

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5233
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE CANTU-CANTU,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
90 00038 3

July 19, 1993

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

PER CURIAM:*

Appellant Jose Cantu-Cantu (Cantu) was charged with 13 others in Count One of a superseding indictment alleging conspiracy to possess 1000 kilograms or more of marijuana. Counts Two, Three, and Four alleged possession of 100 kilograms or more in January, February, and March 1990. Count Two was dismissed upon the Government's motion as to Cantu; he was convicted on the other

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

three counts. Upon direct appeal, Cantu's convictions were affirmed but his sentence was vacated on grounds that the record did not include a transcript of the district court's findings. The cause was remanded for Cantu to be resentenced. United States v. Ramirez, 963 F.2d 693, 705-06, 708 (5th Cir.), cert. denied, 113 S.Ct. 388 (1992). He now appeals the district court's decisions on resentencing to deny a two-level reduction for acceptance of responsibility and impose a three-level increase for his role in the offense. Finding no error, we affirm.¹

At the resentencing, the court imposed a three-level increase on grounds that Cantu was a manager of the criminal venture. The court stated "There's no question that [the conspirators] didn't make any moves, make any plans, they couldn't unload, they couldn't store it at Alfredo Garcia's house, . . . [they] had to come up and make arrangements for it to be unloaded in Dayton and then transported and sold, . . . and Mr. Cantu-Cantu was in charge of all that, and I think that's a middle manager." During allocution, Cantu denied that he was a manager. The court also denied Cantu's request for a two-level reduction, stating: ". . . I'm not convinced now that he has truly accepted responsibility." The court adopted the factual findings and guideline applications stated in the PSR, except for the finding

¹ The government's brief was really inadequate to address the fact-specific issues raised by Cantu. In the future, we expect the government to show, with appropriate record references, why a trial court's findings were not clearly erroneous.

and recommendation for a four-level increase as a leader or organizer.

Cantu first contends that the district court should have reduced his total offense level by two levels on grounds that he accepted responsibility for his role in the offenses, as authorized by U.S.S.G. § 3E1.1. He argues that the court's factual findings that he did not accept responsibility, because he failed to reveal fully his involvement in the offenses, were clearly erroneous. Specifically, he attacks the district court's findings that he acted as a manager relative to the loads of marijuana in February and March 1990.

Application note 2 to § 3E1.1 (1989) states: "Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt. . . ." Note 2 of the 1989 version of § 3E1.1 is applicable because it is more favorable to Cantu than the later version and his offenses occurred in February and March 1990. See United States v. Suarez, 911 F.2d 1016, 1021-22 (5th Cir. 1990).

Even so, Cantu is not entitled to the downward adjustment. The trial transcript shows that he went to trial on the issue of factual guilt. Furthermore, after Cantu was convicted, he asserted that he was only a minor participant in the conspiracy, yet the district court's findings to the contrary are

not clearly erroneous, as shown in the next discussion. Therefore, the district court's denial of the offense-level reduction for acceptance of responsibility should be affirmed.²

Cantu next contends that the district court reversibly erred by imposing a three-level increase in his offense level upon the finding that Cantu was a manager of a criminal activity which involved five or more participants, pursuant to U.S.S.G. § 3B1.1(b). He argues that trial testimony contradicted the court's supporting findings of fact and that some of the Government's witnesses lied during their testimony.

The Government is required to prove the facts which would support a finding that a defendant was a manager by a preponderance of the evidence. United States v. Hinojosa, 958 F.2d 624, 633 (5th Cir. 1992) (U.S.S.G. § 3B1.1(c)). "The determination of manager status demands that the trial judge 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). "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

² At the end of his argument on Issue 1, Cantu asserts that his "right to due process under the Fifth Amendment and his rights to confrontation, compulsory process and effective assistance of counsel . . . have been violated." Brief at 13. Because these averments are not supported by argument or citation of authority, this Court should not consider them. See Thompkins v. Belt, 828 F.2d 298, 302 (5th Cir. 1987).

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 exhaustive on the ultimate issue. United States v. Liu, 960 F.2d 449, 456 (5th Cir.), cert. denied, 113 S.Ct. 418 (1992).

The district court's finding of fact upon which the manager finding was based are supported by the trial testimony of Guadalupe Ruiz-Salas (Ruiz). He was a chauffeur-companion of one of the leaders of the conspiracy, Daniel Bautista. Ruiz testified that Cantu and Bautista gave him instructions to go to the house of one Ramirez, where they would meet other conspirators to transport the February load of marijuana. When Ruiz got to the house, Cantu was waiting but no one else was there. Later that night, Cantu gave Ruiz instructions to take him to a hotel in Pasadena where he talked with his brother Raul. Shortly thereafter, they went to Cantu's hotel, where Raul and Bautista discussed payment for the marijuana in Cantu's presence.

The next morning, Bautista and Ruiz met Cantu at a Denny's Restaurant. Cantu told them "Let's go," that the van would follow them. At Ramirez's house, Bautista, Cantu, and others loaded marijuana into the van.

Later, Bautista told Ruiz that Cantu would be one of three who would take inventory of the March load. The next day, Ruiz told Cantu that some of the packages were not properly wrapped. Cantu said he would check on it himself. He told them he did not want anyone else to touch them, that he would rewrap them himself. Cantu instructed Ruiz to tell another conspirator to have the (wrapping) paper ready for him the next day.

Later, Bautista and Ruiz waited for Cantu to arrive at a motel in Pasadena to meet a van which would pick up the March load. Cantu told Bautista it was ready; he told Ruiz they could leave anytime. The three went toward Galena Park in a pickup truck, to meet the van that was going to get the marijuana. Cantu gave directions. When they got to where the van was, Cantu spoke to someone there. Then he told Bautista and Ruiz "Let's go. He is going to follow us."

The van followed the pickup truck to Ramirez's house, where they loaded the van. After they left there in the pickup, Cantu told Bautista and Ruiz that they were going to meet some other load vehicles. Cantu told them where those vehicles would be. Shortly thereafter, the three were arrested.

Finally, as the government points out, a search of Cantu's motel room turned up paperwork concerning the marijuana deals that were consistent with Cantu's middle-manager status.

The district judge heard this testimony during the trial. "The district court was entitled to disbelieve [Cantu's] witnesses and credit the trial testimony and information in the PSI report"

that Cantu played a managerial role in the offenses for which he was convicted. United States v. Ramirez, 963 F.2d at 707. Thus, there is no clear error in the district court's finding that Cantu was a manager.

For these reasons, the judgment and sentence imposed by the district court is AFFIRMED.