UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-2798
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MICHAEL RODRIGUEZ GONZALEZ, and JEFFRY CERON HERNANDEZ,

Defendants-Appellants.

Appeal from the United States District Court
For the Southern District of Texas

(No. CR-H-92-200)

(February 2, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

A jury convicted Defendant-Appellant Jeffry Ceron Hernandez ("Hernandez") for conspiracy to possess with intent to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846, and for aiding and abetting the possession with intent to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1),

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

841(b)(1)(A), and 18 U.S.C. § 2. Defendant-Appellant Michael Rodriguez Gonzalez ("Gonzalez") pleaded guilty to the same offenses. Hernandez and Gonzalez raise several issues on appeal. Finding no reversible error, we AFFIRM.

FACTS AND PROCEDURAL HISTORY

On August 4, 1992, Houston Police Officer Mark Prendergast ("Prendergast") received information from a confidential informant, from whom he had received reliable information in the past, on an upcoming narcotics transaction involving a large quantity of cocaine base, otherwise known as "crack cocaine." The informant provided a description of a Colombian male and a red sports car, and the location of a particular apartment complex and apartment. Based on this information, several officers drove to the apartment complex and began surveillance.

Prendergast observed a red Geo sports car that matched the informant's description. Approximately ten minutes later, the officers observed a male, matching the description provided by the informant, approach and enter the vehicle. Prendergast later identified this individual as Gonzalez. Gonzalez was followed by another male, later identified as Hernandez, who entered a Datsun Maxima. The two vehicles left the apartment complex together and the officers followed them to a residence at 511 Walston Street in Houston. The Maxima was backed into the driveway with the trunk near the garage door of the residence. Gonzalez and Hernandez entered the residence.

A short time later, Hernandez exited the residence, backed the Maxima into the garage, and closed the garage door. Gonzalez and Hernandez then exited the residence together; Hernandez placed a large white grocery bag inside the trunk of the Geo and both men left the residence in it. Gonzalez and Hernandez drove back to the apartment complex and took the bag inside.

About one hour later, Gonzalez left the apartment complex in the Geo. Hernandez and another individual walked through the apartment complex and entered another apartment. Hernandez was carrying the white bag. Gonzalez subsequently joined them. The three men later exited the apartment, and Gonzalez threw a light-colored plastic bag into the dumpster. The men then left the apartment complex in the Geo. The officers retrieved the plastic bag, which contained "three kilogram wrapping papers which had cocaine residue on them along with boxes of Arm & Hammer baking soda." Prendergast testified that baking soda is commonly used in making crack cocaine.

The officers then pulled over the Geo and asked the occupants to exit the vehicle. Gonzalez, the driver, consented to a search of the vehicle. After the officers found three kilograms of crack cocaine in a canvas bag inside the vehicle, the defendants were arrested.

The officers subsequently returned to the residence at 511 Walston Street. The officers obtained written consent to search from Francis Montgomery, a resident of the house. The officers found that the Maxima in the garage had a false gas tank.

Prendergast testified that drug traffickers often use false compartments to transport narcotics.

A jury convicted Hernandez of conspiracy to possess with intent to distribute in excess of 50 grams of cocaine base, and of aiding and abetting possession with intent to distribute in excess of 50 grams of cocaine base. He was sentenced to two 365-month imprisonment terms to be served concurrently. Following the granting of his motion for a mistrial, Gonzalez pleaded guilty to the same counts. He was sentenced to two 360-month imprisonment terms to be served concurrently.

Prior to trial, Hernandez filed a "motion to suppress any and all evidence seized as a result of the unlawful stop, detention and custodial arrest of defendant and the unlawful warrantless search of the residence located at 511 Walston Street." Following a hearing, the district court denied the motion to suppress. The district court also denied Hernandez's motion to disclose the identity of the informant. The court ordered the preparation and submission *in camera* of the informant's affidavit to determine "whether there is a conflict in the description that Officer Prendergast gave of what he told the informant and what the informant says Officer Prendergast told him." After receiving the affidavit, the court reserved ruling on the motion, noting that Hernandez was not seeking disclosure at that point. The court later determined, on the basis of its *in camera* review of the affidavit, that there was no compelling need for the defense to cross-examine the informant. The court also stated that it had

seen nothing to alter its previous ruling denying the motion to disclose the informant.

