

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-1266
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROCKY CRAIG KIRK,

Defendant-Appellant.

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

(3:92 CR 307 P 02)

(September 17, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Rocky Craig Kirk pleaded guilty pursuant to a written plea agreement to conspiracy pertaining to a continuing criminal enterprise and conspiracy to possess with intent to distribute and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to distribute more than 1000 kilograms of marijuana. He received a 300-month term of incarceration, a concurrent 60-month term of incarceration, two concurrent five-year terms of supervised release, and a \$100 special assessment.

OPINION

Kirk contends that the district court erred in finding that he was in possession of a gun during a drug-trafficking transaction. The crux of his argument is that it was clearly improbable that Kirk possessed a firearm during a drug-trafficking transaction because "only one of 16 people [said] that [Kirk] possessed a gun. . . ." He also maintains "that such a minor reference to gun possession" indicates that district court relied on facts that did not have sufficient indicia of reliability. His argument is unavailing.

The district court's decision to increase Kirk's offense level by two points pursuant to U.S.S.G. § 2D1.1(b)(1) is a factual determination which is reviewed only for clear error. United States v. Devine, 934 F.2d 1325, 1339 (5th Cir. 1991), cert. denied, 112 S. Ct. 954 (1992). A drug offense level is increased by two points "[i]f a dangerous weapon (including a firearm) was possessed." § 2D1.1(b)(1). "The adjustment should be applied if the weapon was present, unless it was clearly improbable that the weapon was connected with the offense." § 2D1.1, comment. (n. 3). Thus, it is irrelevant that the gun was not used or brandished.

"[F]irearms are tools of the trade of those engaged in illegal drug activities," and, therefore, a sentencing court could infer

that a defendant should have foreseen a co-defendant's possession of a dangerous weapon if they are jointly involved in an offense involving a quantity of narcotics. United States v. Aguilera-Zapata, 901 F.2d 1209, 1215 (5th Cir. 1990) (internal quotations and citations omitted).

The district court is allowed to rely on information contained in the presentencing investigative report (PSR) in making factual sentencing determinations as long as the information bears a minimum indicium of reliability. United States v. Vela, 927 F.2d 197, 201 (5th Cir.), cert. denied, 112 S. Ct. 214 (1991). Kirk has the burden of demonstrating that the information contained in the PSR is materially untrue. United States v. Rodriguez, 897 F.2d 1324, 1328 (5th Cir.), cert. denied, 498 U.S. 857 (1990). Although Kirk contends the PSR lacks sufficient indicia of reliability, he is mistaken. The pertinent information was supplied by the investigating agents and therefore was sufficiently reliable. See United States v. Manthei, 913 F.2d 1130, 1138 (5th Cir. 1990).

The PSR stated that Kirk's co-conspirator and ex-stepfather, Jerry Hamilton, received proceeds from Kirk's marijuana sales conducted in the Carolinas. Occasionally during these transactions, Hamilton observed a handgun in Kirk's briefcase. Hamilton was receiving financial payment from Kirk at the time for Hamilton's assistance in the marijuana business. The PSR also stated that Hamilton, a U.S. Department of Defense (DOD) physical security specialist, used that position and DOD truck to transport marijuana through and around Border Patrol check-points. As part

of his duty, Hamilton carried a .38-caliber handgun and a .22-caliber rifle in his truck at all times.

Additionally, at sentencing, DEA Agent Sullivan testified that he personally interviewed Hamilton on one occasion and had knowledge of a prior DEA interview with Hamilton. Sullivan also testified that at both interviews, Hamilton related that he saw Kirk in possession of a firearm when paying Hamilton with proceeds from the sales of marijuana. The firearm was located in Kirk's briefcase which contained the currency. Sullivan testified that he found evidence of corroboration of Hamilton's statements by investigation and through other witnesses. Additionally, he had no reason to discount the information Hamilton provided regarding the firearm.

Also at sentencing, Kirk testified that he "never carried a gun, never carried a gun like on continual or anytime that had anything to do with any marijuana or money business that was in connection with the marijuana business." He further testified that he and Hamilton had a very bad relationship.

