation was corroborated by Saa's telephone records, by surveillance agents who observed the conspirators' trips to and from Bell's apartment, and by the fact that Albornoz was found to possess two kilograms of cocaine. Because Saa has not shown that Bell's testimony was incredible as a matter of law, his challenge to the sufficiency of the evidence has no merit.

Saa also contends that the district court erred by finding, for purposes of sentencing, that he was an organizer, leader, super-visor, or manager relative to offenses of which he was convicted. Based on that finding, the court increased Saa's total offense level by two levels pursuant to U.S.S.G. § 3B1.1(c). Saa argues that statements in his Presentence Report (PSR) are unreliable, that there was no showing that he was culpable under the seven factors listed in the commentary to § 3B1.1, and that the evidence showed that not he but Bianchi was the leader.

The Government was required to prove the facts which would support the application of § 3B1.1(c) by a preponderance of the evidence. United States v. Hinojosa, 958 F.2d 624, 633 (5th Cir. 1992). "The determination of manager status demands that the district court draw an inference from a variety of data, including the information in the pre-sentence report and the defendant's

statements and demeanor at the sentencing hearing." United States v. Mejia-Orosco, 867 F.2d 216, 220-21 (5th Cir.), cert. denied, 492 U.S. 924 (1989). Saa declined to make a statement at his sentencing hearing. "Whether a defendant was `an organizer, leader, manager, or supervisor' of the criminal activity is a question of fact which we review under the clearly erroneous standard, giving due regard to the trial court's assessment of the credibility of the witnesses." United States v. Barreto, 871 F.2d 511, 512 (5th Cir. 1989).

The factors that the court may consider in making the determination "include the exercise of decision making authority, the nature of participation . . . , the recruitment of accomplices, . . . and the degree of control and authority exercised over others." U.S.S.G § 3B1.1, comment. (n.3). However, these factors are not controlling on the ultimate issue. United States v. Liu, 960 F.2d 449, 456 (5th Cir.), cert. denied, 113 S. Ct. 418 (1992).

The PSR, at ¶ 30, summarizes Saa's role in the offenses based on information provided by Jackson, the informant, and the Houston Police Department Narcotics Squad. The probation officer recommended the increase in Saa's offense level on grounds that "[i]nvestigative material indicates Oscar Saa was the leader of a drug-trafficking activity and recruited Carlos Valenzuela and Emirio Albo[r]noz to deliver cocaine and money for him." PSR at ¶ 35. At sentencing, the district court adopted the PSR, overruling Saa's objection that the evidentiary basis was insufficient.

Saa now challenges the probation officer's reliance on Jackson's statement that Saa was the leader as being conclusional and hearsay. At the sentencing hearing, however, he presented no evidence that would support a finding that the statement was unreliable or materially untrue. Under similar circumstances, this Court has upheld an "organizer" finding. United States v. Chavez, 947 F.2d 742, 746 (5th Cir. 1991). The Court also has held that unsworn out-of-court statements by informants supported the district court's "organizer or leader" finding. See United States v. Kinder, 946 F.2d 362, 369 (5th Cir. 1991), cert. denied, 112 S. Ct. 1677, 2290 (1992).

Furthermore, the evidence at the trial supported a finding that Saa rather than Bianchi was the source of the cocaine. At Bell's apartment Saa, not Bianchi, made two phone calls in attempting to obtain it. Later, when he and Bianchi went to look for the lost couriers, it was Saa who pointed out their vehicle and who directed its driver to follow them. Saa also telephoned the Brookglade townhouse whence Valenzuela and Albornoz, at Saa's direction, obtained the two pounds of cocaine and then brought it to Bell's apartment. Thus, there is ample support in the record for the district court's finding that Saa was a leader relative to the narcotics conspiracy.

Valenzuela contends that the district court erred by sentencing him on the basis of the seven kilograms of cocaine that was recovered. He asserts that he was responsible only for two kilograms and that the negotiation by his coconspirators for the

additional five kilograms was not reasonably foreseeable to him. Valenzuela admits that the evidence showed that he was in Bell's apartment when discussions concerning the entire seven kilograms took place, but he claims that the discussions were in English and that he understood only Spanish. There is no evidence in the record, however, that Valenzuela did not understand English.

