UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-4334

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MARK ALAN JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Texas
(91CR88-2)

(February 8, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Defendant, Mark Alan Johnson, pled guilty to conspiring to possess with intent to distribute marijuana, in violation of 21 U.S.C. § 846 (1988). The district court sentenced Johnson to imprisonment for 71 months. Proceeding pro se, Johnson appeals his sentence, contending that the district court erred in: (1) calculating his base offense level; (2) increasing his base offense level by two levels; and (3) refusing to depart downward

---

[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

from the guidelines. Finding no error, we affirm.

I

Johnson's arrest resulted from a Drug Enforcement Agency ("DEA") undercover sting operation which had targeted Johnson's co-conspirators, Michael and Manuel Teran. Cooperating individuals offered to sell the Terans 300 pounds of marijuana for $150,000 and an additional amount on credit. Two DEA agents met with Manuel Teran and presented a sample of the marijuana. Teran approved of the quality of the marijuana and expressed an interest in purchasing the 300 pounds. During this meeting, one of the DEA agents suggested that Teran purchase the 300 pounds and take an additional 200 pounds of marijuana on credit. Teran and the agents agreed to travel to Port Arthur, Texas, to consummate the transaction. Teran advised the agents that he would be accompanied by his brother Michael Teran, his brother-in-law, and another unnamed man.

Later that day, Manuel and Michael Teran, the brother-in-law, Miguel Delallata, and a man later identified as defendant, Johnson, met with the DEA agents. The agents brought approximately 300 pounds of marijuana to a residential location and told the defendants that an additional 200 pounds of marijuana was at a second location. After the initial 300 pounds were inspected, weighed and placed in duffle bags, it was loaded into defendants' cars. While in route to the alleged second marijuana location, all of the defendants were arrested.

Johnson pled guilty to conspiring to possess with intent to distribute marijuana, in violation of 21 U.S.C. § 846 (1988). The district court calculated Johnson's base offense level to be 26, for a conspiracy involving between at least 100 kilograms but less than 400 kilograms of marijuana (221 to 882 pounds).[1] That offense level was increased by two levels due to Johnson's role in the offense, pursuant to U.S.S.G. §3B1.1(c), and decreased by two levels for his acceptance of responsibility, pursuant to U.S.S.G. §3E1.1. An offense level of 26, coupled with a criminal history category of I, resulted in a sentencing guideline range of 63 to 78 months. *See* U.S.S.G. Sentencing Table. The district court assessed Johnson's punishment at 71 months imprisonment.

Johnson appeals his sentence, contending that the district court erred in: (1) calculating his base offense level to reflect all of the drugs which were the subject of negotiation, rather than just the amount he intended to purchase; (2) assessing a two-level increase of his base offense level based upon his role in the conspiracy; and (3) refusing to depart downward from the sentencing guidelines because of alleged government entrapment.

II

A

Johnson first contends that the district court improperly

---

[1] *See* United States Sentencing Commission, *Guidelines Manual,* §2D1.1(a)(3)(c)(9) (Nov. 1991).

calculated his offense level because it considered quantities of drugs which he did not intend to purchase. "The district court's findings about the quantity of drugs on which a sentence should be based are factual findings which we review for clear error." *United States v. Mitchell,* 964 F.2d 454, 457 (5th Cir. 1992).

The determination of Johnson's base offense level is based upon all relevant conduct. *See* U.S.S.G. §2D1.4, comment. (n.1); U.S.S.G. §1B1.3.[2] The district court based Johnson's offense level on all of the drugs which were the subject of negotiation between DEA agents and Johnson and his co-conspirators, a quantity between 300 and 500 pounds, resulting in a base offense level of 26. Supp. Record on Appeal at 3-6; *see* U.S.S.G. §2D1.1(a)(3)(c)(9). Johnson argues that his base offense level should have been 24 because he only conspired to possess with intent to distribute less than 220 pounds, which is less than 100 kilograms. Brief for Johnson at 7; *see* U.S.S.G. §2D1.1(a)(3)(c)(10). We disagree.

In drug distribution cases, "a court properly may consider the amounts of drugs still under negotiation in an uncompleted distribution when calculating relevant conduct." *United States*

---

[2] "Relevant conduct" includes:

> all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense.

U.S.S.G. § 1B1.3(a)(1).

v. Moore, 927 F.2d 825, 827 (5th Cir.), *cert. denied,* ___ U.S. ___, 112 S. Ct. 205. 116 L. Ed. 2d. 164 (1991); *see United States v. Sarasti,* 869 F.2d 805, 806 (5th Cir. 1989). During negotiations with the undercover DEA agents, Manuel Teran was told that the agents had at least 300 pounds of marijuana available and maybe as much as 500 pounds. *See* Presentence Report ("PSR") at 2; Addendum to PSR at 2A. Teran expressly told the agents that he and his co-conspirators would take 300 pounds and that after making a few phone calls, he would let the agents know if they would buy another 200 pounds. *See* Addendum to PSR at 2A. Once the parties consummated the deal for 300 pounds of marijuana, Johnson and his co-conspirators followed DEA agents to a second location, in anticipation of receiving an additional 200 pounds of marijuana. *See* PSR at 5. Thus, the PSR supports the district court's finding that 500 pounds of marijuana were the subject of negotiation between the DEA agents and Teran and his co-conspirators.[3] Accordingly, the district court's use of the 500 pound figure in applying the sentencing guidelines was not clearly erroneous. *See United States v. Farrell,* 893 F.2d 690, 692 (5th Cir. 1990) ("Although Farrell agreed to buy only 500 pounds, he was a member of a conspiracy that anticipated the purchase and distribution of at least 2,000 pounds of marijuana. The judge's use of the 2,000 pound figure in applying the

