

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5515

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TIMOTHY THOMAS GLASSGOW,

Defendant-Appellant.

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

(SA 90 CR 149 07)

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(December 31, 1992)

Before GOLDBERG, JOLLY and WIENER, Circuit Judges.

PER CURIAM:\*

In this sentencing guidelines case, Defendant-Appellant Timothy Thomas Glassgow appeals two aspects of his sentence: the district court's denial of a two-point reduction in his base offense level for acceptance of responsibility, and that court's consideration of 970 pounds of marihuana seized by the government

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

on the same day and from the same source as the 650 pounds of the drug to which Glassgow pleaded guilty of possessing. We find no abuse of discretion by the district court in denying the two-point reduction for acceptance of responsibility. On the other hand, we find the district court's consideration and fact finding relative to the additional 970 pounds of marihuana insufficient to enable us to review the propriety of basing Glassgow's sentence on the larger quantity of drugs, and therefore vacate his sentence and remand for further determinations consistent herewith.

The issue concerning the quantity of drugs for sentencing Glassgow is grounded in the United States Sentencing Commission's Guidelines Manual, § 1B1.3(a)(1). A comment to that provision of the Guidelines 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). (emphasis added). The Guidelines also expressly provide that "quantities of drugs not specified in the count of conviction may be considered in determining the offense level." U.S.S.G. § 2D1.1, comment. (n.13); see also United States v. Mitchell, 964 F.2d 454, 458 (5th Cir. 1992).

To sentence Glassgow for the larger quantity of marihuana, which includes the 970 pounds seized from others, the sentencing court had to find that Glassgow was acting in concert with others

and could reasonably foresee that the others would possess additional quantities of the drug.

The presentence investigation report (PSR) revealed that Glassgow had known the person from whom he obtained the drugs (Martinez) for about one and a half years but revealed nothing about Glassgow's relationship with Martinez or what Glassgow knew about Martinez and any drug activity. Moreover, the PSR revealed that Glassgow had never been to the house where he was to pick up the drugs but was given directions by Martinez for finding that house. The PSR also reveals that when Glassgow arrived at the house with his accomplice in a truck belonging to the accomplice, marihuana had already been separated into several piles, only one of which was intended for Glassgow; and that he and his accomplice loaded their one pile of marihuana into the accomplice's truck and departed, after which they were apprehended.

Even assuming the reliability of the information in the PSR, the acceptance thereof by the district court, and the failure of Glassgow to contest such information, we find that it is inadequate, for purposes of appellate review, to determine the propriety of including the additional 970 pounds of marihuana in the quantity used for sentencing purposes. In particular, we cannot determine whether the district court found or could have found that the scope of Glassgow's involvement with Martinez and the criminal activity undertaken was sufficient to constitute participation in concert with others or that he could reasonably foresee the likelihood that the scope of the venture was such that

it would comprehend the larger quantities of marihuana as required for him to come within the purview of the applicable provision of the Guidelines. We therefore vacate Glassgow's sentence and remand the case for further factual determination on the scope and foreseeability from the standpoint of Glassgow's participation. And, although we have found no reversible error in the district court's denial of the two-point reduction for acceptance of responsibility, our vacature of Glassgow's sentence permits the court's re-examination of that aspect of the sentence as well. VACATED and REMANDED for further proceedings consistent with this opinion.