

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2922
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MARGIL MALDONADO, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-91-0059-13)

(September 22, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Margil Maldonado appeals the sentence he received after pleading guilty of conspiracy to possess with intent to distribute marihuana, interstate travel and transportation in aid of racketeering enterprises and conspiracy to commit the same, and money laundering and conspiracy to commit the same, in violation of 18 U.S.C. §§ 371, 1952, and 1956(a)(1)(A)(i) and (a)(2) and

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

21 U.S.C. § 841(a)(1), (b)(1)(B)(vii), and (b)(1)(C). Finding no error, we affirm.

I.

Maldonado was sentenced to 262 months' imprisonment on each of counts 1, 104, and 106; 60 months on each of counts 2, 5, 6, 41, 105, and 107; and 240 months on each of counts 4, 44, and 16, all to be served concurrently. The court then imposed five years' supervised release for count 1; three years' supervised release on each of counts 2, 4, 41, 69, 105, and 107; and four years' supervised release on counts 104 and 106, all to be served concurrently.

II.

A.

Maldonado contends that the district court erred by determining, pursuant to U.S.S.G. § 3B1.1(b), that he was a manager or supervisor of a criminal activity that involved five or more participants and that was otherwise extensive. According to Maldonado, he was merely a participant transporting drugs and doing menial tasks, and the presentence report ("PSR") contained no reliable information regarding any enhanced role he may have played in the offense conduct. He also argues that the district court failed to address any of the requisite factors in determining whether his offense level should be enhanced.

The government objected to the statement in the PSR that

Maldonado's offense level should be raised three points based upon his role as a supervisor or manager, stating that Maldonado should be awarded a four-level increase as a leader or organizer. Maldonado objected to the three-level enhancement, arguing that he was nothing but a gopher.

During the sentencing hearing, the district court addressed the issue and determined that, while Maldonado did not play the role of leader, he was in the next highest range of management. Therefore, his offense level was enhanced by three levels for being a manager or supervisor.

We will disturb a district court's determination regarding a defendant's role in criminal activity only if it is clearly erroneous. United States v. Barreto, 871 F.2d 511, 512 (5th Cir. 1989). A finding is not clearly erroneous if it is plausible in light of the record read as a whole. United States v. Whitlow, 979 F.2d 1008, 1011 (5th Cir. 1992).

A defendant's offense level may be increased by three levels if he "was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(b). For purposes of section 3B1.1, the sentencing court must examine the "contours of the underlying scheme." United States v. Mir, 919 F.2d 940, 945 (5th Cir. 1990). Accordingly, an increase for a managerial role does not depend upon the specific role of the defendant in the offense of conviction, but rather upon his role in conduct encompassed within the scope of the offense of conviction and any

relevant conduct. United States v. Eastland, 989 F.2d 760, 769 & n.18 (5th Cir.), cert. denied, 114 S. Ct. 246, and cert. denied, 114 S. Ct. 443 (1993).

Factors the sentencing court should consider include

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.

§ 3B1.1(b) comment. (n.4). Additionally, the defendant's role in a criminal activity for the purposes of section 3B1.1 may be deduced inferentially from available facts. United States v. Manthei, 913 F.2d 1130, 1135 (5th Cir. 1990).

In resolving disputed factual matters at sentencing, the district court may consider any relevant evidence with sufficient indicia of reliability. Id. at 1138. A PSR generally has that type of reliability, United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990), and the defendant bears the burden of demonstrating that the information contained in the PSR is materially untrue, United States v. Rodriguez, 897 F.2d 1324, 1328 (5th Cir.), cert. denied, 498 U.S. 857 (1990).

If no relevant affidavits or other evidence are submitted to rebut the information contained in the PSR, the district court is free to adopt its findings without further inquiry or explanation. Mir, 919 F.2d at 943. Furthermore, district courts may adopt disputed PSR facts when the record indicates that the court, at least implicitly, considered the relevant arguments and decided to

credit the PSR's position. See United States v. Sherbak, 950 F.2d 1095, 1099-1100 (5th Cir. 1992).

The PSR reflects that although Maldonado was initially brought into the organization as a driver and off-loader, he was entrusted in 1986 with overseeing and coordinating marihuana shipments and money collection in several major U.S. cities. After he was arrested ferrying drugs for the organization, his position of authority shifted, and he was placed in charge of coordinating and overseeing loads of marihuana and the return of its proceeds from Johnny Russell Miller in Atlanta, Georgia, a distributor/customer of the organization.

Between December 1990 and March 1991, Maldonado helped coordinate the shipment and transportation of 6,000 pounds of marihuana. Tim Kaley would contact Maldonado in Houston, Texas, to receive shipments of marihuana reaching up to 50 to 100 pounds. In December 1990, Maldonado attended a meeting at his business, Creative Colors Body Shop, with the leaders of the organization to discuss the transportation of marihuana via metal boxes capable of holding 1,000 pounds. His place of business was used by the organization to modify transportation vehicles and to load and store marihuana. The PSR stated that at least ten loads of marihuana of 300 pounds apiece were stored there.