[3] Johnson offered no evidence to rebut the factual findings in the PSR. Accordingly, the district court was free to adopt the findings in the PSR without further inquiry. *See United States v. Sherbak,* 950 F.2d 1095, 1099-1100 (5th Cir. 1992).

sentencing guidelines was not clearly erroneous.").

B

Johnson also contends that the district court erred in assessing a two-level increase based upon its finding that Johnson was a leader, manager or supervisor of the conspiracy. *See* Brief for Johnson at 14-18. We review the district court's factual finding for clear error. *See United States v. Rodriquez,* 897 F.2d 1324, 1325 (5th Cir.), *cert. denied,* ___ U.S. ___, 111 S. Ct. 158, 112 L. Ed. 2d 124 (1990).

Under the guidelines, a defendant's base offense level is increased two levels if the defendant is an organizer, leader, manager, or supervisor of a criminal activity not involving five or more participants or which is not otherwise extensive. *See* U.S.S.G. §3B1.1(c). Johnson contends that he was a minor player whose criminal activities outside of the transaction underlying the offense of conviction were separate from those of his co-conspirators. Brief for Johnson at 14-18. We disagree.

The PSR indicates that Johnson was a leader in the conspiracy. In addition to contributing more than one-fourth of the purchase money, *see* PSR at 5, Johnson claimed ownership of 200 pounds of the 500 pounds of marijuana. *See* Addendum to PSR at 2A. Johnson was also one of the participants who evaluated the quality of the marijuana to determine whether it should be accepted. *See id.* at 4A. Moreover, while the Terans were responsible for distributing marijuana in California, Johnson was responsible for distributing marijuana in Pennsylvania through

his own network. *See* PSR at 6. Based upon these findings))to which Johnson does not offer any rebuttal evidence))the district court expressly concluded that the probation officer correctly assessed a two-level increase because of the defendant's role. Supplemental Record on Appeal at 5. Apart from Johnson's unsworn assertions,[4] there is nothing in the record to support Johnson's contention that he was an insignificant and peripheral participant in the conspiracy. Therefore, the district court's factual finding regarding Johnson's role was not clearly erroneous.

C

Lastly, Johnson contends that the district court incorrectly applied guideline section 5K2.12 in denying his request for a downward departure. "We will not review a district court's refusal to depart from the Guidelines, unless the refusal was in violation of the law." *See United States v. Mitchell,* 964 F.2d 454, 462 (5th Cir. 1992) (quoting *United States v. Hatchett,* 923 F.2d 369, 373 (5th Cir. 1991).

Under section 5K2.12, a district court may depart downward if "the defendant committed the offense because of serious coercion, blackmail or duress." U.S.S.G. § 5K2.12. Johnson does not dispute that he was not under threat of coercion. Rather, he contends that the agents persuaded the conspirators to purchase

---

[4] "Unsworn assertions do not bear `sufficient indicia of reliability,' . . . and, therefore should not be considered by the trial court in making its factual findings." *See United States v. Alfaro,* 919 F.2d 962, 966 (5th Cir. 1990).

more than 100 kilograms for the sole purpose of subjecting them to a larger sentence under the guidelines. *See* Brief for Johnson at 20 (citing *United States v. Connell,* 960 F.2d 191, 196 (1st Cir. 1992) ("We can foresee situations in which exploitative manipulation of sentencing factors by government agents might overbear the will of a person predisposed only to committing a lesser crime."). The district court considered Johnson's request for a downward departure on the basis of section 5K2.12, and determined that the agents "did not coerce the defendants to take any additional marijuana on credit to increase their guideline calculations." *See* Supplemental Record on Appeal at 5. Thus, the court's refusal to depart downward was not based on a view that it was precluded from doing so as a matter of law, but rather on its view that the departure was not warranted under the facts of the case. Accordingly, we cannot review the court's refusal to depart downward, as that decision did not amount to a violation of law. *See Mitchell,* 964 F.2d at 460 (declining to review refusal to depart downward where judge's refusal "based not on his view that the guidelines precluded him from doing so as a matter of law, but because he did not believe departure was warranted under the facts of th[e] case"); *United States v. McKnight,* 953 F.2d 898, 906 (5th Cir.), *cert. denied,* ___ U.S. ___, 112 S. Ct. 2975, 119 L. Ed. 2d. 594 (1992).

III

For the foregoing reasons, we **AFFIRM.**