The "clearly erroneous" standard applies to this Court's review of the district court's findings concerning the quantity of drugs involved in an offense. United States v. Kinder, 946 F.2d at 366. "The district court is not limited to considering the amount of drugs seized or specified in the charging instrument but may consider amounts that were part of a common plan or scheme to distribute." United States v. Fuller, 974 F.2d 1474, 1484 (5th Cir. 1992)(citation omitted). "Furthermore, the guidelines impose culpability for the purpose of sentencing for criminal activity `in furtherance of the [conspiracy] . . . that was reasonably foreseeable by the defendant.' U.S.S.G. § 1B1.3, Application Note 1." United States v. Harris, 932 F.2d 1529, 1538 (5th Cir.), cert. denied, 112 S. Ct. 270, 324 (1991), 112 S. Ct. 914 (1992).

The probation department rejected Valenzuela's contention by "reiterat[ing] that according to statements taken from Bell and Tracy Rambo, [Valenzuela] was present during the negotiations for the additional five kilograms of cocaine, and should therefore be held accountable to a total of 7.018 kilograms of cocaine."

At sentencing, the district court adopted the PSR and made these additional findings: "I don't think that it is relevant that

he wasn't able to understand all of the conversations in English. I think he saw what was going on, and I think he had enough reported to him in English that the guideline appropriately fixes his position."

The district court's finding that Valenzuela knew that the object of the conspiracy was to sell seven kilograms of cocaine is supported by the record. The evidence at trial established that Valenzuela arrived at Bell's apartment with Saa and Bianchi and that he was there when Saa made the two calls to obtain the separate quantities of cocaine. Bell testified that Saa made the calls in Spanish, Valenzuela's native language. Furthermore, there is no evidence in the record to show that Valenzuela does not understand English. Because the district court could reasonably infer that Valenzuela knew that seven kilograms of cocaine were involved, its finding is not clearly erroneous.

Valenzuela also contends that because he was a minor participant in the offense, the district court erred by denying him a two-level downward adjustment of his offense level pursuant to U.S.S.G. § 3B1.2. He argues that he was unaware of the total amount of cocaine involved; that he did not personally negotiate with Bell as did Saa and Bianchi; that he only acted as a courier for the two kilograms; and that the record does not show that he was involved in the daily activities of the (short-lived) conspiracy.

The defendant bears the burden of demonstrating in the district court that he is entitled to the minor-participant

sentence reduction. United States v. Mueller, 902 F.2d 336, 345, 347 (5th Cir. 1990). "A defendant's status as a . . . `minor participant' is one of several sophisticated factual determinations which `enjoy the protection of the clearly erroneous standard.'" United States v. Carr, 979 F.2d 51, 55 (5th Cir. 1992)(quoting United States v. Mejia-Orosco, 867 F.2d at 221). Thus, the district court's determination "is entitled to great deference." United States v. Devine, 934 F.2d 1325, 1340 (5th Cir.), cert. denied, 112 S. Ct. 349 (1991), 112 S. Ct. 911, 952, 954, 1164, 1197 (1992).

"A defendant's participation is not minor unless he is `substantially less culpable than the average participant.' U.S.S.G. § 3B1.2, Comment. (backg'd.)." United States v. Follin, 979 F.2d 369, 375 (5th Cir. 1992). A defendant is not automatically entitled to minor-participant status because he was only a courier in a drug transaction. United States v. Nevarez-Arreola, 885 F.2d 243, 245 (5th Cir. 1989).

The record supports the district court's finding, made by adopting the PSR, that Valenzuela was at least an average participant. He accompanied Saa to Bell's apartment, where the transaction was consummated and Saa contacted his sources for cocaine. Valenzuela then was charged with the duty of going to get the two kilograms from the townhouse. Valenzuela was in a superior position to Albornoz because Valenzuela received orders from Saa personally and Albornoz took the greater risk in physically carrying the cocaine from the townhouse. Valenzuela was less

culpable than Saa and Bianchi, but Saa was a leader and Bianchi may also have been. See Mueller, 902 F.2d at 345-46. Accordingly, Valenzuela has failed to show clear error in the district court's determination that he was not a minor participant.

We AFFIRM the judgment of the district court.