

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1816

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARK MENDES SCOTT, a/k/a/ "Red,"

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93 CR 105 P (4))

June 9, 1994

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Mark Mendes Scott appeals his judgment of sentence rendered by the district court. Finding no error, we affirm.

I.

A. FACTUAL BACKGROUND

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

On March 1, 1993, Mark Mendes Scott, James Lee Dean, Curtis Lee Carter II, Lisa Marchell Carter, and Cedric Glenn Smith met to finalize plans to steal a tractor trailer from a Target retail store in Dallas, Texas. Although the other members of this group and an undercover agent, an officer with the Dallas Police Department, had discussed plans for the theft for quite some time, Scott was recruited by Curtis in late February 1993 to drive the Target tractor trailer away from the scene of the crime. Curtis and Scott had previously been incarcerated together in the Dallas County Jail.

Shortly after the meeting, the group proceeded to the Target store. Lisa drove in her own car to the front of the Target store; the others, in a car that Scott had recently stolen, proceeded to the rear of the Target store where the tractor trailer was parked. Dean and Smith then approached Michael Shaw, the driver of the Target tractor trailer, pulled him from the truck at gunpoint, and put him into the trunk of Scott's stolen car. Curtis and Smith then drove this car to a nearby Motel 6 and abandoned it with Shaw still locked in the trunk. Meanwhile, Scott drove the tractor trailer to a pre-arranged designated area where the group made a rendezvous. The group then drove to Curtis' apartment, where Scott and Curtis described the location of the stolen tractor trailer to the undercover officer. The next day, Scott, Dean, Smith, and an unidentified individual met with the undercover officer, who made a partial payment for the stolen tractor trailer and the merchandise it contained. They

also discussed a future theft of another tractor trailer. The partial payment was eventually divided among Curtis, Lisa, Scott, Dean, and Smith.

On March 9, 1993, after Curtis had begun to suspect that the undercover officer was not going to pay the remaining money due for the tractor trailer, Scott and Curtis located the officer's vehicle in an apartment complex. Early the next morning, they returned to the complex to wait for the officer. When the officer tried to exit the complex in his car, Curtis blocked the officer's exit with his car and approached the officer with a semi-automatic weapon in hand. The officer then shot and killed Curtis. Scott fled the scene in Curtis' car and was subsequently arrested for the tractor trailer theft.

B. PROCEDURAL HISTORY

Scott was indicted in a three-count indictment, which charged a conspiracy to obstruct interstate commerce by robbery, in violation of 18 U.S.C. § 371 (Count I); obstruction of interstate commerce by robbery, in violation of 18 U.S.C. § 1951(a) (Count II); and the use and carrying of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1) & (2) (Count III). Pursuant to a plea agreement, Scott pleaded guilty to Counts II and III of the indictment.

Scott's pre-sentence investigation report (PSI) recommended that for Count II, Scott should receive a three-point reduction from his base sentencing level computed under the United States

Sentencing Guidelines (the Guidelines) for acceptance of responsibility. The PSI also recommended that Scott receive two-, four-, and six-point upward adjustments, respectively, for the amount of loss caused by the robbery, the abduction of a person to facilitate the crime, and the use of a firearm during the crime. The total offense level thus computed was 29. Scott's criminal history category of VI resulted in a sentencing range of 91 to 128 months imprisonment for Count II. For Count III, the PSI noted that § 2K2.4 of the Guidelines provided that a mandatory consecutive 60-month sentence was applicable.

Scott objected to the PSI concerning the six-level adjustment for use of a firearm, the failure to provide him with a mitigating role reduction pursuant to § 3B1.2 of the Guidelines, and the offense conduct allegations as outside of the plea agreement. The district court ultimately rejected the upward adjustment for use of a firearm, resulting in a new offense level of 23 and a Guideline range of 92 to 115 months imprisonment for Count II. The court then sentenced Scott to 115 months imprisonment on Count II and to a consecutive 60-month term on Count III. The court also sentenced Scott to a three-year term of supervised release and imposed a \$100 special assessment. Scott now appeals.

II.

