IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7281
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OSCAR JAVIER MONTEMAYOR,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. CR-M-91-00248-S2-01

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March 16, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Because Oscar Javier Montemayor was convicted of an offense involving a drug-trafficking negotiation, the amount of drugs under negotiation in the uncompleted distribution could be used to calculate the offense level. See United States v. Sarasti, 869 F.2d 805, 806 (5th Cir. 1989). The quantity of drugs used to calculate the offense level amounts to a factual finding reviewable for clear error only. United States v. Devine, 934 F.2d 1325, 1337 (5th Cir. 1991), cert. denied, 112 S. Ct. 954 (1992).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

In making its findings, the district court may consider any evidence that has "sufficient indicia of reliability." United States v. Manthei, 913 F.2d 1130, 1138 (5th Cir. 1990). A presentence report (PSR) generally has that type of reliability. United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990). The PSR reflects that Montemayor negotiated with undercover agents to purchase 400 pounds of marihuana.

In addition to the PSR, the district court had sworn admissions from Montemayor that he had conspired knowingly and intentionally to possess with intent to distribute at least 400 pounds of marihuana. Therefore, the finding that the conspiracy involved 400 pounds of marihuana does not amount to error.

Montemayor argues for the first time on appeal that the Government violated his constitutional rights by refusing, based on his race, to file a substantial-assistance motion. See U.S.S.G. § 5K1.1. Because this issue is fact-specific and not a "purely legal question," Montemayor cannot raise it for the first time on appeal. See United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). This argument, therefore, lacks merit.

Montemayor also argues that the district court erred in failing to require the Government to file a substantial-assistance motion. District courts have authority to review the Government's refusal to file such a motion and to grant a remedy if they find that the refusal was unconstitutionally based. Wade v. United States, ___ U.S. ___, 112 S. Ct. 1840, 1843-44, 118 L. Ed. 2d 524 (1992). We need not reach Wade, however, because Montemayor did not raise before the district court the issue of

the constitutionality of the Government's refusal to file a substantial-assistance motion.

AFFIRMED.