Maldonado also maintained an organization fund to pay for the legal fees and other expenses for members of the criminal enterprise. It was conservatively estimated that Maldonado facilitated the distribution of at least 13,636 kilograms of marihuana during

his involvement in the conspiracy.

The PSR was prepared from, inter alia, interviews with case agents. PSR information supplied by investigating agents has been deemed sufficiently reliable. See Manthei, 913 F.2d at 1138. Beyond his allegations of falsehood, Maldonado has not presented evidence that the information in the PSR is materially untrue. Consequently, the district court was able to rely upon the PSR in sentencing.

At sentencing, in assessing a three-level enhancement to Maldonado's offense level, the district court stated that given his exposure to all of the participants and activities in this case, Maldonado was in the upper ranges of management, although not as high as a leader or organizer. Even though the court did not specifically state the factors it had considered in enhancing Maldonado's offense level, its statement above reflects that the court inferentially deduced Maldonado's role in a criminal activity for the purposes of section 3B1.1 See id. at 1135.

Although Maldonado's role in the conspiracy involved the transportation of drugs, he was much more than a mere courier or participant. Given the evidence in the PSR relied upon by the district court, the court's finding that Maldonado acted in such a capacity is not clearly erroneous.

B.

Maldonado argues that the district court erred in computing the amount of marihuana attributed to him. He contends that the

district court improperly found that 13,636 kilograms of marihuana was reasonably foreseeable and that such a finding improperly raised his offense level to 36. Maldonado argues that the district court attributed the large amount to him only because he was a member of the organization instead of looking at the amount accountable for his own conduct and the foreseeable acts of his co-conspirators. He contends that there were periods when he was not involved in the conspiracy but was distributing marihuana on his own.

"In order to attribute to a particular defendant amounts of a controlled substance that was the subject of a conspiracy, the sentencing court must determine the quantity of controlled substance that the defendant knew or should reasonably have foreseen the conspiracy would have involved." United States v. Puma, 937 F.2d 151, 159-60 (5th Cir. 1991), cert. denied, 112 S. Ct. 1165 (1992). The quantity of controlled substances reasonably foreseeable to Maldonado is a question of fact. See United States v. Pofahl, 990 F.2d 1456, 1479 (5th Cir.), cert. denied, 114 S. Ct. 226, and cert. denied, 114 S. Ct. 560 (1993). We review factual findings concerning drug quantity for clear error. United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991).

The district court found that Maldonado's position in the organization made it reasonably foreseeable for him to have known about the 13,636 kilograms of marihuana. The court observed that the 13,636 kilograms was marihuana that actually had been distributed in regard to real customers and that it was a relatively small

amount, considering the scope of the conspiracy. The court then observed that Maldonado was in a position to know of that volume and also to assist directly in its distribution. The court also observed that Maldonado "sort of merged" his separate drug activities with the organization at some point.

Maldonado contends that he was not involved in the organization from April 1987 to December 1990, when he was re-recruited into the conspiracy. The PSR reports, however, that sometime after his arrest in April 1987, Maldonado was placed in charge of distributing marihuana to a main customer of the organization who was located in Atlanta, Georgia. Shortly after the July 1190 arrest of Maurico Rueben, Maldonado took over Rueben's task of coordinating and overseeing all the loads of marihuana transported to Atlanta and the return of its proceeds to Houston. Therefore, the finding regarding the amount of drugs attributable to Maldonado is supported by the PSR.

As stated earlier, "a defendant challenging information presented at sentencing bears the burden of demonstrating its untruth, inaccuracy, or unreliability." United States v. Gracia, 983 F.2d 625, 630 (5th Cir. 1993). Maldonado offered no evidence at his sentencing hearing to dispute the accuracy of the information in the PSR concerning the negotiation and does not offer any information on appeal to support his assertions. Therefore, the district court could properly rely upon the PSR to make its determination as to the drug quantity attributable to Maldonado's participation in the conspiracy and could rely upon that amount to

raise Maldonado's offense level to 36. See Sherbak, 950 F.2d at 1099-1100.

C.

Maldonado argues that the district court erred in not conducting an evidentiary hearing to resolve the issues regarding the amount of marihuana for which he was accountable and his role in the offense. This lies within the discretion of the district court. See United States v. Pologruto, 914 F.2d 67, 69 (5th Cir. 1990). When a district court is faced with specifically disputed facts, it must resolve them if they are used to determine the sentence. Id.

The district court was aware of Maldonado's disagreement with the facts concerning his role in the offense and the amount of drugs attributable to him, but it denied Maldonado's motion for an evidentiary hearing on the two topics. The court observed that it had heard no suggestion of independent evidence that would shed light on Maldonado's involvement. Maldonado's attorney acknowledged that he did not have any new testimony and agreed that an additional evidentiary hearing was not necessary, as there was no new evidence. Additionally, Maldonado does not assert on appeal that any new evidence was available. Consequently, he has failed to demonstrate the need for a hearing, and the district court did not abuse its discretion.

AFFIRMED.