The district court was not impressed with Kirk's version of the facts and assessed a two-level increase for the possession of the firearm. In doing so, the district court relied on the testimony offered at the sentencing hearing, the PSR, the Addendum and Amended Addendum to the PSR, and other written documents. The record indicates that the district court's factual determinations were not clearly erroneous, and the information relied upon bore sufficient indicia of reliability. Additionally, to the extent that

Kirk is arguing that the district court relied upon hearsay, hearsay evidence is admissible at sentencing. United States v. Byrd, 898 F.2d 450, 452-53 (5th Cir. 1990); Fed. R. Evid. 1101(d)(3).

Kirk also contends that district court erred in finding that he failed to accept responsibility. He contends that a comparison of the factual resume, with the sentencing hearing transcript proves that he accepted responsibility. The crux of his argument is that he clearly accepted responsibility and contested the PSR regarding the extent of his involvement in the conspiracy only; specifically, that he was not co-defendant Jimmie Helms' partner. His argument is unavailing.

A sentence imposed by the trial court generally will be upheld on review so long as the sentence was determined by a proper application of the guidelines to facts 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). The burden is on the defendant to demonstrate acceptance of responsibility clearly and affirmatively. § 3E1.1(a); See United States v. Fields, 906 F.2d 139, 142 (5th Cir.), cert. denied, 498 U.S. 874 (1990).

A defendant is not entitled to the reduction simply because he enters a guilty plea. § 3E1.1 comment. (n.3); see United States v. Shipley, 963 F.2d 56, 58 (5th Cir.), cert. denied, 113 S. Ct. 348 (1992). A defendant cannot deny a part of his relevant criminal conduct and still seek a reduction for acceptance of responsibility only on the portion admitted. United States v. Kleinebreil, 966

F.2d 945, 953-54 (5th Cir. 1992). Whether a defendant has accepted responsibility is a factual issue and such a finding is entitled to even greater deference by this Court than that given under the clearly erroneous standard.

The PSR initially recommended a two-level decrease for acceptance of responsibility. The Government objected to the reduction because Kirk filed a response and objections to the PSR which denied significant parts of the PSR's factual component. The Government maintained that Kirk falsely denied and frivolously contested relevant conduct including the orchestration of others in furtherance of the conspiracy, and its response to Kirk's objections set forth a number of specific instances of Kirk's allegedly false and frivolous statements. The Amended Addendum recommended that Kirk not receive an adjustment for acceptance of responsibility.

At sentencing, the district court elicited testimony from both Kirk and Agent Sullivan and then determined that Kirk had not accepted responsibility. Kirk denied a partnership with Helms. He further denied exercising control or instructing the couriers and explicitly denied having anything to do with any of the co-conspirators except Hamilton and Brunson. In essence, he contended that he had a "working knowledge of marijuana" and could "look at [the marijuana] and. . . know if Jimmie Helms would have accepted it at that price and we can make money at it, and that would be my role."

Furthermore, in his objections in the PSR, Kirk stated that he did not employ Hamilton and that Hamilton was "acting on his own or with others to purchase and resell marijuana." Kirk further asserted that co-defendant Brunson acted on his own when he recruited co-defendant Randy Matheney and that Kirk did not "even trust Matheney for any purposes." He further asserted that he never paid any money to Matheney but paid money only to Brunson and that Matheney "never received any money at all from Kirk."

However, in the factual resume which he signed, Kirk did not contest that all the other co-defendants were members of the conspiracy and admitted that he would purchase marijuana and then transport it to various staging areas through numerous co-defendants in addition to Hamilton and Brunson. He also admitted that he would receive monies from the sale of marijuana either from his customers or other couriers, would retain his share of the profits, and then deliver the remaining proceeds to his associates, couriers, and suppliers. The factual resume also stated that Kirk did not contest any of the overt acts alleged in the indictment. Among those overt acts were various instances of receiving the cash proceeds from marijuana sales from numerous members of the conspiracy.

Based on Kirk's sentencing hearing testimony and PSR objections, which differ substantially from the factual resume, the district court had a proper basis from which to conclude that Kirk failed to convince the court that his remorse and acceptance of

responsibility were sincere. See United States v. Alfaro, 919 F.2d 962, 968 (5th Cir. 1990).

We AFFIRM.