

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-1508
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

VICTOR RAUL ALVARADO, and PETE SERNA SERNA,

Defendants-Appellants.

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

(3:93-CR-039-P)

(March 24, 1994)

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge:*

Victor Raul Alvarado and Peter Serna pleaded guilty pursuant to written plea agreements charging them with conspiracy to distribute heroin. The district court enhanced both Alvarado's and Serna's sentence for possession of a firearm related to a drug offense. Alvarado and Serna appeal, contending that the district

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court erred in enhancing their respective sentences based solely on the presentence report (PSR) and additionally, that the district court erred in enhancing their sentences for carrying a firearm when the Government elected not to indict either for a firearm offense. Alvarado also contends that the district court erred in concluding that he was an organizer of the conspiracy. Serna appeals, contending that he deserved a larger downward departure based on the Government's motion. Finding no merit in either appellant's contentions, we affirm the sentences of both.

Discussion

First of all, this Court permits a district court to consider dismissed charges of an indictment when choosing to enhance a sentence. **United States v. Aguilera-Zapata**, 901 F.2d 1209, 1213-14 (5th Cir. 1990). Further, PSR information is generally deemed sufficiently reliable to support sentencing findings. **United States v. Alfaro**, 919 F.2d 962, 966 (5th Cir. 1990). A defendant bears the burden of proving that the PSR contents are unreliable, inaccurate, or materially untrue. **United States v. Kinder**, 946 F.2d 362, 366 (5th Cir. 1991), **cert. denied**, 112 S.Ct. 1677 (1992). District courts may adopt disputed PSR facts if a defendant fails to offer rebuttal evidence or when the record indicates that the district court, at least implicitly, considered the relevant arguments and decided to credit the PSR's position. **See United States v. Sherbak**, 950 F.2d 1095, 1099 (5th Cir. 1992). Findings of fact underlying a district court's imposition of sentence are reviewed under the clearly-erroneous standard. **United**

States v. Mejia-Orosco, 867 F.2d 216, 218 (5th Cir.), **cert. denied**, 492 U.S. 924 (1989). If a defendant fails to lodge a proper objection to the PSR in the district court, and raises an issue for the first time on appeal, then we do not disturb the finding of the district court unless not to do so would result in a "manifest injustice." **United States v. Garcia-Pillado**, 898 F.2d 36, 39 (5th Cir. 1990).

Alvarado objected to an increase in his base offense level due to the possession of a firearm and also objected to material in the PSR which indicates that he advised Serna to "come along and bring a gun for security." Serna, however, did not object to the PSR regarding the firearm, nor did he object to the firearm at sentencing. Neither defendant offered any evidence to rebut the PSR. Thus, Alvarado's firearm possession claim should be reviewed for "clear error" and Serna's for "manifest injustice."

Section 2D1.1(b)(1) of the Sentencing Guidelines directs sentencing courts to increase by two levels the base offense level of a defendant convicted of certain narcotic-related offenses (including conspiracy to distribute) "[i]f a dangerous weapon (including a firearm) was possessed during commission of the offense." It is irrelevant that the gun was not used or brandished. "Firearms are tools of the trade of those engaged in illegal drug activities," and, therefore, a sentencing court can 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. **Aguilera-Zapata**, 901 F.2d at 1215 (internal quotations and citations omitted).

The PSR's on both defendants state that a "fully loaded .38 caliber revolver was seized from Pete Serna. Subsequent investigation shows that Victor Alvarado called Peter Serna Serna on the date of [the drug] transaction and advised him to come along and bring a gun for security." The defendants offer no rebuttal evidence to counter the contents of the PSR. The PSR indicates that both defendants either knew of, or should have foreseen, the firearm's possession when they jointly engaged in a concerted criminal activity involving a quantity of narcotics.

Alvarado next contends that he was not an organizer and the district court clearly erred in increasing his base offense level consistent with that finding. Although Alvarado did not object to the PSR regarding whether he was an organizer, at sentencing, he stated that he was not "the leader of the group". Thus, the district court's finding is reviewed for "clear error". **Mejia-Orosco**, 816 F.2d at 216-218. Alvarado offered no rebuttal evidence to the information in the PSR. The district court can adopt disputed PSR facts when the defendant offers no rebuttal evidence. **United States v. Rodriguez**, 897 F.2d 1324, 1327-28 (5th Cir.), **cert. denied**, 498 U.S. 857 (1990).

The PSR states that Alvarado was contacted when an undercover agent expressed an interest in purchasing an amount of heroin larger than the amount co-defendant Miriam Guzman could handle. Various negotiations ensued, including a number of phone calls from

Alvarado to a confidential informant (CI). Alvarado called the CI to confirm the time and location of the drug transaction. Alvarado arrived with Serna, whom he had enlisted as an accomplice and directed him to bring a gun for security. Alvarado has not shouldered his burden of rebutting the PSR, and the district court did not commit "clear error."

Serna contends that the district court failed to consider mitigating circumstances when ruling on the Government's motion for downward departure. His argument is facially frivolous. The Government filed a motion for downward departure, and the court granted the motion. Serna was sentenced to an 82-month term of incarceration when the statutory minimum term was 120 months, and the Guideline range prior to departure was 87-108 months.

Conclusion

Based on the foregoing, we affirm the sentences of both Appellants.

AFFIRMED.