**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 92-8112
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CEDRIC ANDREA HENDERSON,

Defendant-Appellant.

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Appeal from the United States District Court
For the Western District of Texas

(W-91-CR-128)

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November 23, 1992

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant Cedric Andrea Henderson appeals the sentence imposed following his conviction on a plea of guilty to distribution of "crack" cocaine in violation of 21 U.S.C.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

§ 841(a)(1). He assigns as error the sentencing court's consideration of quantities of cocaine not included in the count of conviction and of the amounts of cocaine distributed on other occasions, given the government's obligation under the plea agreement not to prosecute for offenses other than the principal offense underlying Henderson's conviction. He also questions the voluntariness of his guilty plea. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Henderson negotiated a $20 sale of "crack" cocaine to a confidential informant, the latter being accompanied by an associate of the local narcotics task force who had a van equipped with a video camera. Henderson took the 0.20 gram "rock" of crack cocaine from a match box, and sold it to the informant. Henderson was later identified from a photograph by the associate and the informant as the person who had sold the cocaine to the informant. Over a month later, Henderson approached the associate who then negotiated another $20 sale of crack cocaine, this one weighing 0.15 grams. On this occasion Henderson took the cocaine from a Tylenol tube. Both transactions were videotaped.

Henderson and two other individuals, including one of his suppliers--Tutson--were later stopped in their vehicle by a state trooper for a vehicle registration violation. The driver of the vehicle was arrested for an unrelated offense, and a search of the vehicle turned up 30 rocks of crack cocaine. Tutson and Henderson

were arrested for possession of "crack" cocaine. After he was identified some three months later, Henderson was arrested for the two videotaped transactions.

When confronted with the videotape, Henderson admitted that he delivered the cocaine to the narcotics task force associate. In his confession, Henderson indicated that he had been selling "crack" cocaine for two suppliers over a period of nineteen weeks. He also admitted that he had conducted four other sales of cocaine to other individuals on the same day as one of the two videotaped transactions. Pursuant to a plea agreement, Henderson pleaded guilty to the transaction involving the rock removed from the match box. In return, the government dismissed the remaining count, which had arisen from the other transaction.

Details regarding quantities of drugs involved were provided in Henderson's confession. He described generally how Tutson would provide him with "one hundred dollars worth at a time in a match box . . . about ten times a day . . . about twice a week." As one hundred dollars would purchase about five rocks, Henderson was delivering one hundred "Tutson" rocks per week, and thus 1900 such rocks during the period of nineteen weeks in question. Ervin, the other supplier, would provide Henderson with "five-hundred dollars worth" of cocaine in a Tylenol bottle, "four . . . times a day, seven days a week." This was calculated to produce sales of 700 "Ervin" rocks per week, and thus 13,300 rocks over the nineteen weeks. Based on these admissions, the Presentence Investigation Report (PSR) concluded that Henderson had delivered a total of

15,200 rocks over the nineteen-week period during which he admitted dealing.

For purposes of sentencing, the total weight of those 15,200 rocks was calculated in the PSR to be 2.28 kilos, based on 0.15 grams per rock, the smaller of the weighed rocks delivered to the informant by Henderson. The 2.28 kilos included the amounts seized from the vehicle when Henderson was arrested on the highway prior to being identified. The total amount of drugs directly involved in the charged offenses was only 0.90 grams, which included the two videotaped transactions and the four additional sales specifically admitted by Henderson.

In the PSR, a total offense level of 38 was calculated under the guidelines based on 2.28 kilograms. The preparer of the PSR calculated a criminal history category of VI, observing that, as a result of Henderson's history of five guilty plea convictions for attempted burglary, robbery, and theft, he was automatically assigned to category VI as a career offender. Given a statutory maximum prison term of 20 years, the PSR noted that the guideline imprisonment range of "360 months to life" should be reduced to a single range of 240 months. The district court adopted the PSR's recommendations, sentencing Henderson to prison for 240 months, and Henderson timely appealed.

## II

## ANALYSIS

### A. Quantities of Drugs for Calculating Sentence

Information relied on by the trial court in sentencing must

have some indicia of reliability. See U.S.S.G. § 6A1.3(a), p.s. Thus, a sentence imposed by the trial court will be upheld when the sentence is determined by a proper application of the guidelines to findings of fact that are not clearly erroneous. United States v. Buenrostro, 868 F.2d 135, 136-37 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990). A finding is not clearly erroneous when it is plausible in light of the record as a whole. United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991). The sentencing court may therefore rely on information contained in the PSR which the court has adopted by reference. See United States v. Vela, 927 F.2d 197, 201 (5th Cir.), cert. denied, 112 S. Ct. 214 (1991). Furthermore, when no challenge to the underlying facts is raised, the trial court is free to adopt the facts reported in the PSR without further inquiry. United States v. Rodriguez, 897 F.2d 1324, 1326-27 (5th Cir.), cert. denied, 111 S. Ct. 158 (1990).

