UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2875

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FELIPE GARCIA-CHAVEZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR-H-93-150)

(February 10, 1995)

Before POLITZ, Chief Judge, GARWOOD and BENAVIDES, Circuit Judge.

POLITZ, Chief Judge:[*]

Felipe Garcia-Chavez pled guilty, pursuant to a plea agreement, to one count of conspiracy to possess with intent to distribute 1000 kilograms or more of marihuana in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846, and conceded to the forfeiture of various properties. He appeals the validity of his

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

plea and the sentence imposed. Finding no error, we affirm.

Background

In January 1993 a multi-agency law enforcement task force began an investigation of Garcia-Chavez who was known as a marihuana trafficker with the ability to smuggle in from Mexico as much as 30 tons of marihuana per year. In negotiations with undercover agents, Garcia-Chavez agreed to supply two tons of marihuana and he detailed the price and delivery procedures. He assured the agents that he could supply 3000 pounds every 15 days and could deliver up to 4000 pounds at a time. He described how one of his modes of smuggling involved the use of 10 carriers crossing the border with bales of marihuana, obliterating their footprints as they traveled.

On April 3, 1993 Garcia-Chavez informed agents that the first load of the initial 4000 pounds was ready for delivery at a designated Houston hotel. Agents picked up 26 bundles totaling over 540 pounds of marihuana. The arrangements for the second load were agreed to but before its delivery Garcia-Chavez was arrested and indicted for conspiracy to possess with intent to distribute 1000 kilograms or more of marihuana, the substantive possession with intent charge, and conspiracy to import marihuana.

A plea agreement was reached and at a rearraignment hearing Garcia-Chavez pleaded guilty to the conspiracy to possess with intent to distribute count and conceded the forfeiture of particular properties with the proviso that he could retain certain real property by paying $65,000 in lieu thereof by the date of

sentencing. As part of the agreement, the government committed to dismiss the other counts of the indictment and to recommend a three-point offense level reduction for acceptance of responsibility.

Using the 4000 pounds which were subject to the negotiation rather than the 540 pounds seized, the probation officer calculated a base offense level of 32. To this was added a four-level increase for defendant's role as an organizer or leader under U.S.S.G. § 3B1.1(a). The district court accepted these recommendations and also granted a three-level reduction for acceptance of responsibility. The resulting offense level of 33 with a criminal history category of I yielded a guideline range of 135-168 months. The court sentenced Garcia-Chavez to 168 months imprisonment, a fine of $200,000, and costs of incarceration. A timely appeal followed.

Analysis

Garcia-Chavez first challenges the use of 4000 pounds of marihuana in the sentencing calculation rather than the 540 or so pounds actually delivered. Garcia-Chavez received the PSI in early October and filed written objections thereto on October 25, 1993. No objection was made to the quantity of contraband and we therefore may review only for plain error affecting substantial rights.[1]

We find no error in the use of 4000 pounds in the sentencing

[1] **United States v. Calverley**, 37 F.3d 160 (5th Cir. 1994), (cert. application filed Jan. 18, 1995) (No. 94-7792).

calculus. In a conspiracy offense calculation it is appropriate to use the amount under negotiation, provided the defendant intended the production and could be seen as reasonably capable of producing.[2] The factual basis for these conclusions may be drawn from the PSI.[3] Both Garcia-Chavez's intent and capacity are adequately established by the unchallenged facts in the PSI,[4] and those challenged but accepted by the district court.

Garcia-Chavez next contends that the district court erroneously granted a four-level increase under U.S.S.G. § 3B1.1(a) for his role in the offense.[5] This involves a finding of fact that we review for clear error.[6] The contention that there was no determination that he possessed control over others is belied by the court's finding that he "supervised 15 different people in the ongoing marihuana conspiracy covered in this case." We find no

---

[2]U.S.S.G. § 2D1.1 n.12; **United States v. Mergerson**, 4 F.3d 337 (5th Cir. 1993), cert. denied, 114 S.Ct. 1310 (1994) (upholding sentence based on negotiated amount of narcotics where fact-finder could reasonably determine that defendant had intent and ability to produce negotiated amount).

[3]**United States v. Elwood**, 999 F.2d 814 (5th Cir. 1993); **United States v. Alfaro**, 919 F.2d 962 (5th Cir. 1990).

[4]**United States v. Rodriguez**, 897 F.2d 1324 (5th Cir.), cert. denied, 498 U.S. 857 (1990); see also **United States v. Mora**, 994 F.2d 1129 (5th Cir.), cert. denied, 114 S.Ct. 417 (1993) (finding that district court not required to anticipate dispute over defendant's intent or ability to produce negotiated amount of controlled substance).