At the sentencing hearing, the district court found, contrary to the recommendation in the Presentence Report, that Gonzalez was entitled to a two-level reduction for acceptance of responsibility because he had pleaded guilty. Hernandez and Gonzalez also filed a joint motion for downward departure based on the distinction between cocaine powder and cocaine base contained in the United States Sentencing Guidelines ("Guidelines") and its discriminatory effect on black defendants. The district court denied the defendants' motion for downward departure.

We will address first the issues presented by Hernandez; then the separate issue presented by Gonzalez; and finally an issue presented by both appellants.

I. Whether The Officers Had Probable Cause To Arrest Hernandez?

Hernandez contends that the district court erred in denying his motion to suppress. According to Hernandez, because the officers lacked probable cause to arrest him, any evidence derived from the illegal arrest must be suppressed.

In reviewing a denial of a motion to suppress, the district court's findings of fact are accepted unless clearly erroneous, but its ultimate conclusion on the constitutionality of the law enforcement action is reviewed *de novo*. U.S. v. Chavez-Villarreal, 3 F.3d 124, 126 (5th Cir. 1993). We must review the evidence in the light most favorable to the Government as the prevailing party

and should uphold the district court's ruling denying suppression if any reasonable view of the evidence supports it. U.S. v. Tellez, 11 F.3d 530, 532 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1630 (1994).

A warrantless arrest may be made if the arresting officers have "probable cause to believe that an offense has occurred." U.S. v. Chappell, 6 F.3d 1095, 1100 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1232 and 114 S. Ct. 1235 (1994). "Probable cause exists when facts and circumstances within the knowledge of the arresting officer would be sufficient to cause an officer of reasonable caution to believe that an offense has been or is being committed." U.S. v. Carrillo-Morales, 27 F.3d 1054, 1062 (5th Cir. 1994).

Before stopping the vehicle and arresting Hernandez, the officers had conducted surveillance of Hernandez for several hours, acting on a tip from a known and reliable informant whose information proved correct upon corroboration. The informant identified Hernandez by name, and advised that Hernandez was involved in a narcotics transaction involving a large quantity of cocaine base. The officers observed Hernandez acting in concert with Gonzalez. Hernandez placed a plastic bag into the trunk of the Geo and later carried the bag into the apartment. Gonzalez was later observed discarding a plastic bag, consistent with the plastic bag previously observed, while Hernandez waited on him. Upon retrieving the plastic bag, officers found baking soda, which is often used in making cocaine base, and residue believed to be cocaine inside the bag. Based upon the totality of the facts and

circumstances, we hold that the record supports the district court's conclusion that the officers had probable cause to arrest Hernandez. See Carrillo-Morales, 27 F.3d at 1062. The existence of probable cause justified the warrantless search of the vehicle. See U.S. v. Sutton, 850 F.2d 1083, 1085 (5th Cir. 1988).

II. Whether Consent Was Voluntarily Given For The Search Of The Residence?

Hernandez argues that the search of the residence at 511 Walston Street was illegal because the consent to search was not voluntarily given. He contends that the evidence acquired from the search must thereby be suppressed. The Government asserts, and the district court found, however, that Hernandez has no standing to contest the search of the residence.

Even assuming that Hernandez has standing, there is no Fourth Amendment violation because Montgomery voluntarily consented to a search of the premises. A search conducted pursuant to consent is a specifically established exception to the requirements of both a warrant and probable cause. See U.S. v. Wilson, 36 F.3d 1298, 1304 (5th Cir. 1994). Police may rely on the voluntary consent of a person holding common authority over the place to be searched. Id. The Government must prove by a preponderance of the evidence that the consent was voluntary and that the search was conducted within the scope of the consent received. Id. The standard of review is whether the district court's determination, that Montgomery's consent justified the warrantless search, is clearly erroneous. See id.

Prendergast testified that Montgomery, a resident of 511 Walston Street, voluntarily gave written consent to search the house. He testified that Montgomery was not coerced in any way. He explained that three officers approached the door of the residence, that their guns were not drawn, that they identified themselves as police officers and explained that they were conducting a narcotics investigation, and that Montgomery gave them written consent to search the house. The officers did not threaten to get a search warrant or to place Montgomery under arrest. Hernandez, however, argues that at least five officers went to the residence and barged in uninvited when Montgomery opened the door. According to Hernandez, the officers informed Montgomery that they were conducting a narcotics investigation, threatened Montgomery with arrest, and told Montgomery that, if he did not give consent, they would obtain a search warrant. But because we must defer to the trial court on factual findings and because the trial court chose to adopt Prendergast's account of the events, we find no clear error in the district court's determination that Montgomery's consent was voluntary.

