**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 93-1487
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERTO ZAVALA,
a/k/a Robertin,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-412-R)

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(July 8, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Robert Zavala appeals the sentence he received following a plea of guilty of aiding and abetting in the possession with intent to distribute marihuana, in violation of 21 U.S.C. §§ 841(a)(1) and 842 (b)(1)(C) and 18 U.S.C. § 2. Finding no error, we affirm.

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[*] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

# I.

From 1988 through 1992, Albert Amaya ran a marihuana distribution organization in Dallas, Texas. A 31-count indictment was returned against 25 defendants related to this drug distribution ring. One of these defendants was Zavala, named in counts 1, 9, and 31 of the indictment. Count one charged him with conspiracy to distribute in excess of 1,000 kilograms of marihuana; count nine charged him with aiding and abetting the possession of approximately 163 pounds of marihuana; count 31 charged him with aiding and abetting the possession of approximately 96 pounds of marihuana. Zavala entered a guilty plea to count nine in exchange for dismissal of the other two counts.

Zavala objected to the presentence investigation report (PSR) on the ground that he should be held responsible only for the 163 pounds referenced in count nine. Specifically, he objected to the inclusion of 400 pounds referenced in paragraph 11 of the PSR and 96 pounds that was the subject of count 31 and referenced in paragraph 12. Zavala's objections also addressed changes related to the decrease in the amount of marihuana used to calculate his offense level.

The probation officer prepared an addendum to the PSR that conceded removing the 400 pounds of marihuana from the total used to calculate Zavala's base offense level. Citing U.S.S.G. § 6B1.2(a)(2), the probation officer did not agree to remove the 96 pounds of marihuana from the total. Zavala filed objections to the addendum. The district court granted Zavala a

two-level downward departure for his substantial assistance and sentenced him to 45 months' imprisonment.

II.

On appeal, Zavala argues that the district court erred in including the 96 pounds of marihuana from count 31 to calculate his offense level because the court did not make a factual finding "of controverted matters" as is required by FED. R. CRIM. P. 32(c)(3)(D). Alternatively, Zavala argues that there was insufficient reliable evidence showing that he could have foreseen that quantity of drugs to support the inclusion of the 96 pounds in the offense level calculation.

If a defendant asserts, with specificity and clarity, that anything within his PSR is incorrect factually, then the sentencing judge must make, as to each controverted matter,

> "(i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing." If the sentencing judge "fails to make the requisite finding or determination, or if the finding or determination is ambiguous, the case must be remanded for resentencing."

United States v. Hurtado, 846 F.2d 995, 998 (5th Cir.) (quoting rule 32(c)(3)(D) and United States v. Garcia, 821 F.2d 1051, 1052 (5th Cir. 1987)), cert. denied, 488 U.S. 863 (1988).

Paragraph 12 of the PSR recited the facts surrounding count 31. Zavala objected to that paragraph, stating that "[t]he 96 pounds mentioned in count 31 of the Indictment should be deleted from the calculation of the offense level, because the government

will move to dismiss count 31 at the time of sentencing, as stated in Paragraph 10 of the Plea Agreement." In his objections to the PSR, Zavala did not challenge the facts recited in paragraph 12.

In the addendum to the PSR, the probation officer responded that

> U.S.S.G. § 6B1.2(a)(2) provides that a plea agreement that includes the dismissal of a charge shall not preclude the conduct underlying such charge from being considered under the provisions of U.S.S.G. § 1B1.3, Relevant Conduct, in connection with the counts of which the defendant is convicted. Since Count 31 of the Indictment represents relevant conduct in connection with the defendant's overall criminal activity, the 96 pounds of marijuana mentioned in Count 31 must be included in the total amount of marijuana mentioned in ¶ 13 of the Presentence Report.

Zavala filed an objection to the addendum but, with respect to the above response, stated that "[b]ased on U.S.S.G. § 6B1.2(a)(2), there is no objection." In the objections to the addendum to the PSR, Zavala did not challenge the facts recited in paragraph 12.

We will assume, arguendo, that Zavala has objected adequately to the PSR and addendum in order to preserve the issue for appeal. Although Zavala is correct that a district court's legal determinations are reviewed de novo, United States v. Eastland, 989 F.2d 760, 767 (5th Cir.), cert. denied, 114 S. Ct. 443 (1993), he has not shown any legal error on the part of the district court. "When determining the base offense level for drug distribution, the court may, of course, consider relevant conduct of which the defendant has not been charged, or convicted. Similarly, counts to which the defendant does not plea may be relevant conduct." United States v. Young, 981 F.2d 180, 189 (5th Cir. 1992) (citation omitted), cert.

denied, 113 S. Ct. 2983 (1993). The district court may consider relevant conduct if it was "part of the same course of conduct, plan, or scheme as the count of conviction." Id. Whether the conduct in question was part of the same scheme as the conviction is a factual finding reviewed for clear error. Id.

The district court did not make specific findings of fact regarding this issue but adopted the offense level suggested in the PSR. The district court is allowed to rely upon information contained in the 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). On appeal, Zavala does not argue that the information contained in paragraph 12 is untrue; he simply asserts that the district court did not make the necessary factual findings. See United States v. Alfaro, 919 F.2d 962, 964-66 (5th Cir. 1990) (holding that defendant has burden of showing that district court was clearly erroneous). Therefore, Zavala has not carried his burden of showing that the district court could not have relied upon the information in the PSR to make implicit findings of fact or was clearly erroneous in so doing. See Young, 981 F.2d at 188-89.

AFFIRMED.