

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 93-2869  
Summary Calendar

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UNITED STATES OF AMERICA

Plaintiff-Appellee,

VERSUS

JAIME JOSE CARDENAS,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
(CR H 92 106-1 c/w 92-137-25)

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(April 18, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:<sup>1</sup>

Cardenas appeals his sentence following his conviction on drug trafficking charges. We affirm.

I.

Jaime Jose Cardenas was convicted following a jury trial of conspiracy to possess with intent to distribute in excess of five kilograms of cocaine and possession with intent to distribute in excess of five kilograms of cocaine. Cardenas also pleaded guilty under a separate indictment to conspiracy to participate in a

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<sup>1</sup> 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

racketeering enterprise. Under the plea agreement, the Government agreed to recommend that any sentence Cardenas received in the RICO action would run concurrently with his sentence in the drug case. The cases were consolidated for sentencing.

The Drug Enforcement Agency (the "DEA") learned through a cooperating individual ("CI"), who had infiltrated a Colombian drug-trafficking organization (the "organization"), that the organization desired to move a quantity of cocaine into the United States. A Government agent agreed to transport 800 kilograms of cocaine in two loads. It was agreed that the agent would initially transport a 300-kilogram load of cocaine. The organization arranged an air lift from Columbia to Costa Rica and dropped 300 kilograms of cocaine into the sea. Unbeknownst to the organization, the CI and other narcotic traffickers were able to recover only 275 kilograms.

DEA agents transported the 275 kilograms of cocaine to Corpus Christi, Texas. After the shipment arrived in the United States, Rodrigo, a Costa Rican member of the organization, provided the CI with a phone number and a code name of the individual who was to receive the drugs. The code name was "De Ciego para Juancho," who was subsequently identified as Cardenas. DEA agents transported 50 kilograms of the cocaine to Houston in a motor home. An agent paged Cardenas after their arrival and received a return call from an individual identifying himself as Cardenas. Cardenas provided the agent with a cellular phone number and instructed the agent to use public telephones only.

Cardenas advised the agent that he did not like his proposed delivery site and directed him to proceed to a Chinese restaurant. However, Cardenas did not appear at the restaurant and subsequently called to postpone the delivery, explaining that a monitoring device indicated that the area was under surveillance by federal agents. During a subsequent telephone call, the agent inquired about his payment for transporting the cocaine. Cardenas replied that he had to make a call to check on the payment. Sometime later, Cardenas requested a meeting to discuss the delivery. During the meeting, which was in a motel room obtained by Cardenas, Cardenas produced \$80,000 as a good faith payment toward the agent's transportation fee. The men agreed that 50 kilograms of cocaine would initially be delivered to Cardenas. Cardenas instructed the agent to deliver the remaining 250 kilograms the day after completing the initial 50-kilogram delivery.

Agents transported the 50 kilograms of cocaine packed in ice coolers to Houston in a van and checked into a motel, per Cardenas' instructions. When he arrived to obtain the drugs, Cardenas agreed to return to the motel in two hours with the additional payment of \$120,000. While in the motel room, Cardenas made two calls on his cellular phone during which he asked how his location looked and indicated in code language that he was obtaining the cocaine. Cardenas also inquired about who would deliver the second load of 250 kilograms of cocaine. Cardenas obtained the keys to the van containing the cocaine and left the motel.

A surveillance team followed Cardenas to an apartment complex, where they observed him entering an apartment. Shortly thereafter, agents saw a black male, identified as co-defendant Felix Hurtado, exit the apartment, unload the coolers from the van and carry them into the apartment. Agents arrested Hurtado when he later exited the apartment. An agent then entered the apartment and heard voices in the bedroom. As he approached the room, he observed three individuals, including Cardenas, counting kilos of cocaine. When the individuals realized that the agent was present, they ran toward the bedroom closet. The agents ordered them to come out and they surrendered. During a sweep of the apartment, agents discovered a red duffel bag containing a machine-type pistol and ammunition in the closet.

The Presentencing Report (PSR) recommended that Cardenas be held accountable for at least 358<sup>2</sup> kilograms of cocaine based on the amount that he received and the additional amount that he had agreed to receive the following day. The PSR also recommended a two-level increase of the base offense level for possession of a dangerous weapon during the crime and a three-level increase for Cardenas' role in the offense. Cardenas filed a general objection to the manner in which the base offense level was calculated. During the sentencing hearing, Cardenas specifically objected to the enhancements for the use of a weapon and his leadership role in

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<sup>2</sup> The PSR included an additional 58 kilograms of cocaine that Cardenas received or distributed during other phases of the conspiracy. However, the district court did not consider the additional 58 kilograms at sentencing.

the offense and argued that he should be held accountable for only 50 kilograms of cocaine.

