

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8025

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMON PINA,
a/k/a Ramon Pena,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
EP 88 CR 230 (19)

(March 19, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

I.

Ramon Pina, a/k/a Ramon Pena, along with 18 others, was charged in two counts of a 16-count second superseding indictment with conspiracy to possess with the intent to distribute marijuana. In accordance with a plea agreement, Pina entered a guilty plea to count two of the indictment--conspiracy to possess with the intent

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to distribute over 1000 kilograms of marijuana. The district court originally sentenced Pina to 63 months incarceration and 10 years supervised release.

On appeal, Pina challenged the supervised release portion of the sentence and the court's determination that he had acted as a recruiter for the drug-trafficking enterprise. Because of a misunderstanding regarding the mandatory minimum, the case was remanded for resentencing with a notation that, on resentencing, the district court could remedy any potential error as to Pina's role as a recruiter of drivers. The district court resentenced Pina to 60 months incarceration and 5 years supervised release, from which a second appeal ensued.

Proceeding pro se on appeal, Pina then challenged unsuccessfully the district court's denial of his motion to withdraw his guilty plea, but successfully questioned the court's denial of the acceptance of responsibility credit, when he had been awarded the deduction originally, and the lack of an explicit finding, as suggested by the first appellate decision, as to Pina's role in the offense. This court again remanded the case to permit the court to state its reasons for denying the acceptance of responsibility credit and to explain its implicit finding that Pina was not a minor participant. On remand, the court amended the sentence, granting Pina the 2-level adjustment for acceptance of responsibility and decreasing his incarceration term from 60 to 51 months. The present appeal resulted.

II.

A.

Pina contends the district court erroneously failed to rule on two motions, a Motion to Compel and a Motion for Production of Evidentiary Material, he filed prior to his third appearance before the court for sentencing. However, only the latter motion was filed in the record and entered on the docket sheet. Pina's statement that the district court failed to rule on this motion to produce is incorrect, as the record reveals the motion was implicitly denied.

The motion at issue requested that the court direct the Government to provide Pina with a copy of the tape-recorded conversations of two of his co-defendants. The tapes were mentioned in the PSR as evidence that Pina "discussed the organization's business." Pina asserts that they would reflect only that he told others not to get involved in the organization's activities. Pina infers that had he received the tapes, the court would have granted him a lesser sentence because he could have proved that he occupied a minor role in the offense.

The court did address the issue of the tapes at the resentencing. The prosecutor indicated that he did not know whether any such tapes existed, and the substance of the purported tapes was not taken into consideration at the resentencing.

Finally, assuming that Pina's objections to the PSR comprise the second motion that Pina argues was not ruled on by the district court, his contention still fails. Each of the twelve objections

was specifically addressed by the district court at the resentencing hearing.

B.

Pina argues that the district court violated Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and denied him his Sixth Amendment right of self-representation, by denying him the ability at resentencing to examine Probation Officer Hicks concerning her preparation of the PSR and by not ruling on the motion to produce. As we have explained, the court did rule on Pina's motion.

With regard to Officer Hicks, Pina admits that he was not actually denied the opportunity to put Hicks on the stand but asserts that he was intimidated into not putting her on the stand. Furthermore, during the resentencing proceeding, Pina argued that he wanted to inquire of Hicks why she would not correct the PSR after the case had been remanded by this court. This factor was not relevant to resentencing. On appeal, Pina argues for the first time that he wanted Hicks to testify "as to where she got her data to compose said P.S.I. Report." This issue, however, is raised for the first time on appeal and should not be considered. See United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). In any event, as discussed below, the district court did not consider the disputed portion of the PSR regarding the tapes in imposing the sentence.

Pina provided no pertinent reason for calling Hicks, and he was allowed to freely converse with the court regarding the

appellate order and the PSR objections. At one point, the court indicated to Pina, "[s]o anything you have to say in that regard [his role in the offense], I'll hear you." See Faretta, 422 U.S. at 824. Therefore, there is no basis upon which to find that the court violated Faretta and Pina's rights under the Sixth Amendment.

C.

Pina's third argument is not clear from his initial brief, although he appears to challenge the denial of a 2-point reduction for being a minor participant. In his reply brief, he contends the district court erred by not explaining on the record why sufficient information existed to dispense with the PSR and that the court failed to make a statement that the disputed portions of the PSR would not be taken into account at the time of sentencing as required by Fed. R. Crim. P. 32(c)(1).

The district court acknowledged that it had been directed by this court to address two things: 1) whether Pina was entitled to an acceptance of responsibility credit and 2) to make an explicit finding as to Pina's role in the offense. At the resentencing hearing, Pina argued that the PSR based its determination that a minor participant role adjustment was not warranted on Pina's admission during the Rule 11 proceeding that he had recruited drivers for the organization. He disputed making this admission, and maintained that the Rule 11 transcript supports his argument. Pina says he merely introduced the various parties because they were "at his house" but not for any particular purpose.

Pina submitted affidavits from some of his co-defendants which stated that he had not recruited them. At resentencing, Pina asked the judge: "Do you feel after hearing what I have had to say and reading what you read, do you feel I called all of those people and recruited them?" The court responded:

THE COURT: Personally, I believe that you did, yes. If you're asking me for my opinion, yes, I certainly do. Your claim that you told them, "Oh, whatever, you do, don't get involved in this conspiracy. Whatever you do, don't go out and drive loads of marijuana. Whatever you do, even though I'm doing it, don't you do it." To me that's totally incredible and I do not believe it, if you're asking for my opinion. No, I don't.

In resentencing Pina, however, the court based its ruling on other factors and stated, "I will at this time make a specific finding that you played a key and significant role in the offense, . . . even though you weren't one of the master minds, that you weren't one of the leaders. No question about that. But just to be specific, I'll make that finding." In making its ruling, the court did not rely on the recruitment factor, but relied instead on the fact that Pina drove a large load of concealed marijuana, albeit a small percentage of the whole scheme, for a long distance.

The amended judgment indicates that the only portion of the PSR which the court was not adopting was the section pertaining to acceptance of responsibility, as a finding was made by the court in favor of Pina on that issue. Therefore, Pina misstates that the district court dispensed with the PSR.

Further, contrary to Pina's assertion, the court did rule on all of the contested matters in the PSR, either making findings or deeming them irrelevant. The district court therefore complied

with Fed. R. Crim. P. 32(c)(1). See United States v. Colmenares-Hernandez, 659 F.2d 39, 43 (5th Cir. Unit A 1981), cert. denied, 102 S.Ct. 979 (1981).

AFFIRMED.