

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-8339  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JUAN A. GAYTAN,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
(A-90-CR-96-(03))

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(January 15, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:<sup>1</sup>

Juan Gaytan appeals only his sentence. We **AFFIRM**.

I.

Juan Gaytan and five others were indicted in July 1990 for conspiracy to possess marijuana with intent to distribute (count one); and the corresponding substantive offense (count two). Gaytan pleaded not guilty, but in March 1992, entered into a plea

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<sup>1</sup> Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

agreement whereby he pleaded guilty to count one and the government agreed to dismiss count two after he was sentenced.

The presentence investigation report (PSR) recommended an offense level of 26 and an incarceration range of 70-87 months. Gaytan objected to some of the factual allegations in "The Offense Conduct" section (suggesting that Gaytan's base offense level should be determined on the basis of 250 pounds of marijuana) and challenged the failure to reduce his offense level for acceptance of responsibility and minor or minimal participation in the offense. The district court overruled his objections and, *inter alia*, sentenced him to 70 months in prison.

## II.

On appeal, Gaytan presents these same issues: 1) denial of a two level reduction for acceptance of responsibility, 2) failure to decrease his offense level for minor or minimal participation, and 3) computation of his offense level on the basis of 250 pounds of marijuana.

### A.

Under § 3E1.1 of the Guidelines (in effect at the time of sentencing), a defendant's offense level was to be reduced by two if he "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct". U.S.S.G. § 3E1.1(a). However, as Gaytan concedes, a defendant who pleads guilty is not automatically entitled to the reduction. § 3E1.1(c). Because "[t]he sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility", that

determination is entitled to great deference here. U.S.S.G. § 3E1.1, comment. (n.5). Indeed, our standard of review under this section is even more deferential than the clear error standard, **United States v. Roberson**, 872 F.2d 597, 610 (5th Cir.), cert. denied, 493 U.S. 861 (1989); the appellant must show that the determination was "without foundation". **Id.**; **United States v. Fields**, 906 F.2d 139, 142 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 111 S.Ct. 200 (1990).

Gaytan has not met that burden. Oddly enough, the primary argument offered in his brief is that his acceptance of responsibility is shown by his not fleeing the country while free on bond. The district court specifically found Gaytan's actions while free on bond "enough as far as I'm concerned to show a failure of acceptance of responsibility". It was referring to information in the PSR that Gaytan violated the conditions of his bond on at least three different occasions: once testing positive for cocaine, once testing positive for another drug, and once refusing to submit to drug testing.

A PSR "bears sufficient indicia of reliability to be considered as evidence", **United States v. Alfaro**, 919 F.2d 962, 966 (5th Cir. 1990). We agree that this information alone is enough to negate acceptance of responsibility. Accordingly, we find no error in the district court's determination.

B.

Section 3B1.2 of the Guidelines permits reduction in the offense level for minor or minimal participation in the criminal

activity. A defendant is a "minimal participant" if "plainly among the least culpable of those involved in the conduct of a group" such as one who lacks "knowledge or understanding of the scope and structure of the enterprise", U.S.S.G. § 3B1.2, comment. (n.1), and a "minor participant" if "less culpable than most other participants" but not one whose role was "minimal". *Id.* at n.3. A district court's finding regarding the level of participation will be affirmed unless clearly erroneous. ***United States v. Nevarez - Arreola***, 885 F.2d 243, 245 (5th Cir. 1989).

The PSR states that Gaytan helped transport 250 pounds of marijuana from Laredo, Texas, to several locations in San Antonio, went to the "stash house" where the marijuana was kept, transported marijuana from the "stash house" to his car and delivered marijuana to a purchaser. The decrease Gaytan seeks is intended to be used infrequently. U.S.S.G. § 3B1.2 comment. (n. 2). We do not find error, much less the requisite clear error.

C.

Finally, Gaytan contends that his sentence should have been based upon possessing only 50 pounds of marijuana, the amount he delivered to a purchaser. As noted, he was sentenced instead for possessing 250. Gaytan appears to assert that the sentence was based on the total amount possessed by his customers. The sentencing court's calculation was based, instead, on information in the PSR that Gaytan helped transport 250 pounds of marijuana from Laredo to San Antonio. As noted, the district court found

that this information was accurate; and its sentencing finding, based upon that information, is not clear error.

III.

For the foregoing reasons, the sentence is

**AFFIRMED.**