

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3423
Conference Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
CHRISTOPHER COZAD,
Defendant-Appellant.

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No. 93-3424
Conference Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
EDWIN YEAGER,
Defendant-Appellant.

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Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CR-92-547-N3
- - - - -
(January 6, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.
PER CURIAM:*

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

No. 93-3423

No. 93-3424

-2-

Christopher Cozad and Edwin Yeager appeal their sentences for conspiring to distribute cocaine contending that the district court erred in attributing five kilograms as relevant conduct. Yeager contends that the district court erred in refusing to grant him a two-point reduction for being a minor participant.

In determining the base offense level under the sentencing guidelines, "relevant conduct" that the court may consider includes "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). The sentencing guidelines provide that "quantities of drugs not specified in the count of conviction may be considered in determining the offense level." § 2D1.1, comment. (n.12).

Such findings need be determined by only a preponderance of the evidence. See United States v. Alfaro, 919 F.2d 962, 965 (5th Cir. 1990). Once evidence of the amounts of controlled substances is provided on the record, the defendant has the burden to prove that such evidence is "materially untrue, inaccurate or unreliable." United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991), cert. denied, 112 S.Ct. 1677, 2290 (1992). If the defendant contests facts or conclusions set forth in the PSR, the district court may adopt the PSR only so long as the record reflects that the court fairly considered the relevant factors in dispute when it made its decision. United States v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992); see Fed. R. Crim.

P. 32(c)(3)(D). In a conspiracy, the defendant is accountable for conduct of others that was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity. § 1B1.3(a)(1)(B) & comment. (n.1).

The district court considered the testimony of Cozad and Yeager and the arguments of their attorneys when it rejected the argument that Yeager was merely bluffing when he agreed to broker a total of five kilograms of cocaine. The district court is always free to reject a defendant's declarations which are apparently made for the purpose of reducing his sentence. United States v. Buenrostro, 868 F.2d 135, 138 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990). The district court may reject assertions that information provided by the defendant was merely "puffery" if the record indicates otherwise. Kinder, 946 F.2d at 366.

A finding is clearly erroneous only if, in spite of the evidence showing a certain quantity of drugs, this Court is still "left with the definite and firm conviction that a mistake has been committed." United States v. Mitchell, 964 F.2d 454, 457-58 (5th Cir. 1992) (citation omitted). Based on this record, the district court did not commit such a mistake. The findings of intent, and, to a lesser extent, that of ability, are supported by the ample testimony regarding the negotiations for five kilograms. The finding of ability is also supported by Yeager's testimony that Cozad had been involved in at least one prior

cocaine transaction. The production of the initial two kilograms supports the finding that the defendants were able to produce an additional three kilograms. The findings of the district court are plausible in light of the record as a whole and thus are not clearly erroneous. United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991).

Yeager contends that he was less culpable than Cozad because it was Cozad who knew the inner workings of the drug organization; who had supplied the two kilograms of cocaine; and who stood to benefit more financially from the transaction.

A "minor participant" is defined as one "who is less culpable than most other participants, but whose role could not be described as minimal." § 3B1.2, comment. (n. 3); see United States v. Lokey, 945 F.2d 825, 840 (5th Cir. 1991). Simply being less involved than other participants will not warrant minor participant status; a defendant must be peripheral to the furtherance of illegal endeavors. United States v. Thomas, 932 F.2d 1085, 1092 (5th Cir. 1991), cert. denied, 112 S.Ct. 887 (1992).

Because most offenses are committed by participants of roughly equal culpability, it is intended that the adjustment be used infrequently. United States v. Windham, 991 F.2d 181 (5th Cir. 1993), cert. denied, 114 S.Ct. 444 (1993). Whether a defendant played only a minor role in a conspiracy is a factual determination which must be upheld unless it is clearly erroneous. United States v. Giraldo-Lara, 919 F.2d 19, 22 (5th

Cir. 1990). A party seeking a reduction of the sentencing guidelines must establish by a preponderance of the evidence the factual basis warranting the reduction. See Alfaro, 919 F.2d at 965.

Yeager's culpability may have been the lesser of the two defendants, but Yeager, through numerous recorded conversations with the CI, negotiated the transaction on behalf of himself and Cozad. As planned, the two kilogram cocaine transaction occurred at his residence. Yeager's role was not peripheral. The court did not clearly err in denying Yeager a downward adjustment for minor participant status.

AFFIRMED.