UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5620
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ENRIQUE TREVINO, a/k/a "KiKi",

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(SA 91 CR 454 5)

(December 11, 1992)

Before POLITZ, Chief Judge, JOLLY and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge:[*]

Enrique Trevino, convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846, appeals the sentence imposed. Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

In March, 1991, an undercover Drug Enforcement Administration agent met with Yolanda Sayers in San Antonio to discuss importation of cocaine from Mexico. The agent met several times with Sayers and her supplier, Julio Castillo-De La Garza. On August 30, 1991, Sayers delivered 9 ounces of heroin and he and the agent discussed a 200 kilogram cocaine purchase. The agent then met with Trevino and Julio and Richard Martinez to complete arrangements for the delivery, informing them that he wanted the cocaine delivered to him in San Antonio for transshipment to Chicago. The agent was later informed that he would have to purchase the cocaine from Julio's brother Lisandro in Los Angeles.

At a November 9, 1991 meeting, Trevino advised the agent that he would personally transport the cocaine from Los Angeles to Chicago. Four days later, the agent met Lisandro and Trevino in Inglewood, California, where the three discussed delivery of the cocaine to Chicago in 30 kilogram lots. Lisandro told the agent that the leader of the drug operation, Hector Javier Garcia, wanted to meet him. Trevino told the agent that he had made the necessary arrangements to transport the cocaine to Chicago.

On November 14, the agent met with Lisandro and Garcia, who informed him that they had 50 kilograms available for delivery. Garcia agreed to deliver a one kilogram sample for $480,000 and the agent agreed to purchase the additional 20 kilograms. Later that day, Garcia, Lisandro and Trevino met at a Long Beach, California hotel and the one-kilogram transaction was completed. Authorities

promptly arrested Trevino, Garcia, and Lisandro.

The grand jury indicted Trevino for conspiracy to distribute in excess of 500 grams of cocaine. Trevino pleaded guilty. The district court found Trevino criminally responsible for a conspiracy involving 20 to 50 kilograms of cocaine,[1] and sentenced him to 156 months imprisonment and the mandatory $50 special assessment. Trevino timely appealed.

Analysis

Trevino raises two points on appeal (1) the district court incorrectly sentenced him on the basis of a conspiracy involving in excess of 30 kilograms of cocaine; and (2) the district court erroneously declined to characterize him as a minor participant. Neither of these contentions has merit.

We may disturb sentences under the Guidelines only if "imposed in violation of law, as a result of an incorrect application of the sentencing guidelines, or . . . outside of the applicable guideline range and . . . unreasonable."[2] We accept district court fact findings relating to sentencing unless clearly erroneous,[3] and

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[1]Offenses involving 15 to 50 kilograms of cocaine results in a base Offense Level of 34 under U.S.S.G. §§ 2D1.1(a), (c).

[2]**United States v. Acosta**, 972 F.2d 86 (5th Cir. 1992) (citing 18 U.S.C. § 3742(e); other citation omitted).

[3]We will set aside a finding of fact as clearly erroneous only "when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." **United States v. Mitchell**, 964 F.2d 454, 457-58 (5th Cir. 1992) (quoting **Anderson v. City of Besemer City**, 470 U.S. 564, 573 (1985)).

review de novo the application of the Guidelines.[4]

Trevino contends that because he never had knowledge of a plan to distribute more than 30 kilograms of cocaine the district court erroneously sentenced him on the basis of a conspiracy to distribute more than that amount. Under the Sentencing Guidelines, punishment of a drug offender is to be based on the quantities of illegal substance involved in the offense.[5] As Trevino acknowledges, determination of the appropriate guideline sentencing range depends not only upon his own conduct but also upon "all reasonably foreseeable acts and omissions of others in furtherance of . . . jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, [or] in preparation for that offense . . . ." We may set aside the district court's finding as to the amount of cocaine involved in this offense only if we find it clearly erroneous.[6] Both the presentence report[7] and the DEA agent's testimony at sentencing reflect Trevino's presence

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[4]**United States v. Shell**, 972 F.2d 548 (5th Cir. 1992).

[5]See U.S.S.G. § 2D1.1. The guidelines do not limit consideration to amounts mentioned in an indictment or actually recovered by authorities. See **United States v. Thomas**, 870 F.2d 174 (5th Cir. 1989). At the time Trevino committed the charged offenses, and at the time of his sentencing, U.S.S.G § 2D1.4 punished drug conspiracies as though the object of the conspiracy had been completed. Although the Sentencing Commission has abrogated U.S.S.G. § 2D1.4, amendments to U.S.S.G. § 2D1.1 now call for an identical result.

[6]E.g., **Mitchell**.

[7]As we have previously noted, presentence reports generally carry indicia of reliability sufficient to warrant consideration in making factual determinations required by the Guidelines. See **United States v. Alfaro**, 919 F.2d 962 (5th Cir. 1990).

at discussions concerning delivery of 200 kilograms and 50 kilograms of cocaine. This evidence supports the trial court's finding that Trevino knew of a plan to distribute at least 20 to 50 kilograms of cocaine. We decline to disturb that finding. The trial court correctly calculated Trevino's base offense level.[8]

Trevino also claims that the trial court erroneously refused to reduce his offense level under U.S.S.G. § 3B1.2 in view of his comparatively minor role in the conspiracy. We cannot agree. The presentence report informs that Trevino served as Julio's most trusted assistant, he had responsibility for maintaining the organization's drug "stash" locations, and performed all requested tasks. Trevino's presence during negotiations with the DEA agent belies his contention. Reviewing courts may set aside only clearly erroneous district court findings about minor or minimal participation under § 3B1.2.[9] The evidence in this case amply supports the trial court's finding relative to Trevino's involvement with the conspiracy; we are not prepared to upset either its ruling in this regard or its sentence.

The sentence is AFFIRMED.

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[8]Cf. U.S.S.G. § 1B1.3 comment 2 (defendant accountable for all quantities of contraband with which he was directly involved and all reasonably foreseeable quantities of contraband that were within the scope of jointly undertaken criminal activity).

[9]**United States v. Lokey**, 945 F.2d. 825 (5th Cir. 1991).