In determining the base offense level, the court may properly consider as "relevant conduct" "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." § 1B1.3(a)(2). "Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level." See § 2D1.1, comment. (n.12). "It is not necessary that controlled substances are actually seized and analyzed in order to determine the appropriate offense level." See United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991) (internal quotations and citation omitted). The district court's determination that a defendant's criminal activities involved

quantities of drugs exceeding those quantities forming the basis for conviction will be reversed only if clearly erroneous. United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991), cert. denied, 112 S. Ct. 1677 (1992); United States v. Mejia-Orosco, 867 F.2d 216, 221-22, cert. denied, 492 U.S. 924 (1989).

Such findings need be established only by a preponderance of the evidence. See United States v. Alfaro, 919 F.2d 962, 965 (5th Cir. 1990). Nevertheless, Henderson argues that we should review the district court's determination of fact by requiring proof by clear and convincing evidence, as this standard would provide "greater due process protections at sentencing." But, as Henderson concedes, that is not the law; his argument therefore lacks merit. As such facts will be used only for sentencing and not for prosecution, a lesser degree of protection is operative. See Kinder, 946 F.2d at 366-67.

Henderson contends that the district court erred when it included amounts of cocaine base delivered during transactions on dates other than the date of the illegal transaction to which he pleaded guilty. Henderson grounds his argument, at least in part, on the fact that he was the principal source of the information.

Henderson argues further that he was merely "puffing" when he indicated the amounts of drugs that had been supplied to him. This argument too is without merit. The district court may reject assertions that information provided by the defendant was merely "puffery" when the record indicates otherwise. Kinder, 946 F.2d at 366; cf. United States v. Shacklett, 921 F.2d 580, 584 (5th Cir.

1991) (clear error to adopt unsupported factual findings in PSR). The government correctly counters that Henderson provided considerable detail of the amounts supplied by two named sources, sufficient to trigger operative provisions of the guidelines. The PSR also contained sufficient details, which were corroborated by local government agents involved in the ongoing investigation. The burden is thus placed on Henderson to prove that the information is "materially untrue, inaccurate or unreliable." Angulo, 927 F.2d at 205. Other than a naked allegation of "puffery," Henderson has not provided such proof. The district court was therefore free to reject Henderson's later declarations which were "made for the purpose of reducing his sentence." Buenrostro, 868 F.2d at 138.

The sentencing court has discretion to estimate the quantity of drugs handled as conduct relevant to sentencing. § 2D1.4, comment. (n.2); see § 1B1.3(a)(2). Such discretion is broad. Angulo, 927 F.2d at 205 (relying on an estimate made by an officer). When Henderson was arrested in the company of Tutson, one of his suppliers, officers found approximately 30 rocks of presumptive cocaine in the suspects' automobile, clearly establishing the supply connection between Tutson and Henderson, and further establishing that a substantial amount of cocaine rocks were involved.

We conclude that the court's factual findings of quantity were based on information possessed of sufficient indicia of reliability to support the sentence. The court did not clearly err when it considered quantities of crack cocaine rocks based on the

undisputed Tutson connection set forth in the PSR. Similarly, as Henderson provided ample details to support his connection with his other supplier, Ervin, the quantitative determination by the district court based on amounts estimated on the basis of such details was not clearly erroneous.

B. Prosecution Distinguished from Sentencing

Henderson argues that, as the government promised to prosecute him only for distributing 0.90 grams of cocaine base, the government should not be allowed to pursue sentencing that takes into consideration the other amounts of cocaine base to which Henderson did not specifically plead guilty. We rejected this argument in Kinder. 946 F.2d at 366-67 (use of drug quantities to determine the degree of sentencing is not tantamount to prosecution on those quantities); but see United States v. Kinder, 112 S. Ct. 2290, 2293 (1992) (White, J., dissenting from denial of certiorari).

C. Voluntariness of Plea

Henderson also argues that the government misrepresented the scope of its plea agreement when the additional information was used for purposes of increasing his sentence, thereby rendering his plea involuntary. This argument too is without merit. When the defendant has been informed of the maximum statutory penalty that could result from the offense and receives no more than the stated maximum, his guilty plea is not rendered involuntary. Kinder, 946 F.2d at 367. Henderson was informed by the district court that the maximum statutory penalty that could result from the offense was

"20 years of incarceration." Possessed of that information, Henderson nevertheless affirmatively indicated his approval of the plea agreement and his willingness to plead guilty. We find nothing legally involuntary in that situation.

## III

## CONCLUSION

As the sentencing court did not clearly err in its findings of fact and correctly applied the law to those facts, there was no reversible error in the calculation of Henderson's term of imprisonment. Likewise, the court did not err in accepting Henderson's plea as voluntarily given.

AFFIRMED.