IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7247
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOE GARZA-FLORES,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(CR M 91 027 SI 02)

(April 15, 1993)

On Petition for Rehearing

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Jose Luis Garza-Flores (Garza) appeals his sentence.

The jury found him guilty of conspiracy to possess with intent to distribute in excess of five kilograms of cocaine. The district court sentenced Garza to 151 months of imprisonment, five years of supervised release, and ordered him to pay a $50 mandatory assessment. Garza filed timely notice of appeal, and we affirmed.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Garza has now filed a petition for rehearing, arguing that we erred when we held that Application note one to Sentencing Guideline § 2D1.4 applies only to producers of controlled substances. We now find that it is unnecessary to address this issue because even if the application note applies to the case before us, Garza's sentence would remain the same. Thus, although we continue to affirm the district court's judgment, we grant the petition for rehearing, withdraw our earlier opinion, and substitute this opinion therefor.

I

Garza contends that the district court erred in basing his sentence on the drug quantity of 28-30 kilograms of cocaine. We do not think so.

The district court's factual findings on the relevant quantity of drugs are subject to the "clearly erroneous" rule. U.S. v. Rivera, 898 F.2d 442, 445 (5th Cir. 1990). The district court should consider "all acts and omissions committed or aided by the defendant, or for which the defendant would otherwise be accountable, that occurred during the commission of the offense. . . ." U.S.S.G. § 1B1.3(a)(1).

Garza was found guilty by jury verdict of conspiracy to possess with intent to distribute in excess of five kilograms of cocaine.

> In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant "would otherwise be

> accountable" also includes conduct of others in furtherance of the execution of jointly-undertaken criminal activity that was reasonably foreseeable by the defendant.

§ 1B1.3, comment. (n.1).

Garza twice offered to arrange for a contact in Houston to buy 30 kilograms of cocaine. Although Garza's house was to be collateral for only two kilograms of cocaine, his co-conspirator, Portillo, attempted to procure 30 kilograms of cocaine by offering his store, his house, his van, and another car as collateral. Additionally, Portillo also offered to sell the 30 kilograms out of his home.

The district court's finding that the drug quantity involved was "at least twenty-eight, but not more than thirty kilograms of cocaine" was based on the testimony of Longoria and Agent Palacios at trial. The testimonial evidence involves questions of credibility, which are not for this court to disturb. U.S. v. Davis, 752 F.2d 963, 968 (5th Cir. 1985).

The evidence is persuasive that it was reasonably foreseeable to Garza that the conspiracy would involve 30 kilograms of cocaine. The district court's determination of the quantity of drugs is affirmed.

II

Garza also argues that the district court erred by not determining whether he had the intent and ability to possess 30 kilograms of cocaine. We do not agree.

Pursuant to Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure, when a defendant alleges a factual inaccuracy in the pre-sentence report, the sentencing court must either 1) make a factual finding as to the inaccuracy or 2) determine that no finding is necessary because the matter will not be taken into account at sentencing. United States v. Piazza, 959 F.2d 33 (5th Cir. 1992).

Garza argues that U.S.S.G. § 2D1.4, comment (n.1). directs the court to determine whether he had the intent and ability to purchase 30 kilograms of cocaine. Garza further argues that he had neither the intent nor the ability to purchase 30 kilograms of cocaine. The note that Garza relies on provides:

> If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not capable of producing.

Section 2D1.4 (n.1) speaks to a defendant's ability to produce a quantity of drugs when the defendant "is convicted of an offense involving negotiation to traffic in a controlled substance." § 2D1.4, comment (n.1). Several circuits have found, however, that Section 2D1.4 applies to both the purchase and the sale of controlled substances. See United States v. Brooks, 957 F.2d 1138

(4th Cir. 1992); United States v. Brown, 946 F.2d 58 (8th Cir. 1991); United States v. Adams, 901 F.2d 11 (2d Cir. 1990).

We, however, do not need to decide whether this section applies to both purchases and sales because, even if it applies, Garza's sentence would remain the same. In order for the sentencing court to exclude part of the controlled substance under negotiation, Garza had to show 1) that he did not intend to purchase thirty kilograms of cocaine, and 2) that he was not reasonably capable of purchasing thirty kilograms of cocaine. Brooks, 957 F.2d at 1151.

Before the district court, Garza argued that he only intended and was only capable of purchasing two kilograms of cocaine. After hearing the arguments and reviewing the record, the district court noted that Garza and his co-conspirator offered Garza's residence, a convenience store, and a vehicle as collateral for the cocaine. The district court then found that "the conspiracy here was actually for thirty kilos. I mean, we've got to say that." Later on the district court found that there was overwhelming evidence that there was "at least twenty-eight, but not more than thirty kilograms of cocaine" involved in the transaction. Thus, the district court clearly referred to the disputed facts and made a decision. In these remarks, the district court found that Garza intended to purchase between twenty-eight and thirty kilograms of cocaine. This is all the Federal Rules of Criminal Procedure and

Section 2D1.4 require.[1] See Piazza 959 F.2d at 37 (Here we found that "Rule 32(c)(3)D) does not require the district court to mouth any particular magic words or to make a talismanic incantation of the exact phraseology of the rule; it suffices that the record reflects that the court expressly adverted to the factual controversy in the PSR and complied with either of the alternative mandates of the rule.")

III

Garza argues he was deprived of the due process of law because the district court based the determination of drug quantity on "erroneous assumptions." Specifically, he states that the district court erred by: 1) stating it was bound by the jury verdict as to the drug quantity; 2) by applying overly broad principles of conspiratorial conduct, instead of § 2D1.4; and 3) because the judge failed to make findings independent of the jury verdict. These arguments have no merit.

First, when Garza raised the issue of drug quantity at the sentencing hearing, the district court referred to the fact that Portillo, Garza's co-conspirator, had obtained a 2.2 kilogram drug quantity stipulation in his plea bargain. The court was not

[1]In United States v. Brown, 985 F.2d 766, we reached a similar result. In that case, a defendant relied on the same application note at issue here to argue that he could not be sentenced for attempting to purchase all of the marijuana under negotiation because he did not have the resources to purchase that much marijuana. Finding that the defendant intended to purchase all of the marijuana, we affirmed the sentence.

implying that the jury verdict took the drug quantity determination out of his hands. The court was simply suggesting that Garza might have avoided the more severe sentence by having agreed to a plea bargain that was available, even while the jury was deliberating.

When the court made his specific finding as to drug quantity, he cited the testimony at trial, not the jury verdict, as the basis of his finding. The district court did not erroneously assume that it was bound by the jury verdict.

Second, Garza argues that the court erred by applying the overly broad principles of conspiratorial conduct, instead of § 2D1.4. As discussed above, § 2D1.4 does not apply in the manner Garza has argued to this court. The district court's authority for applying the theory of vicarious liability for conspirators was not Pinkerton v. United States, as suggested by Garza. Pinkerton v. U.S., 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). Section 1B1.3 comment. (n.1), as discussed above, controls when acts of co-conspirators may be considered in sentencing, and § 1B1.3 was properly applied by the district court.

Finally, Garza contends that the court erred by not making findings independent of the jury verdict. This argument is devoid of factual foundation.

IV

For the foregoing reasons we AFFIRM the sentence and judgment of the district court.

A F F I R M E D.