

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-2457
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LARRY JOE GOMEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-92-149-S)

(October 21, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Appellant Larry Joe Gomez appeals the sentence he received for aiding and abetting, possession with intent to distribute in excess of 500 grams of cocaine. Gomez asserts that the district court intended to give him a lower sentence, and that the court's two level increase of his base offense level for possession of a dangerous weapon was clearly erroneous. We affirm.

FACTS

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Gomez pleaded guilty to drug charges after DEA agents arrested him and four others during a drug transaction. One of the defendants, Joel Guerra, had in his possession a nine millimeter pistol. Another defendant, Jesse Guerra, had a MAC-10 semi-automatic weapon at his house, which is where the defendants stored their cocaine. Gomez saw the semi-automatic weapon and cocaine at Guerra's house.

At Gomez's sentencing, the district court assigned him a base offense level of 32. The court added two offense levels for use of a gun in connection with the offense. The court then subtracted three offense levels for acceptance of responsibility, for a total offense level of 31 and a criminal history category of one. The district court sentenced Gomez to 118 months imprisonment, out of a range of 108 to 135 months. Gomez appeals.

DISCUSSION

We will uphold a sentence imposed under the guidelines unless it is imposed in violation of law, results from an incorrect application of the guidelines, or is an unreasonable departure from the applicable guideline range. United States v. Buenrostro, 868 F.2d 135, 139 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990). We review legal conclusions de novo and findings of fact for clear error. United States v. Mourning, 914 F.2d 699, 704 (5th Cir. 1990).

Gomez contends that the district court intended to give him the lowest term of imprisonment allowable under the guidelines, which would be 108 months for a total offense level of 31. He

asserts, however, that the district court mistakenly used a total offense level of 32 instead of 31 to compute his sentence. The lowest sentence allowable under a total offense level of 32 is 121 months. Gomez believes that the district court used 121 months and subtracted the three months that Gomez had already served to reach 118 months. Gomez considers the district court's alleged mistake to be a misapplication of the guidelines. Gomez's sentence of 118 months is within the allowed range for a total offense level of 31. We determine that the district court correctly applied the guidelines. Nothing in the record supports Appellant's argument that the court used an offense level of 32 rather than 31.

Gomez disputes the district court's finding that he used a gun during the offense. Section 2D1.1(b) requires a two level increase if the defendant possessed a dangerous weapon. When a codefendant actually possessed the firearm, the government must show that the defendant could have reasonably foreseen that possession. United States v. Hooten, 942 F.2d 878, 882 (5th Cir. 1991). Gomez told DEA agents that he requested and was assured by his co-conspirators that guns would not be involved. Thus, he contends that he could not have reasonably foreseen that one of his co-defendants would possess a weapon. Furthermore, Gomez asserts that he was never inside the vehicle where the gun was found.

Because firearms are tools of the trade for those engaged in drug activities, the district court may infer a defendant's constructive foreseeability if the government demonstrates that the co-conspirator knowingly possessed the weapon while he and the

defendant were jointly involved in a drug offense. United States v. Aquilera-Zapata, 901 F.2d 1209, 1215 (5th Cir. 1990). Joel Guerra possessed a pistol when he was arrested for the same drug offense as Gomez. Gomez admitted to seeing a semi-automatic weapon at Jesse Guerra's residence, where the co-conspirators kept their cocaine. The district court could infer that Gomez should have reasonably foreseen Joel Guerra's possession of the pistol. We determine that the district court did not commit clear error.

For the foregoing reasons, Gomez's sentence is

AFFIRMED.