Hernandez next argues that the officers exceeded the scope of the consent, which was only for a search of the house, when they entered the garage and searched Hernandez's vehicle. But because Hernandez has not directly challenged the district court's finding that Montgomery's consent "would reasonably have been understood by the officer as extending to consent to search the garage," we hold

that the officers did not exceed the scope of the consent when they entered the garage.

Regarding the search of the vehicle, Prendergast testified that Montgomery did not consent to a search of the vehicle in the garage and thus the officers did not search the interior of the vehicle, but only the outside, which was in plain view. Another exception, a plain view seizure requires (1) that the officers' initial intrusion be supported by a recognized exception to the warrant requirement, and (2) that the incriminating character of the object seized be immediately apparent. Id. at 1306. Here, the officers' entrance into the garage was covered by the consent. Further, the incriminating character of the object, the false gas tank, was immediately apparent, as Prendergast testified that "[a]s soon as we entered into the garage, we could smell fumes -- gas fumes and we observed that the tank was on the ground hanging from the bottom of the Datsun Maxima and we observed that the gas tank had a false tank in it." Accordingly, we find that the officers did not violate any Fourth Amendment protections.

III. Whether The District Court Abused Its Discretion By Refusing To Disclose The Identity Of The Confidential Informant To Hernandez?

Hernandez next contends that the district court erred by refusing to disclose the identity of the confidential informant and by failing to conduct an *in camera* hearing to determine whether the informant's testimony would be helpful to the defense. He claims that the informant's identity became relevant because the officers

communicated with the informant again after conducting surveillance but prior to Hernandez's arrest, related their observations to the informant, and received additional information from him. Hernandez contends that the informant thus became a witness to the officers' credibility and could have impeached the officers with a prior inconsistent statement.

In determining whether disclosure of a confidential informant is mandated, this Court has developed a three-part balancing test, under which the Court considers 1) the level of the informant's participation in the alleged criminal activity; 2) the helpfulness of disclosure to any asserted defense; and 3) the Government's interest in nondisclosure. U.S. v. Orozco, 982 F.2d 152, 154-55 (5th Cir.), *cert. denied*, 113 S. Ct. 2430 (1993). A district court's denial of a motion to disclose the identity of an informant is reviewed for an abuse of discretion. Id. at 155. "The [district] court may conduct an *in camera* hearing when necessary to balance the conflicting interests involved." Id.

The district court did not abuse its discretion by refusing to compel disclosure of the informant's identity. The informant's participation in the criminal activity was minimal. The informant was neither present during the transaction nor did he observe it. See id. Further, Hernandez did not make a sufficient showing that the informant's testimony would significantly aid his defense. See id. "[M]ere conjecture or supposition about the possible relevancy of the informant's testimony is insufficient to warrant disclosure." Id. (citation omitted). Hernandez "speculates that

the informer's testimony might contradict that of the officer, but provides no evidence to support this claim." Id. Finally, the Government's interest in nondisclosure "relates to both the safety of the informant and the informant's future usefulness to the authorities." Id. at 156.

All three factors weigh in favor of nondisclosure. Therefore, the district court did not abuse its discretion by withholding the identity of the informant. See id. at 156. Although Hernandez also argues that the district court should have held an *in camera* hearing to determine the need for disclosure, this Court "does not require the district court to hold an *in camera* [hearing] whenever the defendant requests disclosure of the informant's identity." U.S. v. Cooper, 949 F.2d 737, 750 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 2945 (1992). In any event, as the Government notes, Hernandez did not request an *in camera* hearing before the district court, but requested only an *in camera* inspection of the informant's affidavit, which the court conducted. Thus, the court's failure to conduct an *in camera* hearing was not error. See id.

IV. Whether The District Court Erred By Basing Hernandez's Offense Level Upon Crack Cocaine Rather Than Powder Cocaine For Sentencing Purposes?