[5]U.S.S.G. § 3B1.1(a) directs a four-level increase in the offense level where "defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive."

[6]**Rodriguez**.

clear error. Garcia-Chavez headed an extensive narcotics organization and exercised a large measure of decision-making authority, demonstrating familiarity with methods and details of an extensive operation. He operated with the assistance of many -- including drivers, bodyguards, corrupt Mexican law enforcement officials, and other associates who supplied him with narcotics.[7] Further, the district court also properly considered his claim of supervision of at least ten individuals organized for smuggling bales of marihuana across the border.[8]

In a related argument appellant maintains that the district court violated his due process rights and Fed.R.Crim.P. 32 by declining to allow him to testify in rebuttal of the PSI factual assertion that he had supervised the ten smugglers. In the written objections to the PSI there is no reference to this finding. It was within the discretion of the trial court to permit or decline to allow this testimony.[9]

---

[7]For this determination, guideline commentary directs the district court to consider "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." U.S.S.G. § 3B1.1 n.4.

[8]See U.S.S.G. § 1B1.3(a)(2).

[9]See **United States v. Pologruto**, 914 F.2d 67 (5th Cir. 1990); **United States v. Mueller**, 902 F.2d 336 (5th Cir. 1990); U.S.S.G. § 6A1.3(a). See also Fed.R.Crim.P. 32(c)(3)(A), which provides in relevant part:

> The court shall afford the defendant and the defendant's counsel an opportunity to comment on the [PSI] and, in the discretion of the court, to introduce

Finally, Garcia-Chavez contends that the district court violated Fed.R.Crim.P. 11(e)(1) by participating in the plea negotiations. Rule 11(e)(1) allows parties to "engage in discussions with a view toward reaching [a plea] agreement" but specifies that "[t]he court shall not participate in any such discussions." We review alleged Rule 11 violations for harmless error,[10] reversing only if the sentencing court in fact varied from Rule 11 procedures and in so doing affected a defendant's substantial rights.[11]

A close read of the record reflects that Garcia-Chavez and the prosecutor had reached and reduced to writing an agreement on the plea to the one conspiracy count with dismissal of the other counts and the concession on the forfeitures. The plea further allowed Garcia-Chavez to salvage the real or immovable property by paying in lieu thereof the sum of $65,000. Originally that payment was to be made by the time of the rearraignment and submission of the guilty plea. The government's part of the plea agreement, the dismissal of the other counts and its sentence calculation recommendation, were not due until the sentencing. The court did not enter into the plea negotiations. Rather, in response to defendant's request for a continuance to allow more time for gathering the needed sum of money to partially avoid the

---

testimony or other information relating to any alleged factual inaccuracy contained in it.

[10]Fed.R.Crim.P. 11(h); **United States v. Johnson**, 1 F.3d 296 (5th Cir. 1993).

[11]**Id.**

forfeiture, and after counsel gave assurance that entry of a guilty plea was intended, the court merely suggested to the prosecutor that the government might consider receipt of the money at or before sentencing as timely. This action which favored the defendant was done. We do not perceive the court's suggestion to be an impermissible participation in plea discussions. The court's suggestion was not directed at framing the terms of the plea agreement, but simply sought to aid implementation of an agreement already reached and reduced to writing.[12]

Emphasizing that today's ruling is fact-specific and neither abrogates nor lessens our enforcement of the Rule 11(e)(1) proscription against trial judge participation in the plea bargaining process, we find no validity to any assignment of error advanced by Garcia-Chavez and his conviction and sentence are AFFIRMED.

---

[12]Compare with **United States v. Miles**, 10 F.3d 1135 (5th Cir. 1993) (finding judicial participation in plea negotiation where judge stated, "If I was satisfied that these people likely would never get out of prison I would feel more comfortable" and indicated that "the objectives that . . . were intended to be served" could be served if defendant had "another 40 years to serve beyond what is now contemplated.").

See also **United States v. Frank**, 36 F.3d 898 (9th Cir. 1994) (finding no judicial participation in plea bargaining where colloquy took place after parties had concluded their agreement and it was laid out in open court even though agreement was not yet "formal and binding"); **United States v. Torres**, 999 F.2d 376 (9th Cir. 1993) (finding no judicial participation where parties had already "hammered out" agreement prior to objectionable statement by sentencing judge).