

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1504
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN PINA,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:92-CR-523-G
- - - - -
(January 6, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Juan Pina contends that he is entitled to a two-level downward adjustment in his offense level because he was a minor participant under U.S.S.G. § 3B1.2. He argues that the Government did not demonstrate that he participated in two prior transactions or that he supplied the drugs or profited from the sale, but only that he was present for the negotiation of the December 4th sale.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

This Court will affirm a district court's sentence so long as it results from a correct application of the Guidelines to factual findings which are not clearly erroneous. United States v. Sarasti, 869 F.2d 805, 806 (5th Cir. 1989). "A factual finding is not clearly erroneous so long as it is plausible in light of the record as a whole." United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991). As the party seeking a reduction of the Guideline sentence, Pina must establish, by a preponderance of the evidence, the factual basis warranting the reduction. See United States v. Alfaro, 919 F.2d 962, 965 (5th Cir. 1990).

The Guidelines provide that the sentencing court may decrease the offense level by two levels if the defendant was a minor participant in the offense. See § 3B1.2(b). A minor participant is any participant who is less culpable than most other participants, but whose role could not be described as minimal. Id., comment. (n.3). Simply being less involved than other participants will not warrant minor-participant status; a defendant must be peripheral to the furtherance of the illegal endeavor. United States v. Thomas, 932 F.2d 1085, 1092 (5th Cir. 1991), cert. denied, 112 S.Ct. 887 (1992). A defendant is not entitled to a downward adjustment because others in a conspiracy were possibly more culpable. United States v. Mueller, 902 F.2d 336, 345-46 (5th Cir. 1990). The district court's determination of minor-participant status is not a legal conclusion, but a factual determination that enjoys the protection of the clearly

erroneous standard. United States v. Gallegos, 868 F. 2d 711, 713 (5th Cir. 1989) (internal quotations and citations omitted).

The gist of Pina's argument is that his role in the conspiracy was minimal evidenced by the Government's inability to prove his involvement in the first two transactions and that he did not supply the drugs or profit from the sale. Based on the Presentence Report (PSR), and after considering Pina's objections to the PSR and at the sentencing hearing, the district court determined that minor-participant status was not appropriate. See United States v. Buenrostro, 868 F.2d 135, 137 (5th Cir. 1989) (although judges are encouraged to supply more specific factual findings, simple statement that defendant was not a minor participant suffices as a factual finding), cert. denied, 495 U.S. 923 (1990). The district court was not clearly erroneous in finding minor-participant status was not warranted because Pina did not introduce any evidence to prove that he was only peripherally involved.

AFFIRMED.