Hernandez next argues that the district court erred in basing his offense level on crack cocaine rather than cocaine powder for sentencing purposes. He contends that he never agreed to jointly undertake the criminal activity of transforming cocaine powder into

cocaine base. Hernandez points to Application Note 2 under U.S.S.G. § 1B1.3, which states:

> In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both: (i) in furtherance of the jointly undertaken criminal activity; and (ii) reasonably foreseeable in connection with that criminal activity.

We reject Hernandez's argument because Section 1B1.2(a) of the Guidelines states that the offense of conviction is to be used to determine the guideline for sentencing. Hernandez was convicted of conspiracy to possess with intent to distribute in excess of 50 grams of cocaine base and for aiding and abetting the possession with intent to distribute in excess of 50 grams of cocaine base. The district court thus did not err by basing Hernandez's offense level upon crack cocaine rather than powder cocaine.

Contrary to Hernandez's argument, no discussion of relevant conduct and § 1B1.3 is necessary in this case. Although Hernandez cites U.S. v. Evbuomwan, 992 F.2d 70 (5th Cir. 1993), and U.S. v. Rivera, 898 F.2d 442 (5th Cir. 1990), as cases supporting his argument that Hernandez must be part of the jointly undertaken activity in order to be assigned a base offense level incorporating such activity, both these cases involve situations in which the defendant has been assessed additional base offense levels for activities outside of the activities for which he was convicted. Evbuomwan, 982 F.2d at 72 (defendant convicted of credit card fraud causing a loss of $1,500, but district court computed base offense level on $90,471, which was the loss attributable to others); Rivera, 898 F.2d at 444-45 (defendant convicted of distributing .28

grams of heroin, but district court computed base offense level on 224.47 grams of heroin, which was the quantity attributable to co-defendants). Accordingly, we affirm the district court's computations in Hernandez's sentencing.

V. Whether The District Court Erred By Refusing To Grant Gonzalez An Additional One-level Reduction For Acceptance Of Responsibility Pursuant To U.S.S.G. § 3E1.1(b)?

Gonzalez argues that the district court erred by refusing to grant him an additional one-level reduction for acceptance of responsibility pursuant to § 3E1.1(b) of the Guidelines. This Court reviews a district court's determination of whether a defendant has accepted responsibility "under a standard of review `even more deferential than a pure clearly erroneous standard.'" U.S. v. Tello, 9 F.3d 1119, 1122 (5th Cir. 1993) (citations omitted).

Section 3E1.1(b) established a tripartite test to determine entitlement to the additional one-level decrease for acceptance of responsibility. U.S. v. Mills, 9 F.3d 1132, 1136 (5th Cir. 1993). The sentencing court is directed to grant the additional one-level decrease in the defendant's offense level if 1) the defendant qualifies for the basic two-level decrease for acceptance of responsibility under § 3E1.1(a); 2) the defendant's offense level is 16 or higher before the two-level reduction under § 3E1.1(a); and 3) the defendant timely "assisted authorities" by either a) providing complete information to the Government concerning his own

involvement in the offense; or b) notifying authorities of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the court to allocate its resources efficiently. Tello, 9 F.3d at 1124-25. If the defendant satisfies all three prongs of the test, the district court is "without any sentencing discretion" to deny the additional one-level decrease. Mills, 9 F.3d at 1138-39.

Because Gonzalez was found by the district court to be entitled to the basic two-level decrease under § 3E1.1(a) and because his offense level prior to such decrease was 38, the first two prongs of the test were satisfied. Regarding the third prong, the record suggests that Gonzalez did not provide complete information to the Government concerning his own involvement in the offense. Although he submitted a written statement to the probation officer, the probation officer noted that Gonzalez's version of the offense was inconsistent with the facts and that the "facts seem to indicate that [Gonzalez's] knowledge of the transaction was greater than what he admits." Further, the district court found that "there is some question as to whether [Gonzalez] has fully shared all the knowledge he has."

Neither did Gonzalez timely notify authorities of his intention to enter a plea of guilty. At his arraignment on September 10, 1992, Gonzalez entered a plea of not guilty. His jury trial began on April 19, 1993. On the fourth day of his jury trial, the district court granted Gonzalez's motion for a mistrial. Not until his rearraignment on June 24, 1993 did Gonzalez enter a

plea of guilty and decide to cooperate. To qualify for a reduction under § 3E1.1(b)(2), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the Government may avoid preparing for trial. § 3E1.1, comment. (n.6). Although Gonzalez argues that he entered his guilty plea before a new trial date was scheduled and before any resources were expended on the new trial, he entered the plea only after the Government had prepared and undertaken the first trial. Gonzalez argues that, because Gonzalez was tried with Hernandez, Gonzalez's decision to go to trial did not create an additional burden on the Government and the courts because they would have had to try Hernandez in any event. Further, Gonzalez contends that the Government's interpretation of the provision would render the provision meaningless anytime a trial ends in mistrial. Such an interpretation would not encourage guilty pleas and the subsequent conservation of judicial resources.

