IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8127
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SILVESTRE GRACIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-90-CR-196-02)

(February 3, 1993)

BEFORE KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant Silvestre Gracia was convicted on the basis of his plea of guilty to the charges of conspiracy to possess with the intent to distribute marijuana. In this appeal, he alleges several points of error in the district court's calculation of his sentence under the United States Sentencing Guidelines. Finding no reversible error in the trial court's calculation, we affirm.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

FACTS AND PROCEEDINGS

A federal grand jury indicted Defendant-Appellant Silvestre Gracia with conspiring with David Williams, Richard Spenser, Jaime Anzaldua, Thomas Schlumpberger, James Weil, and Eduardo Gracia, Silvestre's brother, to possess with intent to distribute more than 1,000 kilograms of marijuana in violation of 21 U.S.C. § 841(a)(1) and § 846 (count one), aiding and abetting the above offense in violation of § 841(a)(1) (count two), and using proceeds from the unlawful distribution to conduct a financial transaction with intent to promote the distribution of marijuana in violation of 18 U.S.C. § 1956(a)(1).

In a written plea agreement, Silvestre agreed to plead guilty to counts one and three in exchange for the government's promise that it would dismiss the remaining charges after sentencing and would not pursue other offenses. The government made no agreement concerning sentencing. The arrangement between Silvestre and the government began to deteriorate when it became apparent that Silvestre had provided information to the government that proved to be false. Silvestre claims that he ceased cooperating because he felt that the government was not fulfilling its oral promises to him, including a promise not to pursue members of his family. Consequently, the government withdrew its agreement; however, Silvestre's guilty plea stood.

In the presentence investigation report (PSR), the probation officer reported that investigators had determined that the drug

distribution organization in which the defendants were involved was responsible for distributing 16,000 pounds of marijuana. The probation officer calculated a base offense level of 34 for count one as Silvestre "participated in at least seven shipments of marijuana containing approximately 2,000 pounds each for a total of 14,000 pounds [or 6,350.4 kilograms] of contraband." Silvestre was unaware of the remaining 2,000 pound shipment. The base offense was increased by four levels because of Silvestre's role as a leader or organizer of the criminal activity and by two more levels for obstruction of justice. The combined adjusted offense level for both counts was forty, with a criminal history category of I, producing a guidelines imprisonment range of 292 to 365 months. The district court adopted the PSR and sentenced Silvester to 300 months imprisonment for count one, 240 months imprisonment on count threeSQto be served concurrentlySQand five years supervised release on each count, also to be served concurrently.

II

ANALYSIS

A. Standard of Review

The district court's findings of fact with regard to sentencing are reviewed under a clearly erroneous standard; the application of those facts to the guidelines is a question of law subject to de novo review.[1] Similarly, the court's legal

[1] United States v. Shell, 972 F.2d 548, 550 (5th Cir. 1992).

interpretation of sentencing guidelines are reviewed de novo.[2]

B. Computation of Sentence

Silvestre challenges the district court's computation of his sentence, asserting that the court erred in finding that the quantity of marijuana involved in the offense was 16,000 pounds. He argues that the total amount of marijuana attributable to him should have been limited to 2,000 pounds because information concerning any additional shipments of marijuana was subject to § 1B1.8 of the plea agreement. Section 1B1.8(a) provides:

> Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

The court rejected this objection below, finding that other members of the conspiracy provided the information used in the PSR; therefore, the information involving the 14,000 pounds of marijuana did not implicate § 1B1.8 of the plea agreement. Under the instant circumstances, the district court's adoption of the facts in the PSR was not clear error.

Silvestre also states in passing that the district court misapplied the guidelines to the facts. He fails, however, to brief his argument and it is thereby abandoned.[3]

---

[2] United States v. Lara-Velasquez, 919 F.2d 946, 953 (5th Cir. 1990).

[3] Weaver v. Puckett, 896 F.2d 126, 128 (5th Cir) cert. denied, 111 S.Ct. 427 (1990).

C. Obstruction of Justice

Silvestre also argues that the district court erred by applying a two-level enhancement for obstruction of justice. "Under Guideline 3C1.1 if the defendant `willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of his offense,' the court may increase the offense level by two."[4] Application note 3(h) specifically provides that the two-level enhancement for obstruction of justice applies when the defendant provides "materially false information to a probation officer in respect to a presentence or other investigation for the court."[5]

Silvestre claims that his refusal to continue cooperating under the plea agreement resulted from the government's alleged breach of its oral assurances that it would not proceed against his brother. The government, however, relying on the PSR, asserts that Silvestre did not simply withdraw his cooperation, but actively gave false information that misled investigators. Again, the district court's adoption of the PSR under these circumstances is not clear error.

Silvestre also asserts that the district court erred by increasing his base level by four on the basis of his purported leadership role in the conspiracy. Silvestre does not brief or

---

[4] United States v. Beard, 913 F.2d 193, 199 (5th Cir. 1990) (quoting U.S.S.G. § 3C1.1).

[5] U.S.S.G. § 3C1.1, comment h.

argue this point so it too is abandoned.[6]

D. Constitutional Challenges

Finally, Silvestre objects to the district court's use of information he provided pursuant to his plea agreement to compute his sentence. He claims that the use of the relevant conduct information violates his due process rights and, because the information is hearsay, violates his Sixth Amendment right to confrontation. Silvestre raises these claims for the first time on appeal; consequently, they "are not reviewable by this Court unless they involve purely legal questions and failure to consider them would result in manifest injustice."[7] Although Silvestre's claims raise legal issues, failure to consider them would not result in manifest injustice because his fundamental fairness and confrontation arguments have been explicitly rejected.[8] Therefore, we decline to address these issues.

For the foregoing reasons, the district court's sentence is AFFIRMED.

---

[6] Weaver, 896 F.2d. at 128.

[7] United States v. Sherbak, 950 F.2d 1095, 1101 (5th Cir. 1992).

[8] See id; see also United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990).