

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7460
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUADALUPE IZAGUIRRE RAMIREZ,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(CR-B-92-21-02)

(April 28, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Guadalupe Izaguirre Ramirez and two codefendants were charged in a two-count indictment with conspiring to possess and possession with the intent to distribute cocaine. A jury found Ramirez guilty of both counts of the indictment.

The PSR calculated a base offense level of 32; the offense level was increased by two points under U.S.S.G. § 2D1.1(b)(1) for

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

possession of a firearm and by two points for obstruction of justice pursuant to § 3C1.1 by Ramirez's denial that a gun was present during the offense; a total offense level of 36 resulted. Ramirez's criminal history category was II. The resulting guideline range was 210 to 262 months imprisonment.

Ramirez submitted objections to the PSR arguing that no amount of the cocaine should be used to establish a base offense level, an argument that amounts to a claim that the evidence was insufficient to prove his guilt. He also challenged the proof of his possession of a firearm used to increase his base offense level.

The district court concluded that Ramirez should be sentenced for the one-kilogram count of conviction and overruled Ramirez's objection regarding the presence of a firearm, resulting in a guideline range of 120 to 135 months. The court sentenced Ramirez to serve concurrent terms of 135 months and mandatory eight-year terms of supervised release for both counts and imposed a \$100 mandatory assessment.

I

On appeal, Ramirez argues that, because the district court erroneously denied him a mistrial, the conviction should be reversed. Ramirez asserts that the government's failure to prove identity in relation to the conditionally-admitted extraneous offense warranted a mistrial. He also challenges the prejudicial effect of the joinder of two or more crimes just because of the similarity of the crimes.

Pursuant to Fed. R. Evid. 404(b), the government attempted to introduce a 1988 judgment of conviction against Ramirez for possession of cocaine. Ramirez's counsel objected to the introduction of the prior offense as prejudicial and as an attempt by the government to attack Ramirez's character. Overruling the objection, the district court noted that the prior conviction was for an identical offense and that it was subject only to identification and admonishments to the jury.

When the exhibit was introduced at trial, the court instructed the jury that Ramirez was not on trial for the prior offense, but if the jury was convinced that Ramirez had engaged in the offense conduct, they could consider the prior similar offense in regard to certain elements of the instant offense. The government then attempted to introduce the prior judgment and conviction through Sergeant Reynaldo Gonzalez of the Texas Department of Public Safety, Narcotics Division. The court permitted defense counsel to voir dire the witness on his personal knowledge of the identity of the perpetrator of the 1987 offense. Sergeant Gonzalez testified that he did not know Ramirez in 1987 or that Ramirez had been placed on probation, but that he had "learned through the FBI it [the defendant] is the same." When the government moved to admit the exhibit, the court ruled that it had failed to prove identification and granted Ramirez's objection to the introduction of the exhibit, denying the government's request to admit the

exhibit into evidence. The court instructed the jury to disregard any evidence of a prior conviction.

The prior-conviction evidence did not implicate Rule 404(b). Although the district court initially concluded that the evidence could be admitted because the probative value of the prior offense would overcome any prejudicial value of the admission, the court reserved admission for proof of identity.

In response to the court's suggestion, Ramirez unsuccessfully moved for a mistrial because the government had attempted to admit prior conviction evidence but failed for lack of identification. "This court will reverse a district court's refusal to grant a mistrial only for an abuse of discretion." U.S. v. Limones, 8 F.3d 1004, 1007 (5th Cir. 1993), petitions for cert. filed, (U.S. Feb. 28, 1994) (No. 93-8123 & No. 93-1360). Moreover, "where a motion for a mistrial involves the presentation of prejudicial testimony before the jury, a new trial is required only if there is a 'significant possibility' that the prejudicial evidence had a 'substantial impact' upon the jury verdict, viewed in light of the entire record." Id. at 1007-08 (citation omitted).

The court's denial of a mistrial was not an abuse of discretion because there is no indication that the references to the prior conviction influenced the verdict. The jury was admonished about not considering this evidence in reaching a verdict. Jurors are presumed to follow their instructions. Zafiro v. U.S., ___ U.S. ___, 113 S.Ct. 933, 939, 122 L.Ed.2d 317 (1993).

The presumption that the jury followed the court's instructions negates the assertion that a mistrial was warranted because the jury considered prejudicial evidence. See U.S. v. Willis, 6 F.3d 257, 262 (5th Cir. 1993). Accordingly, the district court did not abuse its discretion in denying Ramirez's motion for a mistrial.

The joinder argument is irrelevant because Ramirez was not being tried simultaneously for two similar offenses. The government merely attempted to introduce proof of a 1988 conviction for purposes of identity in relation to the present offense.

II

Ramirez next challenges whether the evidence established beyond a reasonable doubt that a weapon was present during the commission of the offense. Quoting from the transcripts of the trial and the sentencing hearing, Ramirez asserts that the evidence did not connect him to the firearm because the gun was not fingerprinted, and he was not identified as being in the shed where the gun was found.

It is not necessary that the evidence establish beyond a reasonable doubt that a firearm was present because Ramirez was not charged with committing the offense of carrying a firearm in connection with a drug-trafficking crime. Instead, his sentence was enhanced under § 2D1.1(b)(1) based on the presence of a firearm as a specific offense characteristic.

