IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2515

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSE RAMIREZ GUERRA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-92-149-2)

(June 6, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

I.

A grand jury indicted Jesse Guerra for conspiring to possess more than five kilograms of cocaine with the intent to distribute and for possessing more than 500 grams of cocaine with the intent to distribute. A grand jury also charged Joel Guerra, a codefendant, with possessing a firearm during and in relation to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the offenses. Jesse Guerra pleaded guilty to the possession count. The Government dismissed the conspiracy count. The district court accepted the plea.

The events leading to the charges began when Darren Brady negotiated with a DEA agent for the sale of 25 kilograms of cocaine with an initial purchase of five kilograms. Brady introduced the agent to Larry Gomez. The parties agreed to close the deal at a Houston restaurant. The agent observed Gomez, Jesse Guerra, and an unidentified man arrive in a Nissan followed by a Oldsmobile. Before the agent could reach the parking lot, the vehicles left. Gomez informed the agent that the supplier had become suspicious and decided to change the location.

At the alternate site, a Hispanic male took a bag from the Nissan and placed it into the Oldsmobile, which then drove away. The agent met Gomez and Michael Altamirano in the parking lot. Jesse Guerra and Altamirano left in the Nissan and returned thirty minutes later. Altamirano exited the Nissan and entered the agent's vehicle while Gomez returned to the Nissan. Altamirano gave the agent one kilogram of cocaine. Gomez and Jesse Guerra left the parking lot in the Nissan. Authorities arrested Gomez and the Guerras. Joel Guerra's vehicle, the Oldsmobile, contained a pistol.

The PSR calculated Jesse Guerra's base offense level as 34 under U.S.S.G. § 2D1.1(c)(5) for the negotiated 25 kilograms of cocaine. It added two levels for possession of a dangerous weapon under § 2D1.1(b)(1) and two levels for a supervisory role under

§ 3B1.1(c). This made a total offense level of 38. The PSR calculated Jesse Guerra's criminal history category as VI for 16 criminal history points. The combined total offense level and criminal history category yielded a sentencing range of 360 months to life. Jesse Guerra did not object to these calculations.

At the sentencing of Brady, Gomez, and Joel Guerra, the court found that the drug quantity "should be 5 kilograms rather than the 25." The court also stated that "the weapon was connected with the drug crime, and . . . it was reasonably foreseeable by these Defendants that the gun [would] be used." At Jesse Guerra's sentencing, the court reiterated its belief that "it was a five kilo transaction and that the gun was reasonably foreseeable." The court sentenced Guerra to 360 months. Guerra did not object. The judgment listed Guerra's total offense level as 38. The court had failed to change the drug quantity from 25 to five kilograms.

II.

Guerra failed to object to the PSR or to the sentence, so we review his claims for plain error. See U.S. v. Pofahl, 990 F.2d 1456, 1479 (5th Cir.), cert. denied, 114 S. Ct. 266, cert. denied, 114 S. Ct. 560 (1993).

III.

Guerra first contends that the district court incorrectly assigned him nine criminal history points for three prior felony drug convictions. He maintains that these convictions fit the definition of "related cases" and should have been treated as one sentence under U.S.S.G. § 4A1.2(a)(2), resulting in six fewer

criminal history points. Guerra argues the offenses were related because they involved the same scheme and type of conduct and occurred within a six month period. He also states that the sentences were imposed on the same day and ordered to run concurrently.

The commentary to § 4A1.2 states that prior sentences are not related if they were for offenses separated by an intervening arrest. Guerra's crimes were separated by intervening arrests. This fact alone precludes treating the cases as related. In addition, U.S. v. Garcia, 962 F.2d 479 (5th Cir.), cert. denied, 113 S. Ct. 293 (1992), forecloses Guerra's arguments. In that case, which involved a similar factual scenario, we found the prior convictions not related for sentencing purposes. That case squarely determines the result in this one.

IV.

The PSR calculated Guerra's base offense level as 34 based on 25 kilograms of cocaine. The court found that only five kilograms of cocaine were involved, but failed to reduce the offense level accordingly. The court adopted the PSR's factual findings and sentencing calculation, notwithstanding the court's contrary finding regarding drug quantity. Had the court made the correction, Guerra's base offense level would have been 32 rather than 34, his total offense level would have been 36, and his sentencing range would have been 324 to 405 months.