Gonzalez, however, does not cite any cases in support of his arguments. Further, the key resources that the provision was aimed at preserving, the energy the Government uses to prepare for trial, have already been used once the first trial begins. Because the third prong of the test was thus not satisfied, the district court did not err in denying Gonzalez the additional one-level decrease for acceptance of responsibility.

VI. Whether The District Court Erred In Denying The Defendants' Motion For Downward Departure Based Upon The Disparate Sentencing Provisions For Cocaine Base And Cocaine Powder Contained In The Sentencing Guidelines?

Gonzalez and Hernandez each argue that the district court erred by denying their joint motion for downward departure based on the disparate sentencing provisions for cocaine base and cocaine powder contained in the Guidelines and the resulting discriminatory effect on black defendants. We will not review a district court's refusal to depart from the Guidelines unless the refusal was in violation of the law. U.S. v. Buenrostro, 868 F.2d 135, 136 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990).

We have held that the disparate sentencing provisions for cocaine base and cocaine powder contained in the Guidelines do not offend constitutional due process or equal protection guarantees. U.S. v. Watson, 953 F.2d 895, 897-98 (5th Cir.), *cert. denied*, 112 S. Ct. 1989 (1992). In so holding, we have held that disparate sentencing provisions "will survive an equal protection analysis if [they] bear[] a rational relationship to a legitimate end." U.S. v. Galloway, 951 F.2d 64, 66 (5th Cir. 1992).

Gonzalez and Hernandez emphasize that they are not attacking the constitutionality of the sentencing provisions. Rather, they cite 18 U.S.C. § 3553(b), which allows a district court to depart from the Guidelines range if it finds "an aggravating or mitigating circumstance of a kind . . . not adequately taken into consideration by the Sentencing Commission in formulating the

guideline that should result in a sentence different from that described," and argue that the disparate impact on minorities is such an aggravating or mitigating circumstance. Gonzalez and Hernandez also point to U.S.S.G. § 5H1.10, p.s., which prohibits race from being taken into account at sentencing, and argues that the disparate impact of the provisions have indirectly circumvented the goals of this section.

Gonzalez and Hernandez continue by stating that the district court did not believe that it had the authority to depart downward in this instance, and argue that we are not required to "give deference to the sentencing court's exercise of discretion . . . if the court mistakenly believed that departure was not permitted." U.S. v. Soliman, 954 F.2d 1012, 1014 (5th Cir. 1992). Although it is true that the district court did not believe that it had the authority to make such a departure, it held that, even if it had discretion, it would not depart downward. Thus, we must review the district court's decision only for a violation of law.

Gonzalez and Hernandez point to the testimony at sentencing of Dr. George R. Schwartz ("Schwartz), M.D., who has undertaken research into the effects of cocaine powder and cocaine base on the human body. According to Schwartz, cocaine powder and cocaine base are essentially the same thing, except that cocaine powder is more dangerous than cocaine base because of its adverse effects on the cardiovascular system and its greater tendency, by means of its ingestion, to spread the virus causing Acquired Immune Deficiency Syndrome. Despite this, cocaine base is punished 100 times more

severely. Schwartz, who is familiar with the congressional hearings that led to the Guidelines, also testified that little medical and scientific data had been gathered at the time of the hearings and that Congress had been misled on the addictive qualities of cocaine base.

The district court, however, found Schwartz's testimony to be unpersuasive, and we cannot find this to be an abuse of discretion especially in light of our holdings that a rational basis does exist behind the higher sentences for cocaine base. "[T]he fact that crack cocaine is more addictive, more dangerous, and can therefore be sold in smaller quantities is reason enough for providing harsher penalties for its possession." Watson, 953 F.2d at 898. The district court's refusal to grant a downward departure was thus not in violation of the law.

CONCLUSION

For the foregoing reasons, the Appellants' convictions are AFFIRMED.