The district court overruled Cardenas' objections concerning the use of a weapon and his leadership role in the offense. The court also determined that Cardenas was involved in negotiations for delivery of at least 150 kilograms, and probably 275 kilograms, of cocaine.<sup>3</sup> The district court sentenced Cardenas to 364 months imprisonment on each count in both cases, the sentences to run concurrently. This appeal followed.

## II.

Cardenas argues that the district court erred in attributing 275 kilograms of cocaine to him in calculating his offense level. The determination of the amount of drugs for which a defendant will be held accountable is a factual finding, which we review for clear error. **United States v. Fierro**, 38 F.3d 761, 774 (5th Cir. 1994), **cert. denied**, 63 U.S.L.W. 3690 (Mar. 20, 1995). Under the Sentencing Guidelines (the "Guidelines"), in the case of jointly undertaken criminal activity, a sentencing court is not limited to a consideration of the quantity of drugs actually seized or charged, but may consider any amounts that were part of a common plan of distribution, if those larger amounts were reasonably foreseeable and were part of the illegal activity the defendant joined. **Fierro**, 38 F.3d at 773; U.S.S.G. §§ 1B1.3 (a)(1)(B).

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<sup>3</sup> Section 2D1.1(c)(3) of the Guidelines sets a base offense level of 38 for an offense involving between 150 and 500 kilograms of cocaine.

A.

Cardenas argues first that the 275-kilogram transaction was the product of sentence manipulation. He contends that the government controlled the amounts that were subject to negotiation and induced Cardenas' involvement in specific transactions. Cardenas further contends that when he attempted to avoid the transaction, the government would contact high-ranking traffickers to pressure Cardenas into dealing.

The evidence reflects that Cardenas actually took delivery of 50 kilograms of cocaine and that he had agreed to receive an additional 250 kilograms of cocaine immediately thereafter. Cardenas did not express any hesitation as to the amount of drugs to be delivered. His only hesitation concerned the delivery location because he feared surveillance. The evidence also showed that Cardenas was in contact with members of the Columbian organization that had delivered the 300 kilograms of cocaine to the government agents, and thus was aware of the amount of drugs that had been transported into the United States. There was no evidence that Cardenas was not a willing participant in the transaction or that the Government offered to deliver additional unexpected kilograms of cocaine. Thus, the district court's finding that Cardenas was accountable for 275 kilograms of cocaine was not clearly erroneous. **See United States v. Richardson**, 925 F.2d 112, 117 (5th Cir. (1991)).

B.

Cardenas argues next that his involvement should be limited to the single transaction in which he personally negotiated to obtain only 50 kilograms of cocaine. The Guidelines provide that

[i]n an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

U.S.S.G. § 2D1.1, comment. (n.12).

Although Cardenas was arrested after the 50-kilogram delivery, the evidence reflects that he clearly anticipated delivery of an additional 250 kilograms of cocaine the next day. Cardenas was also in contact with the Columbian organization, and it was his responsibility to receive the full load of drugs which had been transported into the United States. Thus, the district court's finding that Cardenas should be held accountable for the 250 kilograms of cocaine that he had negotiated to receive is not clearly erroneous.

C.

Cardenas also makes several arguments for the first time on appeal that his accountability should be limited to 50 kilograms of cocaine. An appellant who raises an issue for the first time on appeal must show that there is actually an error, that it is plain, and that it affects substantial rights. **United States v. Olano**,

113 S. Ct. 1770, 1777-78 (1993); Fed. R. Crim. P. 52(b). Plain error is one that is "clear or obvious, and, at a minimum, contemplates an error which was clear under current law at the time of trial." **United States v. Calverley**, 37 F.3d 160, 162-63 (5th Cir. 1994) (en banc) (internal quotation and citation omitted), **cert. denied**, 115 S.Ct. 1266 (1995).

Cardenas first argues that his accountability is limited to the 50 kilograms of cocaine actually found in his possession because he was indicted and sentenced for conspiracy to possess and possession of only 50 kilograms of cocaine. However "a sentencing court must consider for sentencing purposes a defendant's involvement with quantities of narcotics not charged in the indictment when such conduct was part of the same course of conduct or common scheme or plan as the offense of conviction." **United States v. Register**, 931 F.2d 308, 313 (5th Cir. 1991) (quoting U.S.S.G. §§ 1B1.3(a)(2)). Thus, the district court's consideration of amounts of cocaine that were not specifically included in the indictment or the plea agreement was not error, plain or otherwise.

