

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 92-7198  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GERARDO RODRIGUZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
(CR 91 00166 01)

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(December 22, 1992)

Before KING, DAVIS and WIENER,

DAVIS, Circuit Judge:<sup>1</sup>

Appellant challenges the sentence imposed by the district court on grounds that the district court erroneously attributed 300 pounds of marijuana to him instead of thirty. We find no error and affirm.

I.

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<sup>1</sup>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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Gerardo Rodriguez (Gerardo) pleaded guilty to conspiring with Pedro Rodriguez (Pedro) and with other unknown persons to possess with intent to distribute "in excess of 100 kilograms" of marijuana. The written guilty plea states that "I dispute the amount of marijuana for which I am responsible, and request a hearing on that issue." The PSR reported that Gerardo had conspired to possess 500 pounds of marijuana. Gerardo negotiated an agreement with Hinojosa, an undercover agent, to purchase 500 pounds of marijuana. Gerardo and an associate, Guadalupe, later met with Hinojosa to discuss the matter further. When it became apparent to Hinojosa that Gerardo wanted to take the entire 500 pounds on consignment then resell it at a profit before paying for it, Hinojosa stalled, and indicated that he would discuss it with his boss. When Gerardo and Guadalupe insisted on seeing a sample, Hinojosa brought two kilograms for their perusal. Although several buyers appeared on the scene to inspect the sample, including an individual whose father would allegedly buy "all the marijuana," no deals were made at that time. Gerardo later contacted Hinojosa and requested 300 pounds for an interested buyer, a "hippie," in Dallas for \$700 per pound or \$210,000. Gerardo extended his list of potential buyers, which included Pedro, who later came up with a bag containing \$20,500. Hinojosa testified that in a meeting with Gerardo and Pedro, the latter displaying the part-payment, they urged that the balance of the payment would be forthcoming. Gerardo, at one point, indicated that they had "enough to pay for three hundred easy."

After considering all evidence in the hearing, the district court found that Gerardo conspired to possess 300 pounds (136.1 kg.) of marijuana. The PSR had recommended an offense level of 26, which was enhanced two points for Gerardo's managerial role, and then reduced back to 26 by a two-point reduction for acceptance of responsibility. The sentencing range for offense level 26 corresponded to bulk marijuana quantities ranging from at least 100 kilos to less than 400 kilos (220.45 to 881.80 pounds). U.S.S.G. § 2D1.1(c)(9). The court determined a total offense level of 24, reluctantly granting a two-point reduction for acceptance of responsibility, but withholding a two-point enhancement for Gerardo's alleged managerial role. With a criminal history category of I, PSR ¶¶ 44, and an offense level of 24, Gerardo was sentenced to a guideline maximum of 63 months in a range of 51-63 months.

## II.

Gerardo contends that the district court erred when it imposed a sentence that attributed 300 pounds rather than 30 pounds of marijuana to him as relevant conduct. This argument lacks merit.

Information relied upon by the court in sentencing must have some indicia of reliability. **See** U.S.S.G. § 6A1.3(a). The general rule is that a sentence imposed by the trial court will be upheld on review so long as the sentence was determined by a proper application of the guidelines to facts that are not

clearly erroneous. **U.S. v. Buenrostro**, 868 F.2d 135, 136-37 (5th Cir. 1989), **cert. denied**, 495 U.S. 923 (1990).

It is not necessary that a transaction be completed to consider as relevant conduct the quantity of drugs the parties expect to transfer since "a court properly may consider the amount of drugs still under negotiation in an uncompleted distribution when calculating relevant conduct." **U.S. v. Moore**, 927 F.2d 825, 827 (5th Cir.), **cert. denied**, 112 S.Ct. 205 (1991). Once evidence of the amounts of controlled substances is provided on the record, the defendant has the burden to prove that such evidence is "materially untrue, inaccurate or unreliable." **U.S. v. Kinder**, 946 F.2d 366.

Gerardo's erroneous argument is partly rooted in his assumption that because Pedro, one of many contacts, actually produced the funds necessary to purchase 30 pounds of marijuana, Gerardo conspired to possess only 30 pounds. The record belies that assumption. Based on the record, the district court found that Gerardo was involved in an ongoing effort to procure at least 300 pounds of marijuana, not 30 pounds in one isolated delivery. Moreover, the district court correctly observed that Gerardo pled guilty to conspiracy to procure a quantity of marijuana, not actual success in doing so. Near the conclusion of the hearing, the court also declared: "I don't have the slightest doubt at all that you were actively trying to negotiate for a large amount of marijuana." That finding was not clearly erroneous.

Gerardo argues that he could not have reasonably procured even 100 pounds of marijuana, as evidenced by his inability to produce the funds. The record belies that assertion because it reveals the extent of Gerardo's contacts and his ability to achieve that goal. The district court also properly observed that it was not material to the consideration of relevant conduct that Gerardo did not yet have the money to procure the bulk quantity; he planned to sell it off in pieces. Pedro's appearance with \$20,500, sufficient to purchase 30 pounds, was only part of that scheme.

Gerardo also argues that the Government failed to prove that he conspired to possess 300 pounds with anyone other than Hinojosa. Because Hinojosa was a Government agent, Gerardo argues that he could not have conspired with him. This argument is without merit. The record supports the district court's findings as to the scope and the amount involved in the conspiracy and contains many references to non-governmental participants in the scheme, including Pedro.

Gerardo suggests that he was merely bluffing when he agreed to broker 300 or 500 pounds of marijuana. But the district court was free to reject Gerardo's statement apparently "made for the purpose of reducing his sentence." **Buenrostro**, 868 F.2d at 138. **See also Kinder**, 946 F.2d at 366; **cf. U.S. v. Shacklett**, 921 F.2d 580, 584 (5th Cir. 1991) (clear error to adopt unsupported factual findings in PSR). The record reveals that Gerardo

actively negotiated a sale of 500 pounds of marijuana, which he later reduced to 300 pounds.

Because the record fully supports the district court's importation of 300 pounds of marijuana to appellants, its sentence is affirmed.

AFFIRMED.