UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5508
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DANNY CORNELIUS GRIESBECK,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-88-CR-254(5))

(December 17, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Danny Cornelius Griesbeck challenges his conviction and sentence for conspiracy to possess with intent to distribute in excess of 1,000 kilograms of marijuana. We **AFFIRM**.

I.

In September 1988, Detective Favela of the Del Rio, Texas, Police Department received information from Juan Abrego, a

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

confidential informant, that a group in San Antonio was interested in buying marijuana. Abrego set up a meeting between Favela, and Tarim, Abrego's contact in San Antonio.[2]

On September 20, 1988, Favela, Abrego and Investigator Santellanes traveled from Del Rio to San Antonio to meet with Tarim. The officers met with Tarim and made preliminary arrangements to sell marijuana to a friend of Tarim's.

The officers returned to San Antonio three days later. Tarim told them that the original deal had fallen through, but introduced them to another potential customer, Dimas Soto Valencia. Favela told Valencia that they had 4,800 pounds of marijuana for sale.

Valencia spoke briefly with the officers, then introduced them to Juan Estrada Lazara. Lazara agreed to $500 per pound. Favela repeated that he had 4,800 pounds of marijuana for sale; delivery would be made in San Antonio, half of the price to be paid in advance in Del Rio, the other half upon delivery. Lazara said that he would "send one of his people" to look at a sample in Del Rio. The officers returned to Del Rio that day.

The next day (September 24), the officers received a call from a man identifying himself as "Mario", who said that Lazara had sent him to examine marijuana samples. Abrego, Santellanes and Favela picked "Mario" (later identified as Mario Gaitan) up at his motel and took him to a park to show him the samples. When the officers met Gaitan, the appellant, Griesbeck, was with him, but remained in

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[2] He is referred to in the Presentence Investigation Report (PSR) as "Tarin", but throughout the trial transcript at "Tarim".

the motel room. He did not accompany Gaitan to examine the samples and was not introduced to the officers. Favela later testified that Gaitan liked the samples and was "pretty sure" that Lazara and "his people" would buy all that Favela had to sell. However, Gaitan cautioned that he must first check with Lazara and the Chicago "money man". When they took Gaitan back to the motel, the officers again saw Griesbeck, but did not speak to him.

Two days later, Gaitan contacted Abrego; and he met Gaitan and Griesbeck at the motel. This time they were accompanied by the "money man", later identified as Paul Blangin. Abrego took the three men to another motel, where they were joined by officers Favela and Santellanes. Blangin inspected a sample of marijuana and spoke to the officers through Gaitan.[3]

Blangin agreed to purchase the entire 4,800 pounds of marijuana, but explained that he must return to Chicago to get more money. Due to some miscommunications, he had come to Del Rio under the assumption that only 500 pounds of marijuana were available for sale, and had brought only enough money to cover half the price of that amount. Blangin was to return with money to cover the price of 2,000 pounds of marijuana, half to be paid in Del Rio and the other half upon delivery of the 4,800 pounds in San Antonio. The additional 2,800 pounds would be paid for within a week after delivery. Blangin told the officers that he would leave Gaitan and Griesbeck in Del Rio with the money (supposedly one half of the

[3] The officers conducted business speaking only Spanish, a language Blangin apparently did not speak.

price of 500 pounds of marijuana) to assure his interest in the deal. Favela later testified that Griesbeck was present throughout this meeting and inspected a marijuana sample.

The officers met with Gaitan and Griesbeck several times between September 27 and October 1, when Blangin returned to Del Rio. During those meetings, Griesbeck advised them to talk to Blangin about how to launder their drug money, as Blangin had been doing it successfully for years. He also said that Blangin controlled the heroin and cocaine markets in Chicago and, thanks to this new contact, would now control the marijuana market there, as well. At one point, Griesbeck explained that Blangin was delayed because he had decided to drive to Del Rio, rather than risk boarding an airplane with such a large amount of money.

Blangin arrived in Del Rio on October 1, 1988. He gave the officers the money which, coupled with that held in Del Rio, totalled nearly $500,000. Blangin told the officers that he wanted to get to San Antonio and pick up the marijuana because he had load cars waiting there to transport it to Chicago.[4] He also said he would call to make sure the rest of the money would be in San Antonio. Later that day, Favela, Abrego, Santellanes, Blangin, Griesbeck and Gaitan drove to San Antonio.

The officers did not see Blangin for the next several days. While he was apparently collecting money for the second payment, Gaitan, Griesbeck, Valencia and Lazara met often with the officers.

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[4] In his testimony at Griesbeck's trial, Blangin denied making these statements.

At one point, Griesbeck received a telephone call, then told the officers that Blangin would arrive with the money on October 3. Sometime before Blangin arrived, Griesbeck left to report to his probation officer in Florida. He said that he would return as soon as possible to complete the deal.

Blangin arrived in San Antonio with the balance of the money on October 4. Favela then placed a telephone call and ordered that the marijuana be delivered to the motel where he was waiting with Blangin, Gaitan and Valencia. Lazara was not present. The truck arrived; and, as Favela was opening the door, DEA agents and other law enforcement officials arrested Blangin, Gaitan and Valencia. Griesbeck was arrested in Florida a few days later. Lazara remains a fugitive.

Griesbeck and the others were charged with conspiracy to possess with intent to distribute marijuana (count 1) and attempt to do the same (count 2) in a superseding indictment in late December 1988. Griesbeck initially pleaded guilty, but withdrew that plea. After a bench trial on count 1 only[5], Griesbeck was found guilty and sentenced to, *inter alia*, 156 months in prison.

