IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3569
Summary Calendar

UNITED STATES,

Plaintiff-Appellee,

v.

DAVID A. BETZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR-91-365-M-6)

(February 25, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

David A. Betz appeals the sentence imposed by the district court after he pleaded guilty to a charge of conspiracy with intent to distribute marijuana in violation of 21 U.S.C. §§ 841 (a)(1) and 846. Because we conclude that the district court correctly applied the United States Sentencing Guidelines (the "Guidelines"),[1] we affirm the sentence.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

[1] United States Sentencing Commission, Guidelines Manual (Nov. 1991) [hereinafter cited by section number as U.S.S.G.].

I.

Between May 17, 1991, and July 9, 1991, a confidential informant, acting at the direction of federal law enforcement officers, negotiated with Salvadore Pace, Jr. regarding the sale of a quantity of marihuana for later distribution by Pace and his associates in and around New Orleans, Louisiana. Pace ultimately agreed to purchase 750 pounds of the drug at a price of $650 per pound. Pace requested that the marihuana be delivered to his residence in River Ridge, Louisiana, and agreed to have a partial payment of approximately $30,000 available upon delivery.

On July 17, 1991, the informant and an undercover narcotics officer attempted to deliver the marihuana. Pace advised the informant, however, that he could not accept delivery or deliver the partial payment until his partner "David" approved the marijuana. He told the informant that David would be there the next morning. When the informant and the undercover officer returned to Pace's residence on the following day, they were met by Pace and David Betz. As the marihuana was being transferred into Pace's workshop, Pace and Betz evaluated the marihuana and advised the informant and the officer that it was acceptable. They both were promptly arrested.

Betz was indicted by a federal grand jury and charged with one count of conspiracy to possess with the intent to distribute marihuana in violation of 28 U.S.C. §§ 841(a)(1) and 846. On

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We apply the version of the Guidelines in effect on the date of sentencing. See United States v. Woolford, 896 F.2d 99, 102 (5th Cir. 1990).

September 30, 1991, Betz pleaded guilty pursuant to a written plea agreement. The district court accepted Betz's plea and ordered a presentence investigation.

The Presentence Report (PSR) concluded that the object of the conspiracy for which Betz had been convicted was the delivery of 750 pounds of marihuana. The report indicated, however, that Betz contended that it was never his intent to become involved with such a large quantity of marihuana and that he should not be held accountable for the full 750 pounds. According to the report, Betz stated that he thought that the load would be 350 pounds of marihuana until Pace informed him, just minutes before the load arrived, that the transaction involved 750 pounds of the drug. The PSR also indicated that Betz admitted to distributing marihuana from smaller loads delivered to Pace's house on two occasions prior to his arrest.[2]

Based upon these facts, the PSR recommended a criminal history category of I--Betz had no prior criminal convictions--and an offense level of twenty-four. In its offense level calculation, the PSR took into account the full 750 pounds of marihuana, recommending a base offense level of twenty-six[3] and a

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[2] Each of these loads consisted of no more than 100 pounds; a third load was rejected by Betz because the marihuana was of poor quality.

[3] Although the amount of marihuana actually delivered in the undercover operation was 615 pounds (278.9 kilograms), the object of the conspiracy was the delivery of the 750 pounds (340.2 kilograms) negotiated by Pace. Section 2D1.4 of the Guidelines specifically provides that where a defendant is convicted of a conspiracy to commit any offense involving a controlled substance, the offense level shall be the same as if

two-level reduction for acceptance of responsibility.[4] The PSR thus arrived at a guideline sentencing range of fifty-one to sixty-three months imprisonment.

Betz filed written objections to the PSR on two grounds. Betz first argued that the PSR had incorrectly calculated his offense level based upon the full 750 pounds of marihuana. He complained that the loads previously delivered to Pace's residence were much smaller and that he did not know until minutes before the delivery that Pace had agreed to purchase 750 pounds. According to Betz, he told Pace that he was "crazy" when he learned of the large quantity.

Betz also objected to the PSR on the grounds that it failed to recommend a reduction in the offense level for his mitigating role in the offense.[5] Betz argued that he was entitled to a decrease because he did not know the scope of the enterprise and had no desire to get involved with such a large quantity of marihuana. According to Betz, he played only a small role in the transaction -- that is, to evaluate the marihuana for Pace, who made the deal for the drugs.

