

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1107
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EMIGDIO RUELAS JACOBO,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:92-CR-399-G (01)
- - - - -
(October 29, 1993)

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

PER CURIAM:*

Emigdio Ruelas Jacobo argues that a 3.5 kilogram sale negotiated by his co-conspirators should not have been used in determining his offense level under the sentencing guidelines and that the sentencing judge failed to make findings of fact required by FED. R. CRIM. P. 32. The sentencing guidelines provide that "quantities of drugs not specified in the count of conviction may be considered in determining the offense level." U.S.S.G. § 2D1.1, comment. (n.12). A defendant may be sentenced

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

based upon his "relevant conduct," which in the case of a conspiracy, makes a defendant accountable for conduct of others that was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity. U.S.S.G. § 1B1.3(a)(1) and comment. (n.1). This guideline applies whether or not the conduct was charged as a conspiracy. § 1B1.3, comment. (n.2). Nevertheless,

[i]n an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant *did not intend to produce and was not reasonably capable of producing* the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

§ 2D1.1, comment. (n.12) (emphasis added).

Jacobo objected to the probation officer's finding that the 3.5 kilograms should be included in the offense level computation. Jacobo argues that it was erroneous for the sentencing judge to determine that the conspiracy was capable of producing the 3.5 kilograms because a transaction involving that amount of heroin "was out of proportion to the series of transactions totalling 233.15 grams." The sentencing judge's basis for findings concerning the disputed 3.5 kilograms are not available to the Court because a transcript of the sentencing hearing is not included in the record on appeal. Therefore, the Court is unable to determine whether the sentencing judge erred in adopting the PSR or whether Martinez was merely "puffing" about the ability to deliver 3.5 kilograms of cocaine. See

United States v. Mergerson, 995 F.2d 1285, 1294 (5th Cir. 1993).

"If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion." FED. R. APP. P. 10(b)(2). Jacobo has provided no explanation for why he failed to assure that this Court received a transcript of the sentencing. Such failure to include the sentencing transcript prevents this Court from reviewing Jacobo's contentions of error; therefore, the decision of the district court is AFFIRMED. See United States v. Hinojosa, 958 F.2d 624, 632-33 (5th Cir. 1992).