UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-4901
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERT JOSEPH KNIGHT and
JUAN LEE LOPEZ,

Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Louisiana

6:90 CR 600002 01 03

(June 28, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

Juan Lee Lopez and Robert Joseph Knight were convicted by a jury for conspiring to manufacture phenylacetone and methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. On

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeal, this Court affirmed the conviction, but remanded the case for resentencing based upon the Government's cross-appeal challenging the district court's grant of the two-level reduction for acceptance of responsibility. United States v. Lopez, No. 91-4200 (5th Cir. June 24, 1992). The facts of the offense conduct are set forth in this Court's prior opinion affirming the conviction.

Upon remand, the district court denied both Lopez and Knight the two-level reduction for acceptance of responsibility, resentencing Knight to serve a ninety-two month term of imprisonment, followed by forty-eight months of supervised release, and a $50 special assessment. Lopez was resentenced to serve seventy-eight months in prison, followed by forty-eight months of supervised release, and a $50 special assessment.

OPINION

As a preliminary issue, it should be noted that the Government raises a challenge to this Court's jurisdiction over the instant appeal. In its brief, the Government argues that the appellants failed to file notices of appeal. Relying on this Court's decision in O'Neal v. United States, 264 F.2d 809 (5th Cir. 1959), modified, 272 F.2d 412 (1959), the Government contends that the notice of appeal given by the appellants in the instant case does not suffice to invoke the jurisdiction of this Court.

In O'Neal, this Court dismissed an appeal where the only notice of appeal was given orally, although the district court clerk referenced such oral notice in a minute entry on the docket

sheet and in a subsequent letter to the parties. Id. at 811. This Court stated that the rules could not "be extended so far as to authorize the Clerk to act for a defendant represented by counsel...." Id. at 812. In this case, Lopez and Knight gave oral notice of appeal to the district court following their resentencing. That same day, the deputy clerk typed, signed, and filed two separate notices of appeal--one for each defendant. The district court granted the oral motions, but advised defense counsel to "check to see if there's any other requirements."

Unlike O'Neal, however, where the only written evidence of a notice of appeal was a minute entry to the docket sheet, the record in the instant case does contain the two written notices of appeal prepared by the deputy clerk. Although neither notice in the instant case is signed by either the appellants or their attorneys, this Court has held that notices of appeal do not have to be signed. McNeil v. Blackburn, 802 F.2d 830, 832 (5th Cir. 1986).

Moreover, in its subsequent modification of O'Neal, this Court granted jurisdiction based upon its discovery of additional written evidence in the record manifesting the defendant's intent to appeal. Relying on an appeal bond found in the record, this Court noted that "the recitals of that bond are entirely adequate to be accepted as a notice of appeal." O'Neal v. United States, 272 F.2d 412, 413 (5th Cir. 1959).

As noted previously, the record in this case does contain the written notices of appeal signed by the deputy clerk. The record also contains an appointment of counsel form filed in this Court on

September 10, 1992, appointing Steven R. Chandler to represent Knight. Chandler filed an appearance on October 5, 1992 and a transcript request on October 5, 1992. Counsel for Lopez filed a motion in this Court seeking leave to incorporate briefs which had been presented to the district court.

In light of the emphasis on "flexibility and substance rather than form in the appellate rules," In Re K.M.A. Inc., 652 F.2d 398, 399 (5th Cir. Unit B 1981), the subsequent modification of O'Neal to find jurisdiction based on additional evidence in the record, and the fact that this notice of appeal did "indicate the litigants' intent to seek appellate review" and "ensure[s] that the filing provides sufficient notice to other parties and the courts," Smith v. Barry, ____ U.S. ____, 112 S. Ct. 678, 682, 116 L. Ed. 2d 678 (1992), this Court will consider the merits of Lopez and Knight's appeal.

Both Lopez and Knight challenge the district court's decision to deny them the two-level reduction in their base offense level for acceptance of responsibility. While neither appellant cites any case law in support of his argument, each contends that his plea of not guilty and continued assertions of innocence throughout trial should not preclude him from receiving the reduction.

The sentencing guidelines provide for a two-point reduction in the offense level "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct...." U.S.S.G. § 3E1.1(a). The sentencing judge is in a unique position to evaluate a defendant's acceptance

of responsibility, and therefore, this Court's review of this finding is more deferential than the pure "clearly erroneous" standard. United States v. Fabregat, 902 F.2d 331, 334 (5th Cir. 1990); United States v. Brigman, 953 F.2d 906, 909 (5th Cir. 1992), petition for cert. filed, (Aug. 4, 1992) (No. 92-5417). Moreover, the burden in the instant appeal rests with Lopez and Knight, and not the Government. United States v. Villarreal, 920 F.2d 1218, 1224 (5th Cir. 1991).

The guidelines do not necessarily preclude the award of the two-level reduction for acceptance of responsibility to defendants who plead not guilty, see U.S.S.G. § 3E1.1, comment. (n. 2), but they note that the two-level reduction is "not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." Id.

This is precisely the factual scenario presented by the instant case. Both Lopez and Knight asserted their factual innocence throughout all phases of their trial. Each took the stand in his own defense and denied the alleged drug conspiracy. Each continued to assert his innocence in post-trial proceedings, including a motion for a new trial based upon newly discovered evidence. Each continued to deny complicity through the appellate process, challenging the sufficiency of the evidence on appeal to this Court. At resentencing, the district court was able to find no facts to support its earlier decision awarding Lopez and Knight the two-level reduction.

Knight and Lopez both argue that the district court refused to consider their evidence of remorse. The district court did state that it would not consider their evidence because it came "too late," but Knight and Lopez were allowed to proffer the evidence, which has been reviewed by this Court. The proffered evidence, however, does not clearly demonstrate acceptance of responsibility. In light of the above, the district court's decision not to award the two-level reduction was not clearly erroneous.

Knight also argues that this denial of the two-level reduction constitutes a violation of his Fifth Amendment right against self-incrimination. This particular argument has already been considered and rejected by this Court in United States v. Singer, 970 F.2d 1414, 1420 (5th Cir. 1992).

We AFFIRM the judgment of the trial court on resentencing.