

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-3330  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

KENRICK DAWSON,  
a/k/a/ Vincent King,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
(CR-92-579-D)

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(February 28, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Kenrick Dawson, along with co-defendant Kenzie Williams, pled guilty to conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. On April 14, 1993, the district court sentenced Dawson to 105 months imprisonment, 3 years supervised release, and payment of a \$50 fine. Dawson now appeals his sentence. Because the

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

district court properly applied the Sentencing Guidelines to its factual findings, we affirm.

#### I. BACKGROUND

On November 17, 1992, Los Angeles County law enforcement authorities notified the Jefferson Parish Sheriff's Office (JPSO) of a suspected shipment of illegal narcotics from Los Angeles to New Orleans. LAPD police dogs had detected narcotics in a Federal Express package addressed to Shelly Evans at Tulane University. On November 18, 1992, pursuant to a search warrant, the JPSO and the DEA intercepted the package at the New Orleans airport, field-tested its contents, and concluded that it contained cocaine hydrochloride.

The investigating officers substituted cornstarch and a trace of cocaine for the original contents and made a controlled delivery of the package to Ms. Evans at Tulane University. Ms. Evans, apparently unaware of the package's contents, told investigators that she had agreed to accept it for an acquaintance, Vincent King (later identified as Kenrick Dawson). She arranged for Dawson to retrieve the package that afternoon.

A DEA surveillance team observed a car occupied by Dawson and co-defendant Kenzie Williams drive up to Ms. Evans' location at the university. While Williams retrieved the package, Dawson walked toward a public telephone. After Williams placed the package in the trunk of the car, DEA agents arrested him and seized the car, the package, a beeper and an electric bill addressed to Vincent King at 1441 1/2 Frenchman Street. The

seized Federal Express package was determined to contain 495.5 grams of cocaine hydrochloride. Dawson escaped but was arrested later the same afternoon.

Investigators searched the 1441 1/2 Frenchman Street apartment pursuant to a warrant. They discovered that the apartment was leased in Dawson's name and that both Dawson and co-defendant Williams resided there. Agents seized from the apartment 13.1 grams of cocaine base (crack), a trace of marijuana, a .32 caliber revolver, and miscellaneous drug paraphernalia and papers.

Dawson and Williams were indicted on December 10, 1992, on one count of conspiracy to possess with intent to distribute cocaine hydrochloride. On February 3, 1993, both defendants pled guilty to the one-count indictment in accordance with a plea agreement. On April 14, 1993, the district court held a sentencing hearing, at which it considered the probation officer's Presentence Investigation Report (PSR) and the defendants' objections thereto.

The PSR recommended that Dawson receive a base offense level of 26 based on the 495.5 grams of cocaine hydrochloride from the Federal Express package and the 13.1 grams of cocaine base found in Dawson's apartment. The PSR also increased the base offense level by 2 levels for possession of a weapon and decreased it by 3 levels for acceptance of responsibility, resulting in a proposed total offense level of 25. The guideline range for imprisonment, based on a total offense level of 25 and

Dawson's proposed criminal history category of IV, was 84 to 105 months.

Dawson raised two objections to the PSR. First, he argued that the 13.1 grams of cocaine base found in the apartment should not be included in the calculation of his base offense level because these drugs "[were] not conclusively connected to" Dawson and because they may have been found in Williams' bedroom. Dawson also objected to the two-level enhancement for weapon possession, which was based on the discovery of a revolver in the apartment. The probation officer responded that the cocaine base and the revolver were discovered in the bedroom identified as Dawson's and that the apartment was leased under Dawson's name. The sentencing court overruled Dawson's objections, adopted the findings of the PSR, and accepted the PSR's calculation of Dawson's offense level. Dawson was sentenced to 105 months imprisonment, 3 years supervised release, and a \$50 fine. He raises these same two objections on appeal.

## II. STANDARD OF REVIEW

This court reviews factual findings of a district court in its determination of a defendant's relevant conduct for sentencing purposes under a "clearly erroneous" standard of review. United States v. McCaskey, 9 F.3d 368, 372 (5th Cir. 1993); United States v. Lokey, 945 F.2d 825, 839 (5th Cir. 1991). Factual findings in a sentencing determination must be supported by a preponderance of the evidence. McCaskey, 9 F.3d at 372. The district court's sentence will be upheld so long as it

results from a correct application of the guidelines to factual findings that are not clearly erroneous. McCaskey, 9 F.3d at 372; United States v. Alfaro, 919 F.2d. 962, 964 (5th Cir. 1990). The district court's interpretations of the guidelines are conclusions of law and are reviewed de novo. McCaskey, 9 F.3d at 372.

