

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1081
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OBERIAN LEANDER HILL,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:92-CR-118-A
- - - - -
(November 1, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:*

Oberian Leander Hill appeals the sentence imposed by the district court following his guilty plea to Count 3 of a three-count indictment charging him with possession with intent to distribute 23.27 grams of cocaine base. "Review of sentences imposed under the guidelines is limited to a determination whether the sentence was imposed in violation of law, as a result of an incorrect application of the sentencing guidelines, or was

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

outside of the applicable guideline range and was unreasonable." U.S. v. Matovsky, 935 F.2d 719, 721 (5th Cir. 1991) (citing 18 U.S.C. § 3742(e)). Findings of fact are reviewed for clear error. Id.

Hill contends that his offense level should have been calculated on the basis of the drugs involved in the count of conviction only and that he should not have been held responsible for 210 grams of cocaine base involved in a dismissed count. A defendant may be sentenced based upon his "relevant conduct," which, in the case of a jointly undertaken criminal activity, makes a defendant accountable for the conduct of others in furtherance thereof which was reasonably foreseeable to the defendant. U.S.S.G. § 1B1.3(a)(1) and comment. (n.1). "A 'jointly undertaken criminal activity' is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy." § 1B1.3, comment. (n.2). Accordingly, "[i]n drug distribution cases, the base offense level can reflect quantities of drugs not specified in the count of conviction if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction." United States v. Moore, 927 F.2d 825, 827 (5th Cir.), cert. denied, 112 S. Ct. 205 (1991) (internal quotations omitted).

Hill argues that the district court relied solely on testimony of a co-defendant and that the testimony was unreliable, inconsistent, and self-serving. This argument is unavailing. The district court expressly relied on the arresting

officer's report and did not rely solely on the co-defendant's testimony. Moreover, even without the police report, the district court is entitled to rely on the testimony of an accomplice or co-conspirator so long as the testimony is not "incredible or otherwise insubstantial on its face." United States v. Singer, 970 F.2d 1414, 1419 (5th Cir. 1992). This rule applies even though the co-defendant testified pursuant to a plea agreement with the Government. United States v. Osum, 943 F.2d 1394, 1405 (5th Cir. 1991). "[T]estimony generally should not be declared incredible as a matter of law unless it asserts facts that the witness physically could not have observed or events that could not have occurred under the laws of nature." Id. The district court, as the finder of fact, was entitled to believe the co-defendant's testimony and to disbelieve Hill's testimony. See United States v. Lindell, 881 F.2d 1313, 1322 (5th Cir. 1989), cert. denied, 493 U.S. 1087, and cert. denied, 496 U.S. 926 (1990). The district court's factual finding that Hill had actual knowledge of the cocaine base was not clearly erroneous.

Even if Hill had no actual knowledge of the presence of the cocaine base, Hill and the co-defendant were engaged in a jointly undertaken criminal activity within the meaning of § 1B1.3 and the district court could properly have concluded that the presence of the cocaine base was reasonably foreseeable to Hill. § 1B1.3; see § 1B1.3, comment. (n.2(c)(6)).

Hill contends that the district court improperly refused to reduce his offense level for acceptance of responsibility. The sentencing court must reduce the defendant's offense level by 2

levels, "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his offense" U.S.S.G. § 3E1.1(a). The district court's determination whether the defendant has accepted responsibility within the meaning of § 3E1.1 is entitled to even greater deference than that accorded under a clearly erroneous standard of review. United States v. Mourning, 914 F.2d 699, 705 (5th Cir. 1990); see § 3E1.1, comment. (n.5).

Among the factors to be considered by the district court in determining whether to award the two-level reduction for acceptance of responsibility is whether the defendant has truthfully admitted, or has not falsely denied, any additional relevant conduct for which he is accountable under § 1B1.3. See § 3E1.1, comment. (n.1(a)). Because Hill refused to admit his involvement with the cocaine base found in his automobile and because the district court properly determined that the possession of the cocaine base by Hill or by his co-defendant was relevant conduct under § 1B1.3, the district court's refusal to award a two-level reduction for acceptance of responsibility was not clearly erroneous.

AFFIRMED.