The district court's decision to apply § 2D1.1(b)(1) is a factual determination subject to review only for clear error. U.S.

v. Devine, 934 F.2d 1325, 1339 (5th Cir. 1991), cert. denied, 112 S.Ct. 954 (1992). A factual finding is not clearly erroneous as long as it is plausible in the light of the record read as a whole. U.S. v. Shipley, 963 F.2d 56, 58 (5th Cir.), cert. denied, 113 S.Ct. 348 (1992).

Section 2D1.1(b)(1) provides that the base offense level be increased by two levels "[i]f a dangerous weapon (including a firearm) was possessed." "The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." § 2D1.1, comment. (n.3). The burden of proof in this respect is on the government under a preponderance-of-the-evidence standard. U.S. v. Menesses, 962 F.2d 420, 428 (5th Cir. 1992).

Ramirez's argument regarding the presence of a firearm is meritless. During the trial, Sergeant Gonzalez testified that upon his reading Ramirez the Miranda warnings, Ramirez admitted the presence of one weapon at the apartments where the transaction was to occur. He also testified that Ramirez admitted that he hid in a shed at a private residence after seeing the police officer approach his vehicle outside of the apartments.

The record demonstrates that Ramirez acted in concert with two other individuals, Sergio Vicente Resendez and Ramon Eluid Alonzo-Perez. Ramirez's codefendants admitted the presence of at least one firearm during the drug transaction. Resendez stated that he observed three pistols in the Isuzu. Alonzo indicated that there

was only one firearm in the vehicle and that the gun belonged to Ramirez's brother.

Additionally, Ramirez and Alonzo were found by a Brownsville police officer in the backyard near the shed where the 9mm weapon was discovered. PSR ¶ 18. Ramirez admitted to the arresting officer that a firearm was in the vehicle and Ramirez was the driver of the vehicle. PSR ¶¶ 11, 24. A PSR bears sufficient indicia of reliability. U.S. v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990). A defendant who objects to consideration of information by the sentencing court bears the burden of proving that it is "materially untrue, inaccurate or unreliable." U.S. v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). If a defendant disputes information in the PSR without presenting rebuttal evidence, then he fails to carry his burden. U.S. v. Rodriguez, 897 F.2d 1324, 1327-28 (5th Cir.), cert. denied, 498 U.S. 857 (1990). During the sentencing hearing, Ramirez objected to the adjustment to the offense level for the firearm, but he did not offer additional evidence to rebut the contested portions of the PSR.

The district court's decision to apply § 2D1.1(b)(1) is not clearly erroneous as the presence of the weapon was established by a preponderance of the evidence.

III

Finally, Ramirez argues that the trial court erred by not enforcing the immunity agreement. Ramirez argues that he entered into an immunity agreement with state officials that provided that

he would negotiate a ten-kilogram cocaine transaction in exchange for immunity regarding the instant one-kilogram transaction. Ramirez argues that because he cooperated as agreed, the district court erroneously accepted the government's explanation that the immunity agreement should not be enforced.

We think that the government is correct when it argued that Ramirez failed to establish a breached immunity agreement with the federal authorities, or that an agreement existed regarding a § 5K1.1, p.s., motion for substantial assistance.

The testimony offered at trial regarding the immunity agreement indicated that Ramirez was supposedly cooperating with the DEA Drug Task Force at the time of his arrest. Sergeant Gonzalez testified, however, that he was unable to confirm with DEA Agents Luis Gutierrez or George Gavito that Ramirez was working with the DEA as a documented informant. Although Sergeant Gonzalez testified that after Ramirez's arrest for the one-kilogram transaction at issue, Ramirez agreed to work as an informant in a ten-kilogram purchase, Gonzalez further testified that on the following day Ramirez provided information that proved useless.

Sergeant Gonzalez also testified that one week later Ramirez was arrested by the DEA on September 10, 1991, as a result of another drug transaction. Gonzalez testified that, after that arrest, Ramirez entered into an agreement with his agency, (the Texas Department of Public Safety, Narcotics Division), the DEA and the U.S. Attorney's office that provided that Ramirez would conduct

three deals for the state district attorney. Gonzalez testified that the unrelated state charges and the case brought by the DEA were dismissed. Gonzalez testified that the agreement regarding the instant case was contingent on Ramirez providing reliable information on other drug deals. As a result of Ramirez's probation revocation, Ramirez failed to contact Gonzalez and was unable to cooperate as agreed. Gonzalez also testified that Ramirez failed to provide any information during the thirty-two days prior to his incarceration on the probation revocation.

Ruling on Ramirez's motion to dismiss the case on the grounds of immunity, the district court concluded that there was no evidence that Ramirez had been promised immunity by the federal authorities. This conclusion is supported by the evidence presented at trial. There was no agreement entered between Ramirez and the federal government regarding dismissal of the instant charges, and the testimony at trial established that the officials were not satisfied with the extent of Ramirez's alleged cooperation. Cf. U.S. v. Watson, 988 F.2d 544, 548-49 (5th Cir. 1993) (defendant has burden of proving government violated plea agreement), cert. denied, 114 S.Ct. 698 (1994).

IV

For the reasons stated herein, the judgment of the district court is

A F F I R M E D.