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the object of the conspiracy had been completed. U.S.S.G. § 2D1.4. The base offense level for crimes involving at least 100 kilograms of marihuana but less than 400 kilograms is twenty-six. U.S.S.G. § 2D1.1(a)(3) and (c)(9).

[4] The Guidelines allow the sentencing court to reduce the applicable offense level by two levels if a defendant "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S.S.G. § 3E1.1.

[5] See U.S.S.G. § 3B1.2 (Mitigating Role).

The probation officer addressed Betz's objections in a Addendum to the PSR. With regard to Betz's first objection, the officer noted that Betz was properly held accountable for the full 750 pounds of marihuana because he had agreed to accept more than twice as much marihuana as had been delivered in the past, he had been told the day of his arrest that 750 pounds was to be delivered, and he had helped to unload and evaluate the marihuana when it arrived. Thus, the conduct for which Betz was accountable pursuant to the Guidelines included the full 750 pounds.

The probation officer also noted that Betz's role in the offense was not mitigating. The officer observed that Betz had been involved in selling marihuana for the same supplier since 1986, that he had recruited Pace to accept the shipments, that the buyer involved in the transaction was "his buyer," and that he was to receive a share of the profits from the transaction. Thus, the officer concluded, no offense level reduction was warranted.

At the June 17, 1992, sentencing hearing, Betz renewed his objections to the PSR. After hearing the arguments of counsel,[6] the district court overruled Betz' objections. Observing that it did not intend to "second-guess" the probation officer, the

[6] Betz argued that his account of the events was supported by tape recordings of conversations between other members of the conspiracy and requested that transcripts of the recordings be made part of the record. After determining that the probation officer who prepared the PSR had reviewed the tapes, the district court refused to admit the transcripts as evidence.

district court then adopted the findings and recommendations of the PSR and sentenced Betz to fifty-one months imprisonment.[7] Betz now brings this appeal, which is specifically authorized by statute. See 18 U.S.C. § 3742 (a)(2).

II.

On appeal, Betz maintains that the district court incorrectly applied the Guidelines in calculating his offense level (1) by failing to make a specific finding as to a controverted matter in the PSR, (2) by taking into account the full 750 pounds of marihuana delivered to Pace's residence, and (3) by refusing to grant him a downward adjustment for his role in the offense. We address each of these arguments, in turn.

A.

In reviewing Betz's sentence, we will uphold the district court's sentence so long as it results from a correct application of the Guidelines to factual findings that are not clearly erroneous. United States v. Sarasti, 869 F.2d 805, 806 (5th Cir. 1989); see also 18 U.S.C. § 3742(d). A factual finding is not clearly erroneous if the district court's account of the evidence is plausible in light of the record viewed in its entirety. United States v. Fields, 906 F.2d 139, 142 (5th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 200 (1990). If, however, the sentence was imposed as a result of an incorrect application of the Guidelines, we must remand the case to the district court for

[7] The court also imposed a $5000 fine, 5 years of supervised release, and a special assessment of $50.

further sentencing proceedings, even if the sentence is reasonable. United States v. Mejia-Orosco, 867 F.2d 216, 217 (5th Cir.), cert. denied, 492 U.S. 924 (1989); see also 18 U.S.C. § 3742(e)(1). We review the district court's application of the Guidelines to its factual findings de novo. United States v. Alfaro, 919 F.2d 962, 965-66 (5th Cir. 1990).

B.

Betz first contends that the district court erred by failing to make a specific finding with regard to a controverted matter in the PSR. Betz argues that his objections created a dispute as to the quantity of marihuana properly attributable to him for sentencing purposes. Thus, Betz asserts, the district court's failure to make its own finding on the matter constitutes reversible error. We disagree.

Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure requires that the sentencing court make a finding resolving each controverted matter in the PSR. FED.R.CRIM.P. 32(c)(3)(D). The sentencing court may satisfy this requirement, however, by rejecting a defendant's objection and orally adopting the PSR's finding. United States v. Webster, 960 F.2d 1301, 1310 (5th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 355 (1992); United States v. Puma, 937 F.2d 151, 155 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1165 (1992). Moreover, the district court need not "mouth any particular magic words" or "make a talismanic incantation of the rule;" it suffices that the record reflects that the court considered the disputed issue and

rejected the defendant's objection to the PSR. See United States v. Piazza, 959 F.2d 33, 37 (5th Cir. 1992).