The court must apply the version of the guidelines effective at the time of sentencing. United States v. Gross, 979 F.2d 1048, 1050-51 (5th Cir. 1992) (citing 18 U.S.C. § 3553(a)(4)). The version of the sentencing guidelines in effect from November 1, 1992 through October 31, 1993 (the 1992 edition of the Guidelines Manual), applies to Dawson because he was sentenced on April 14, 1993. The probation officer incorrectly applied the 1993 edition of the Guidelines Manual in preparing the PSR. However, as no substantive changes were made between 1992 and 1993 to the relevant portions of the guidelines for Dawson's sentence, the error was harmless.

### III. DISCUSSION

Dawson challenges his sentence on three main grounds. First, he contends that the sentencing court improperly included cocaine base found in the apartment as relevant conduct in the calculation of his base offense level. He argues that inclusion of the cocaine base violated his plea agreement because he was charged with and pled guilty only to possession of the cocaine hydrochloride found in the Federal Express package. Second, he contends that the sentencing court improperly enhanced his

offense level for weapon possession because the gun was not conclusively connected either to Dawson or to the offense of conviction. Third, Dawson contends that the court failed to make factual findings about the connection between the cocaine base and the revolver and his offense of conviction, and that the court's conclusions that these items constituted relevant conduct were supported by insufficient evidence. We will address Dawson's third contention first.

#### A. Sufficiency of the Evidence

The sentencing court adopted Dawson's PSR in determining his sentence. The district court has discretion to accept the facts set forth in the PSR even when these facts are disputed. United States v. Mora, 994 F.2d 1129, 1141 (5th Cir. 1993). A defendant must support his objections to the PSR with specific rebuttal evidence to refute its facts. United States v. Rodriguez, 897 F.2d 1324, 1327 (5th Cir. 1990). When, as in this case, the defendant objects to the PSR but offers no rebuttal evidence, the court may adopt the PSR without further inquiry. United States v. Sherbak, 950 F.2d 1095, 1099-1100 (5th Cir. 1992). In adopting the PSR, the court implicitly weighs the positions of the probation officer and the defendant and credits the version offered by the probation department. Sherbak, 950 F.2d at 1099. The court's adoption of the findings of the PSR provides the defendant with adequate notice of its resolution of disputed facts. Mora, 994 F.2d at 1129; see also United States v. Hooten, 942 F.2d 878, 881 (5th Cir. 1991) (stating that the

sentencing guidelines require the court to make factual findings on disputed issues). At the sentencing hearing, Dawson offered no rebuttal evidence to support his written objections to the PSR. Therefore, the sentencing court did not err by adopting the facts as set forth in the PSR.

#### B. Calculation of Dawson's Base Offense Level

Dawson and co-defendant Williams pled guilty to a charge of conspiracy to possess with intent to distribute 495.5 grams of cocaine hydrochloride. "In applying the sentencing guidelines, the court must first determine the applicable offense guideline section from Chapter Two." McCaskey, 9 F.3d at 373; United States Sentencing Commission, Guidelines Manual, § 1B1.1(a) (Nov. 1992).<sup>1</sup> The applicable guideline section for conspiracy to distribute cocaine is § 2D1.1. U.S.S.G. § 2D1.1. This guideline section specifies a range of base offense levels based on drug quantity. U.S.S.G. § 2D1.1(c) (Drug Quantity Table). Section 1B1.3 provides that when a guideline specifies more than one base offense level, the base offense level for a particular defendant shall be determined from a consideration of all "relevant conduct." U.S.S.G. § 1B1.3. Relevant conduct in the case of a conspiracy includes all acts and omissions committed or caused by the defendant and "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1).

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<sup>1</sup> All citations to the sentencing guidelines in this opinion are to the version effective November 1, 1992, unless otherwise indicated.

The sentencing court included the 13.1 grams of cocaine base (converted to 1310 grams of cocaine hydrochloride) as relevant conduct in determining Dawson's base offense level of 26. U.S.S.G. § 2D1.1(c)(9)(for possession of at least 500g but less than 2kg cocaine).

