

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1436
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAUL HERNANDEZ,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:92-CR-279-R(14)
- - - - -
(March 22, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:*

Raul Hernandez pleaded guilty to one count of conspiracy to possess with intent to distribute cocaine, cocaine base, and marijuana. Hernandez objects to the quantity of cocaine used to calculate his base offense level at sentencing.

The district court's determination of the amount of drugs involved in the offense is reviewed for clear error. United States v. Eastland, 989 F.2d 760, 767 (5th Cir.), cert. denied, 114 S.Ct. 246 (1993). Fact-findings need be established at

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sentencing only "`by a preponderance of the relevant and sufficiently reliable evidence'". United States v. Montoya-Ortiz, 7 F.3d 1171, 1179 (5th Cir. 1993) (citation omitted).

"The district court has wide discretion in evaluating the reliability of the information [used at sentencing] and whether to consider it." United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991), cert. denied, 112 S.Ct. 1677, 2290 (1992). A defendant who objects to the use of information at sentencing "bears the burden of proving that it is `materially untrue, inaccurate or unreliable.'" Id. (citation omitted).

Hernandez asserts that the district court erred in determining that a conversation between Hernandez and an informant referred to cocaine because the language used was ambiguous and the only "undisputed" fact was that Hernandez "dealt in marijuana." During the conversation Hernandez and the informant discussed marijuana and never specifically mentioned cocaine by name. Hernandez indicated that he trafficked ten to 20 kilograms of a substance during the conversation.

According to Benjamin Routh, a special agent with the Drug Enforcement Administration (DEA), he knew that Hernandez and the informant were discussing cocaine because "[w]hen you talk about drugs you talk about kilos and talk about cocaine. When you talk about marijuana you use the reference in pounds. People don't sell a kilo of marijuana. Sell marijuana by the pound quantities." Routh explained that it was his understanding that cocaine was being discussed solely on the basis of the use of the word "kilo."

The district court credited Routh's explanation and determined that Hernandez was responsible for the quantity of cocaine specified in the presentence report (PSR). This determination was not clearly erroneous in light of the evidence proffered by the Government against Hernandez.

Because the district court's account of the evidence is plausible in light of the entirety of the record and because the evidence has the necessary minimum indicia of reliability the court's sentencing determination is AFFIRMED.