

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2953
Conference Calendar

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JILBERTO CARDENAS-LOPEZ,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CR-H-93-212-1
- - - - -
(July 22, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

Jilberto Cardenas-Lopez (Cardenas) asserts that the district court's factual finding that he was the organizer or leader of a criminal activity that involved five or more participants was clearly erroneous. His argument is unavailing.

This Court reviews trial court findings of fact regarding Sentencing Guideline issues for clear error. United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990). The district court is allowed to rely on information contained in the PSR when making

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

factual sentencing determinations as long as the information relied upon bears a minimum indicium of reliability. United States v. Vela, 927 F.2d 197, 201 (5th Cir.), cert. denied, 112 S.Ct. 214 (1991). A 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 district 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).

Cardenas offered no rebuttal evidence to support his assertion that co-defendant Maria Vega-Trevino's statement regarding the existence of other distributors of falsified immigration documents was not sufficiently reliable. See Mir, 919 F.2d at 943. PSR information supplied by investigating agents has been deemed sufficiently reliable. See United States v. Manthei, 913 F.2d. 1130, 1138 (5th Cir. 1990). Furthermore, the district court specifically stated that it believed "there were other distributors," and thus explicitly considered the relevant arguments and decided to credit the PSR's position. See Sherbak, 950 F.2d at 1099. Cardenas has not shown that the district court's finding in this regard was not clearly

erroneous.

On appeal, Cardenas attempts to recast his allegations and sets forth arguments not raised in the district court. Specifically, he argues that he did not actually organize or lead a number of the individual participants, including the alien/smuggler and the unidentified woman. He also maintains that the use of "other distributors" to reach a total of five or more participants was erroneous because by doing so, the district court looked beyond the offense of conviction and improperly enlarged the class of participants. These specific arguments were not presented in the district court.

This Court will not consider issues raised for the first time on appeal "`unless they involve purely legal questions and failure to consider them would result in manifest injustice.'" United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990) (citation omitted). A district court's determination whether a defendant is a leader or an organizer is a factual determination. See United States v. Pofahl, 990 F.2d 1456, 1480 (5th Cir. 1993). Thus, Cardenas' new arguments raised for the first time on appeal regarding his role in the offense are not reviewable.

Assuming, arguendo, that the issues have been preserved, this Court recently foreclosed the argument that a leader or organizer had to exercise control over all of the individual participants, holding that the exercise of control over at least one other participant was sufficient to justify a four-level enhancement. See United States v. Okoli, 20 F.3d 615, 616 (5th Cir. 1994).

Further, the district court may properly consider not only the contours of the charged offense, but the "contours of the underlying scheme itself," and "look beyond the narrow confines of the offense charged to consider all relevant conduct." Mir, 919 F.2d at 945. Cardenas has not offered any evidence supporting his assertion that the district court improperly enlarged the class of participants. See id.

AFFIRMED.