A sentencing court's interpretations of the guidelines are reviewed de novo. United States v. McCaskey, 9 F.2d 368 372,

(5th Cir. 1993), cert. denied, 62 U.S.L.W. 3691 (U.S. April 18, 1994); see United States v. Thomas, 12 F.3d 1350, 1369 n.33 (5th Cir. 1994), cert. denied, 1994 WL 144831 (U.S. May 16, 1994). The sentencing court's factual findings must be supported by a preponderance of the evidence, and we review such findings under the clearly erroneous standard. McCaskey, 9 F.3d at 372. We afford great deference to the district court's refusal to grant a defendant minor participant status; such a determination should not be disturbed except for clear error. United States v. Devine, 934 F.2d 1325, 1340 (5th Cir. 1991), cert. denied, 112 S. Ct. 954 (1992); see United States v. Martinez-Moncivais, 14 F.3d 1030, 1039 (5th Cir. 1994). We will conclude that such a determination is clearly erroneous only if we are left with the definite and firm conviction that a mistake has been made. United States v. Mitchell, 964 F.2d 454, 457-58 (5th Cir. 1992). In other words, we uphold the district court's determination as to minor participant status if it is plausible in light of the record as a whole. Thomas, 12 F.3d at 1368; United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991).

III.

The Guidelines allow a two-level decrease in sentence level if the defendant was a minor participant in the crime, and a three-level decrease if the defendant's role can be classified as falling between minor and minimal. U.S.S.G. § 3B1.2; see Molano-Garza v. United States Parole Comm'n, 965 F.2d 20, 23 (5th Cir.

1992), cert. denied, 113 S. Ct. 1009 (1993). A defendant is not entitled to minor participant status unless he is substantially less culpable than most other participants. Molano-Garza, 965 F.2d at 23. However, the greater culpability of a co-defendant does not automatically qualify a defendant for minor participant status; each defendant must be separately assessed. United States v. Thomas, 963 F.2d 63, 65 (5th Cir. 1992). A showing that a defendant was at least an average participant thus prevents his obtaining minor participant status. Devine, 934 F.2d at 1340.

Scott contends that the district court erroneously failed to award him a mitigating role deduction in calculating his offense level for Count II. He specifically challenges the court's finding that his "skill as a truck driver was instrumental in the completion of the robbery since none of the other defendant's [sic] possessed this skill." He also argues that the indictment, the stipulated facts, and the PSI clearly demonstrate that his role was substantially less culpable than most of the other defendants who participated in the planning, recruitment, preparation, and the actual implementation of the activities surrounding the offense. Further, he asserts that the district court erred in its application of the Guidelines by failing to consider all of Scott's relevant conduct in determining whether Scott was entitled to a mitigating role reduction and in failing to compare the culpability of Scott's conduct with the average participant in the offense.

A.

Scott specifically challenges the district court's finding adopted from Scott's PSI that his skill as a truck driver was instrumental in the completion of the robbery because none of the other participants possessed this skill. Scott contends that because the other defendants could have driven the tractor trailer themselves or forced the driver at gunpoint to drive the tractor trailer, the district court's finding was clearly erroneous.

Scott bore the burden of bringing such an alleged factual inaccuracy contained in the PSI regarding his involvement in the crime to the district court's attention by showing that the statement was materially untrue, inaccurate, or unreliable. United States v. Navejar, 963 F.2d 732, 735 (5th Cir. 1992). Scott's attorney stated at Scott's sentencing hearing: "[T]he Government has said that [Scott's] driving of the truck was instrumental in the robbery, and to be sure, they needed to have a driver. That Scott was the only person who could accomplish that goal, we don't know. And we would assert that the Government would have the burden of proof on that issue if the Government is going to take that position." However, a general allegation that a factual statement in a PSI is inaccurate or misleading is not enough. Id. Because Scott failed to offer rebuttal evidence to refute the factual statement at issue in his PSI, the district court was free to adopt it without further inquiry. United States v. Sherbak, 950 F.2d 1095, 1099-1100 (5th

Cir. 1992). Hence, Scott's argument with respect to this specific point is meritless.

B.

Scott also contends generally that the district court clearly erred in determining that he was not entitled to minor participant status. He argues chiefly that the other participants had been involved in planning the robbery for months and that he became involved "only a day or so before the robbery and then only to drive the tractor-trailer truck."

The factual resume submitted to the district court, which both Scott and his attorney signed, indicates that Scott and the other participants met on March 1, 1993, to finalize plans and to undertake the robbery. After Curtis and Smith abducted Shaw, the Target truck driver, and placed him into the trunk of the stolen car Scott had been driving, Scott and Dean entered the cab of the truck, and Scott drove the truck to a pre-arranged location, where all of the participants later rendezvoused. The next day, an undercover officer made a partial payment for the truck and its contents, which was divided equally among the participants, including Scott. Scott's PSI also indicates that this undercover officer was the officer who had been a part of the original planning as a "fence" for the stolen merchandise and that Scott and Curtis had informed him of the location of the truck after it had been stolen.