Cardenas argues next that the amount negotiated with government agents should not be attributable to him because an agreement between a government agent and a defendant cannot constitute a conspiracy. Cardenas relies on **United States v. Mergerson**, 4 F.3d 337 (5th Cir. 1993), **cert. denied**, 114 S.Ct. 1310 (1994) to support this argument. However, this aspect of **Mergerson** is inapplicable to the present case. **Mergerson** held that for the



imposition of a mandatory life sentence pursuant to 21 U.S.C. §§ 841(b)(1)(A)(i), for possession with intent to distribute over a kilogram of heroin, the statute requires the government to show that the defendant actually possessed or conspired to possess over one kilogram of heroin during the conspiracy. **Id.** at 345. The court noted that "mere proof of amounts negotiated with the undercover agents . . . would not count toward the quantity of heroin applicable to the conspiracy count." **Id.** at 346. However, the **Mergerson** court expressly distinguished quantity determinations for purposes of the Guidelines, for which further amounts negotiated with agents can be considered. **Id.** at 345. Thus, the district court did not err in considering the additional quantity of cocaine.

Cardenas argues next that his accountability should be limited to 50 kilograms because the specifics of the delivery of the additional 250 kilograms were not discussed. He contends that his inability "to produce" those 250 kilograms demonstrates that such transaction was not foreseeable to him. Cardenas argues in this regard that any additional delivery was contingent upon the approval of other organization members and that he had expressed reluctance to complete the delivery. He also argues that the 50-kilogram delivery was induced because the agents made the delivery although Cardenas had only produced only \$80,000 of the \$120,000 due for the delivery. Further he argues that his relevant conduct cannot include drug quantities distributed before he entered the conspiracy.

In making these arguments, Cardenas seeks to have this court make factual findings concerning his relevant conduct which should have been addressed by the district court. "[Q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." **United States v. Guerrero**, 5 F.3d 868, 871 (5th Cir. 1993), **cert. denied**, 114 S. Ct. 1111 (1994). Accordingly, these arguments are not subject to appellate review.

### III.

Cardenas also argues that the district court erred by increasing his offense level by two levels for possession of a firearm in connection with the offense. Cardenas contends that all negotiations had been accomplished without the use of weapons; that he did not reside in the apartment where the gun was found; and that he did not go into the area of the house where the gun was concealed until the police raided the apartment.

The Guidelines provide for a two-level increase in the base offense level "[i]f a dangerous weapon (including a firearm) was possessed" during commission of the offense. U.S.S.G. §§ 2D1.1(b)(1). This increase applies "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." **Id.**, comment. (n.3). It is generally sufficient to show "that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant." **Hooten**, 942 F.2d at 882.

Moreover, in the case of jointly undertaken criminal activity, the sentencing court may increase a defendant's offense level to reflect "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. §§ 1B1.3(a)(1)(B). Because "this Court has repeatedly observed [that] firearms are `tools of the trade' of those engaged in illegal drug activities," sentencing courts "ordinarily may infer that a defendant should have foreseen a co-defendant's possession of a dangerous weapon, such as a firearm," if the Government shows that another participant knowingly possessed it during the joint commission of the offense. **United States v. Aguilera-Zapata**, 901 F.2d 1209, 1215 (5th Cir. 1990) (internal quotation and citation omitted).

The evidence supports the district court's determination that the apartment in which the weapon was found was "strictly a drop house" for the organization. Even if one of Cardenas' co-defendants owned the weapon, its presence in the apartment was foreseeable to Cardenas. Further, Cardenas and the other defendants ran directly to the closet containing the gun when they became aware of the agent's presence, indicating their knowledge of its presence. Because the evidence reflected that a "temporal and spatial" relationship existed between the weapon, Cardenas, and the drug-trafficking activity, the district court's enhancement of the offense level based on possession of a weapon was not clearly erroneous.

#### IV.

Cardenas argues last that the district court erred in enhancing his offense level for his role as a leader, organizer or supervisor. Cardenas argues that the "essence" of the crime occurred in Costa Rica and involved traffickers not including Cardenas. Cardenas contends that he had no decision-making authority and little control over the others involved and that he was a mere intermediary to deliver the cocaine to Hurtado.

The Guidelines require a two-level increase in a defendant's offense level if the defendant was an organizer, leader, manager or supervisor in the criminal activity. U.S.S.G. § 3B1.1(c). We review a district court's finding that a defendant was a leader or supervisor for clear error. **United States v. Alvarado**, 898 F.2d 987, 993 (5th Cir. 1990). Factors for the district court to consider in making the determination include the exercise of decision-making authority, the nature of the participation in the offense, and the degree of control and authority over others. **Id.**

The evidence reflects that Cardenas was responsible for taking possession of the cocaine upon its arrival in the United States. Cardenas determined the time and place in which the delivery would occur and postponed the delivery because he was not personally satisfied that it could be accomplished without detection. Cardenas based this decision on information provided to him by assistants monitoring the police channels. Cardenas also determined when the future delivery of 250 kilograms was to occur.

Thus, the district court's finding that Cardenas played a supervisory role in the offense was not clearly erroneous.

V.

For the foregoing reasons, we affirm the sentence imposed by the district court.

AFFIRMED.