II.

Griesbeck challenges the sufficiency of the evidence to support his conviction. In the alternative, he contends that the district court erred in determining his sentence by applying a base offense level of 32 for 4,800 pounds of marijuana, rather than an

[5] At the beginning of trial, the government announced that count 2 had been dismissed.

offense level of 26 for 500 pounds, and by refusing to reduce his offense level for both his minor role and acceptance of responsibility.

A.

In reviewing the sufficiency of the evidence to support a finding of guilt in a bench trial, this court is to determine only if there is *any* substantial evidence to support that finding. ***United States v. Jennings***, 726 F.2d 189, 190 (5th Cir. 1984). "It is not our function to make credibility choices or to pass upon the weight of the evidence. The test is whether the evidence is sufficient to justify the trial judge, as trier of the facts, in concluding beyond a reasonable doubt that the defendant was guilty." ***Id***. (quoting ***Gordon v. United States***, 438 F.2d 858, 868 n.30 (5th Cir.), *cert. denied*, 404 U.S. 828 (1971)). Of course, in making this determination, we view the evidence in the light most favorable to the judgment. ***United States v. Reeves***, 782 F.2d 1323, 1326 (5th Cir.), *cert. denied*, 479 U.S. 837 (1986).

In a drug conspiracy case, the government need prove only the existence of an agreement to do an illegal act, and the defendant's knowledge of that agreement and voluntary participation in the conspiracy. Obviously, the agreement need not be a formal one, and both its existence and the defendant's participation in it may be proven by circumstantial evidence. ***United States v. Mollier***, 853 F.2d 1169, 1172 (5th Cir. 1988).

Viewed in this light, there was more than substantial evidence to support Griesbeck's conviction. Griesbeck does not challenge

the existence of an agreement or the voluntariness of any of his actions. His claims go only to his knowledge. But, among other things, while on parole in Florida, he was present at numerous meetings in Texas regarding the drug transaction at issue; and, he inspected a sample of the marijuana and gave the "sellers" several updates on the whereabouts of the "money man". Moreover, Paul Blangin, the man Griesbeck calls the "organizer, manager and director" of the conspiracy, testified that Griesbeck was an active participant in the transaction and introduced him to all of the other major players.

B.

As noted, Griesbeck challenges his sentence on three points.

1.

First, Griesbeck contends that the district court erred by calculating his sentence on the basis of 4,800 pounds of marijuana, the amount Favela agreed to sell and Blangin agreed to buy. He asserts that, instead, he should be sentenced only on the basis of 500 pounds, the amount Blangin originally thought was available for sale.

The district court's finding on the relevant quantity of drugs is a finding of fact, reviewed only for clear error. ***United States v. Rivera***, 898 F.2d 442, 445 (5th Cir. 1990). In making this finding, the district court must consider "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". U.S.S.G. § 1B1.3(a)(1). The commentary explains that

> [i]n the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant "would be otherwise accountable" also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant.

U.S.S.G. § 1B1.3, comment (n.1). At sentencing, the district court rejected Griesbeck's argument that he could not have foreseen a transaction for 4,800 pounds of marijuana. Finding the ultimate transaction "reasonably foreseeable", the court stated that "it's about as strong a circumstance as there can be to indicate that he was quite aware of what was involved in the deal". We agree. Griesbeck waited in Del Rio with over $200,000 while Blangin was off collecting more money -- all of which Griesbeck knew would constitute payment for only half the total amount. He was present when Blangin made the deal to purchase 4,800 pounds, and he even boasted to the "sellers" that Blangin controlled Chicago's drug market. Surely, it is foreseeable that one seeking to corner yet another part of that market would purchase large amounts of marijuana. In sum, we do not find clear error.

2.

Griesbeck next contends that his offense level should have been reduced because of his minor role in the conspiracy. The Guidelines explain that "a minor participant means any participant who is less culpable than most other participants". U.S.S.G. § 3B1.2, comment. (n.3). Factual determinations under this section

are again reviewed under the stringent clearly erroneous standard. ***United States v. Hewin***, 877 F.2d 3, 5 (5th Cir. 1989).

The district court found that Griesbeck was an "important participant" in the conspiracy. The PSR ranked Blangin as the "most culpable", then listed Griesbeck and two others as "less culpable". This is hardly sufficient to establish that Griesbeck was less culpable than "most" other participants. He is not entitled to a reduction merely because another participant was more culpable than he. *See* ***United States v. Velasquez***, 890 F.2d 717, 720 (5th Cir. 1989). The district court's refusal to grant a reduction was not clear error.

3.

Finally, Griesbeck contends that the district court should have granted a reduction for his acceptance of responsibility. Because the sentencing judge "is in a unique position to evaluate" this factor, the district court's ruling is entitled to great deference. U.S.S.G. § 3E1.1, comment. (n.5).

Section 3E1.1 allows a two level reduction for a defendant who "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct". This reduction is not necessarily foreclosed to one who proceeds to trial; but, for obvious reasons, its application to such defendants is "rare": "This adjustment 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". U.S.S.G. § 3E1.1 comment. (n. 2).

Even in the absence of such a deferential standard, we would find this provision wholly inapplicable to Griesbeck's case. Griesbeck still does not admit guilt for the charged offense. This very appeal is based partially upon his challenge to the conviction itself. The district court did not err in denying an acceptance of responsibility reduction.

III.

Accordingly, the conviction and sentence are

AFFIRMED.