The Government argues for affirmance because the 360 month sentence falls within both the correctly and incorrectly calculated

sentencing ranges. Although it might be impossible to determine whether such an error impacted the sentence, we have stated:

> [E]ven when the number of months of a prison sentence that is imposed as a result of an incorrect application of the Guidelines is also a number of months that properly could be imposed by a correct application of the Guidelines, i.e., when the same sentence is included in both the correct and incorrect sentencing ranges, the sentence must nevertheless be vacated and the case remanded for resentencing; unless, that is, we are persuaded--either by the party seeking to uphold the sentence through application of the harmless error analysis, or by or own independent review of the record--that the district court would have imposed the same sentence absent the erroneous factor.

U.S. v. Tello, 9 F.3d 1119, 1131 (5th Cir. 1993). This case, however, involved the harmless error analysis, not a plain error inquiry. The question remains whether the failure to start from the proper base offense level in this case constituted plain error.

In U.S. v. Hoster, 988 F.2d 1374, 1380-83 (5th Cir. 1993), the district court plainly erred in calculating the base offense level. That case involved a six level discrepancy between the computed and actual offense levels. This case involves a discrepancy of only two levels. We explicitly found that the six level discrepancy in Hoster constituted plain error in that case and suggested that a two level discrepancy would not have done so. Id. The sentence assigned in this case would have been appropriate even if the district court had started from the proper base offense level, so the sentence does not amount to a miscarriage of justice.

V.

Guerra next argues that the district court erroneously increased his offense level under U.S.S.G. § 2D1.1(b) for

possession of a weapon. Guerra maintains there is no evidence connecting him to the weapon, which was found in Joel Guerra's Oldsmobile. Guerra further argues that, following his arrest, Joel Guerra stated that he had the weapon to rip off the other participants in the drug deal.

The weapons adjustment applies unless it is clearly improbable that the weapon related to the offense. U.S.S.G. § 2D1.1, comment. The Government must prove possession by a preponderance of the evidence, U.S. v. Mergerson, 4 F.3d 337, 350 (5th Cir. 1993), cert. denied, 62 U.S.L.W. 3623 (U.S. Mar. 21, 1994) (No. 93-7246), and must show that the defendant reasonably could have foreseen possession. U.S. v. Hooten, 942 F.2d 878, 882 (5th Cir. 1991). The question of firearms possession is a factual one, U.S. v. Paulk, 917 F.2d 879, 882 (5th Cir. 1990), and if the district court could have resolved it upon proper objection, it cannot constitute plain error. U.S. v. Sparks, 2 F.3d 574, 589 (5th Cir. 1993), cert. denied, 114 S. Ct. 720, cert. denied, 114 S. Ct. 899 (1994). This standard means that we need not address Guerra's argument on this point.

In any event, it is not improbable that the weapon in the Oldsmobile was connected to the offense or that Jesse Guerra reasonably could have foreseen its presence. The manner in which the vehicles approached the restaurant indicates that the Oldsmobile was following the Nissan to protect the drug deal. After the deal was completed, Jesse Guerra met with Joel Guerra, who was still driving the Oldsmobile. The Guerras held supervisory

roles in the offense and directed other defendants. It is reasonable to infer that Jesse Guerra knew his codefendant had a gun.

Jesse Guerra's reliance on the statements Joel Guerra made immediately following his arrest concerning his reason for having the weapon is misplaced. The district court was not bound to accept those statements in view of the other evidence. In addition, although Joel Guerra told agents he had the gun to rob other participants in the deal, Joel Guerra's guilty plea for using and carrying a firearm during and in relation to the drug trafficking offenses suggests a wider role for the weapon.

VI.

Guerra contends that the disparity between his 360 month sentence and the most serious sentence for a codefendant, 120 months, violates the Fifth Amendment. A defendant cannot challenge his sentence by pointing to a lesser sentence received by a codefendant. U.S. v. Boyd, 885 F.2d 246, 249 (5th Cir. 1989).

AFFIRMED.