Dawson argues that the district court erred in including the cocaine base as relevant conduct in his sentencing calculation because he was not indicted for its possession, its inclusion violated his plea agreement, and the government did not provide sufficient evidence connecting the cocaine base to Dawson or his offense of conviction. The district court's findings about the quantity of drugs on which a sentence should be based are factual findings which we review for clear error. United States v. Mitchell, 964 F.2d 454, 457 (5th Cir. 1992). If quantities of drugs outside the offense of conviction are considered in calculating the offense level, they must be supported by a preponderance of the evidence. Sherbak, 950 F.2d at 1100. The district court may consider amounts not included in the charging instrument if they were part of a common plan or scheme to distribute. Id.; United States v. Garcia, 902 F.2d 324, 326 (5th Cir. 1992). The district court's conclusion that possession of the cocaine base in Dawson's apartment was part of a common plan or scheme to distribute was not clearly erroneous. The PSR stated that investigators discovered the cocaine base in the bedroom identified as belonging to Dawson, and that the apartment was leased to Dawson. Dawson contradicted the PSR by



claiming that the cocaine base was found in Williams' bedroom and that he did not know that the cocaine base was in the apartment. By adopting the PSR, the court credited the investigators' report. Even assuming that the cocaine base did actually belong to Williams, Williams possession of this cocaine base could be contributed to his co-conspirator Dawson under section 1B1.3(a)(1)(B). U.S.S.G. s 1B1.3(a)(1)(B). Application of this section would be amply supported by the discovery in the apartment of such drug distribution paraphernalia as scales and baggies. Therefore, the possession of the cocaine base constituted relevant conduct and the cocaine base was properly included in the calculation of Dawson's base offense level.

The court's consideration of the cocaine base in Dawson's sentence also did not violate his plea agreement. The government did not promise not to bring up information about the items discovered in Dawson's apartment at the sentencing hearing. The government's only promise relevant to sentencing in this agreement related to informing the court of defendant's cooperation prior to sentencing. The district court did reduce Dawson's offense level by three levels for acceptance of responsibility. We note that the plea agreement states that it constitutes the sole agreement between the parties and that the government has made no promises other than those contained in the agreement. Therefore, the district court's inclusion of the cocaine base found in Dawson's apartment as relevant conduct in the calculation of his base offense level was proper. See

McCaskey, 9 F.3d at 377 (stating that the sentencing court may consider relevant conduct in sentencing even if the government promised in a plea agreement not to prosecute that conduct because consideration of relevant conduct at sentencing is not equivalent to prosecuting the defendant for an additional offense).

C. The Two-Level Enhancement for Weapon Possession

Section 2D1.1(b)(1) provides that the base offense level should be increased by two levels if "a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1). The comments to this section state that the purpose of the weapon enhancement is to reflect the increased danger of violence when drug traffickers carry weapons. U.S.S.G. § 2D1.1 cmt. n.3. The offense level should be adjusted "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." Id. The government must prove weapon possession by a preponderance of the evidence. United States v. Hooten, 942 F.2d 878, 881 (5th Cir. 1991). The district court's decision to apply § 2D1.1(b)(1) is a factual one which we review for clear error. United States v. Eastland, 989 F.2d 760, 769 (5th Cir. 1993).

The government can demonstrate weapon possession in two ways in a conspiracy case. First, the government can show that "a temporal and spatial relationship existed between the weapon, the drug-trafficking activity and the defendant." Eastland, 989 F.2d at 770; Hooten, 942 F.2d at 881. "Generally, the government

must provide evidence that the weapon was found in the same location where drugs or drug paraphernalia are stored or where part of the transaction occurred." Hooten, 942 F.2d at 882. Alternatively, the government can show that a co-conspirator possessed the weapon and that the defendant could have reasonably foreseen that possession. Hooten, 942 F.2d at 881. Under either theory, the court correctly applied the weapon possession enhancement to Dawson's sentence. Investigators discovered the revolver in an apartment in which both Dawson and his co-defendant Williams resided and where the cocaine base and drug packaging material were found. The revolver's proximity to the cocaine base created a sufficient relationship between the weapon, the defendant, and the drug-trafficking activity to trigger the enhancement for weapon possession. See, e.g., Eastland, 989 F.2d at 770 (applying the firearm enhancement when guns were discovered in defendant's residence the day after his arrest). Even if Dawson had provided evidence that the gun belonged to Williams, Williams' possession of a firearm in their apartment would have been conduct in furtherance of the conspiracy that would have been reasonably foreseeable to Dawson-his roommate and co-conspirator. In either case, the presence of the revolver in the defendants' apartment constituted relevant conduct which could properly be considered in determining Dawson's sentence. Therefore, the district court's conclusion for sentencing purposes that Dawson possessed a weapon was not clearly erroneous.

## V. CONCLUSION

The sentence and conviction imposed by the district court are AFFIRMED.