

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-2712
Summary Calendar

United States of America,

Plaintiff-Appellee,

VERSUS

Tony Duran Nealy,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 91 91 3)

(August 6, 1993)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge*:

Defendant challenges the district court's finding that he was an organizer, manager, leader or supervisor in a conspiracy to distribute cocaine. Finding no error, we affirm.

Facts and Prior Proceedings

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Tony Duran Nealy pleaded guilty to conspiracy to possess with intent to distribute "crack" cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A). A presentence investigation report (PSR) was ordered, and the probation officer calculated Nealy's base offense level at 34. To that he added two levels for Nealy's role in the offense as an organizer, leader, manager or supervisor and then subtracted two levels for Nealy's acceptance of responsibility. Nealy's base offense level was thus 34. Nealy objected to the adjustment for his managerial role in the offense, arguing that there was no evidence to suggest that he played any greater role than the other defendants involved in the conspiracy.¹ Nealy reiterated his objection at the sentencing hearing. The district court overruled Nealy's objection and increased his base offense level by two pursuant to U.S.S.G. § 3B1.1(c). The district court sentenced Nealy to a 200-month term of imprisonment, to be followed by a five-year term of supervised release. Nealy timely appeals his sentence to this Court.

Discussion

Nealy's sole argument on appeal is that the district court

¹ Specifically, Nealy's written objection to the increase in his sentence for his role in the offense stated:

...Tony Nealy contends his role was equal to that of his co-defendants, James Nealy and Wade Brown. All three defendants participated in the meetings with the cooperating defendant. All three defendants were present at the time of the transaction. There is no evidence that Tony Nealy recruited James Nealy or Wade Brown. Nor is there any evidence that Tony Nealy was to receive a larger share of the fruits of the crime. Further, there is no evidence that Tony Nealy exercised any supervision over James Nealy or Wade Brown at the time of the transaction.

erred by adjusting his offense level upward for his role in the offense. We review a district court's finding that a defendant played a managerial or leadership role in criminal activity for clear error. **United States v. Alvarado**, 898 F.2d 987, 993 (5th Cir. 1990). "A finding of fact is not clearly erroneous if it is plausible in light of the record viewed in its entirety." **United States v. Sherrod**, 964 F.2d 1501, 1506 (5th Cir. 1992), **cert. denied**, 113 S.Ct. 1422 (1993).

The Guidelines suggest that judges should look to seven factors when considering an adjustment for a defendant's role in the offense:

- (1) The exercise of decision-making authority;
- (2) The nature of participation in the commission of the offense;
- (3) The recruitment of accomplices;
- (4) The claimed right to a larger share of the fruits of the crime;
- (5) The degree of participation in planning or organizing the offense;
- (6) The nature and scope of the illegal activity; and
- (7) The degree of control and authority exercised over others.

United States v. Rodriguez, 897 F.2d 1324, 1325-26 (5th Cir.), **cert. denied**, 111 S.Ct 158 (1990); **see** U.S.S.G. § 3B1.1, **comment**.(n.3). In his written objection to the two level increase for his role in the offense, Nealy argued that there was no evidence consistent with the seven factors listed in the Sentencing Guidelines. Further, Nealy argued during sentencing that the evidence showed that it was more plausible to presume that his

older brother, James Nealy, who had a much more extensive criminal record than Tony Nealy, was the real leader because it was not reasonable to presume that Tony was supervising his older, more experienced brother James. Nealy makes the same argument on appeal.

The district court may rely on information in the PSR as long as it 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). The defendant bears the burden of demonstrating that the information relied on by the district court in the PSR is materially untrue. **Id.** Nealy has failed to meet this burden. The probation officer found that Nealy played an aggravating role in the offense. Specifically, he found that Nealy negotiated with a confidential informant for the sale of the crack cocaine; directed the actions of James Nealy and Wade Brown in effecting the delivery of the cocaine by sending them to "check out" the confidential informant and the undercover DEA agent; Nealy decided when and whether to consummate the drug deal; his participation in the offense was significant as he was involved in the offense from negotiation to delivery; and Nealy was present at the scene to supervise the actual delivery of the cocaine. In addition, the PSR indicates that the DEA case agents were advised by the confidential informant that he had previous crack cocaine dealings with Tony Nealy and his brother James Nealy, and that Tony Nealy was always in charge. These statements and conclusions in the PSR were based on the statements of the investigative agents on the case and the confidential informant. As this Court stated in

United States v. Marshall, 910 F.2d 1241, 1244 (5th Cir. 1990), the district court may properly find sufficient reliability of a PSR which is based on the results of a police investigation. While Nealy may argue that the statements in the PSR do not conclusively demonstrate that he possessed a leadership role, he offers no specific evidence to rebut the information in the PSR. **Vela**, 927 F.2d at 201. Therefore, Nealy has not overcome the burden of demonstrating that the statements in the PSR are materially untrue, thereby making the PSR unreliable.

Based on the information in the PSR and the transcripts of the sentencing hearing, the district court's finding, that Nealy was an organizer, leader, manager or supervisor of the drug transaction, is plausible.

Conclusion

Based on the foregoing, we find no clear error by the district court and therefore affirm.