In the case at bar, the PSR concluded that Betz had knowingly participated in a transaction involving 750 pounds of marihuana and attributed that quantity to Betz for purposes of calculating his offense level. Betz filed a written objection alleging that he did not know that 750 pounds of the drug were involved until minutes before the delivery. The probation officer rejected Betz's objection and attached a written addendum to the PSR to that effect. When Betz re-urged the objection before the district court, the court also rejected Betz's objection, then adopted the PSR with its written addendum. The district court thus satisfied the requirements of Rule 32(c)(2)(D) by making a specific finding that Betz had actual knowledge that the conspiracy involved 750 pounds of marihuana.

C.

Betz next argues that the district court incorrectly applied the Guidelines by considering the full 750 pounds of marihuana in calculating his offense level. In particular, he asserts that case must be remanded because the district court failed to make a finding as to the amount of marihuana that he knew or reasonably should have foreseen was involved in the conspiracy. Betz also contends that "there was no evidence that he could have foreseen that the conspiracy involved 750 pounds [of marihuana]." This argument is meritless.

As Betz correctly points out, the entire amount of drugs involved in a conspiracy is not automatically attributable to each defendant for sentencing purposes; rather, the sentencing court must make a specific finding of the amount of drugs that each conspirator knew or reasonably should have foreseen was involved in the conspiracy. Webster, 960 F.2d at 1309; Puma, 937 F.2d at 159-60. Here, the PSR specifically concluded that, because Betz had actual knowledge that the transaction in which he participated involved 750 pounds of marihuana,[8] the full amount was properly attributed to him for sentencing purposes. As discussed supra, by rejecting Betz's objection to the quantity specified in the PSR and orally adopting the report, the district court made the requisite finding that Betz had knowledge of the

[8] This fact distinguishes the instant case from Webster and Puma. In Webster, the PSR adopted by the sentencing court made no specific finding with respect to the amount of drugs that either of the defendants knew or reasonably should have foreseen was involved in the conspiracy; rather, the report referred only to the amount "dispersed by the defendants during the course of the conspiracy" and the amount "involv[ed" in the offense of conviction. 960 F.2d at 1309. Similarly, in Puma, the PSR adopted by the sentencing court attributed to the defendant the entire amount of drugs involved in the conspiracy without giving any reason for doing so. Puma, 937 F.2d at 159. In both cases, this court remanded for a determination of the amount of drugs that the particular defendant "knew or reasonably should have foreseen" was involved in the conspiracy. Here, the PSR specifically concluded that Betz knew that the transaction involved 750 pounds of marihuana.

full 750 pounds. In light of the facts set forth in the PSR,[9] we cannot say that this finding was clearly erroneous.

D.

Finally, we consider Betz's argument that the district court erred in refusing to grant him a reduction in his offense level for his mitigating role in the conspiracy. Betz argues that he was entitled to a reduction because he was not aware of the extent of the conspiracy, because his role in the conspiracy was not significant until the marihuana was delivered, and because he was "subservient" to Pace. We disagree.

The Guidelines provide for an offense level reduction for a defendant whose role in the offense is "minor" or "minimal." U.S.S.G. § 3B1.2 (Mitigating Role). A defendant is entitled to a reduction, however, only if his role in the offense makes him substantially less culpable that the average participant. United States v. Thomas, 963 F.2d 63, 65 (5th Cir. 1992); U.S.S.G. § 3B1.2, comment. (backg'd). The greater culpability of a co-defendant does not automatically qualify a defendant for "minor" status; each participant must be separately assessed. Thomas, 963 F.2d at 65. Moreover, the sentencing court's determination of a defendant's role in the offense is a factual determination, which must be upheld unless it is clearly erroneous. United States v. Giraldo-Lara, 919 F.2d 19, 22 (5th Cir. 1990).

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[9] Indeed, the PSR's finding was based upon Betz's own admission that, although he was told prior to the delivery that it involved 750 pounds of marihuana, he nevertheless directly participated in the transaction.

In the instant case, the record contains ample support for the district court's finding that Betz was at least an average participant in the conspiracy. The PSR indicates that Betz was involved in an on-going marihuana distribution scheme, that he recruited Pace to accept deliveries at his residence, that the transaction in question involved Betz's buyer, that Betz was to get a "cut" of the profits, and that Pace would not accept delivery until Betz approved of the quality of the marihuana. In light of these facts, we cannot say that the district court's refusal to grant an offense level reduction was clearly erroneous.

III.

For the reasons set forth above, we conclude that the district court correctly applied the Guidelines in calculating Betz's sentence. The judgment of the district court is therefore AFFIRMED.