The district court adopted the factual statements in Scott's PSI as its fact findings. A PSI generally bears sufficient

indicia of reliability to be considered by the trial court as evidence in making a factual determination required by the sentencing guidelines. United States v. Gracia, 983 F.2d 625, 629 (5th Cir. 1993); United States v. Robins, 978 F.2d 881, 889 (5th Cir. 1992). Based on this evidence, the district court determined that Scott was not a minor participant.

Scott nonetheless contends that in making this determination, the district court failed to consider all of Scott's relevant conduct, as required by the Guidelines, and instead erroneously conducted a limited analysis of only the activities undertaken once the offense was committed.

The Introductory Commentary to Chapter 3, Part B of the Guidelines states:

This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3(a) (Relevant Conduct), *i.e.*, all conduct included under § 1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction.

U.S.S.G. § 3B1, intro. comment. Section 1B1.3(a)(1), comment n.1, of the Guidelines provides that "[c]onduct for which the defendant would otherwise be accountable . . . includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant."

In making its determination that Scott was not entitled to minor participant status, the court stated:

I do not believeS
I think if you look at it on the surface how long he was involved, . . . he was not involved in the

planning as long, but I don't think that's what minimal participant or minor participant means. I think that you have to look at the role that they actually played once the offense was committed, and his role wasSOhe had a different role, but it was the same as all of the others there. And in the context of looking at what everybody did once that offense was committed, I don't know, I can't say that he was a minor participant anymore than Ms. Carter later on who just drove them there and then went and picked them up later on. Everybody had their role, but I am not willing to find under the facts of this case that Mr. Scott was a minimum or a minimal or a minor participant so I will deny your objection on that.

Scott contends that this statement indicates that the court erred by failing to take into account Scott's not being involved in most of the planning for the crime that went on before he was recruited. This contention, however, is meritless.

Scott pleaded guilty to the obstruction of interstate commerce by robbery and to the use and carrying of a firearm during a crime of violence, but not to the conspiracy charge with which he was indicted and which the government dismissed as part of the plea bargain agreement. Hence, the district court properly noted that it had to look beyond "the surface level" of how long Scott was involved and take into account "the role that [Scott] actually played once the offense was committed." The court made it clear that under the facts of the case it declined to find that Scott was a minor participant in the offenses to which he pleaded guilty. These facts indicate that Scott (1) met with his co-defendants the day of the robbery to finalize plans, (2) supplied the carSOa car which he had stolenSOthat was used for the abduction of the driver of the tractor trailer, (3) participated in the armed taking of the tractor trailer, (4)

helped advise the "fence" of the tractor trailer's location after the robbery, and (5) received an equal share of the initial proceeds. We thus conclude that the district court made it clear that it had considered all of Scott's relevant conduct surrounding the offenses to which Scott pleaded guilty in making its determination that Scott was not a minor participant.

Finally, Scott contends that the district court's statement, as quoted above, indicates that the court improperly compared Scott's conduct only against that of Lisa Carter instead of against that of the "average participant" as contemplated by the Guidelines. Scott also asserts that the district court failed to articulate a valid basis for finding that Scott was not a minor participant.

Despite Scott's argument otherwise, the district court's mere pronouncement that it could not "say that [Scott] was a minor participant anymore than Ms. Carter" does not dispositively indicate that the court compared Scott's conduct only against that of Lisa Carter in making its determination concerning whether Scott should be afforded minor participant status. In fact, the court made it clear that it had compared Scott's conduct to that of the other participants by indicating that Scott's part was as unique as the parts each of the other participants played, for "everybody had their role." This comment, coupled with the court's enunciation that it was "unwilling to find under the facts of this case that Mr. Scott was a minimum or a minimal or a minor participant," is a

sufficient articulation of the basis on which the court determined that Scott was not a minor participant. The facts of this case, which we have detailed above, indicate that the court's basis on which it made its determination was, indeed, a valid one.

We therefore cannot conclude that the district court clearly erred in determining that Scott was not entitled to minor participant status.

V.

For the foregoing reasons, we AFFIRM the judgment of the district court.