

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-3450
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAFAEL GUERRERO,

Defendant-Appellant.

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Appeal from the United States District Court for the
Middle District of Louisiana
(CR-93-12-B-M1)
S)))))))))Q
(February 18, 1994)

Before JOHNSON, GARWOOD and JOLLY, Circuit Judges.*

PER CURIAM:

Defendant-appellant Rafael Guerrero (Guerrero) pleaded guilty to one count of possession, with intent to distribute, of 500 grams or more of cocaine. The district court sentenced Guerrero to, among other things, 136 months' imprisonment. Guerrero appeals, challenging only his sentence.

Guerrero's initial challenge to his sentence is the claim that

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the district court clearly erred in determining his relevant conduct based on the out-of-court statements of a confidential informant. The transaction to which Guerrero pleaded guilty was made with a confidential informant, and involved one kilogram of cocaine. The confidential informant reported that Guerrero had made at least five or six prior trips, bringing one to three kilograms of cocaine on each occasion. Guerrero presented a letter at the sentencing hearing, which he signed under oath, stating, among other things, that he had only made three trips involving one kilogram each. Guerrero did not testify at sentencing or present any other evidence apart from the letter.

Guerrero seeks to rely on the commentary to section 6A1.3 of the Sentencing Guidelines indicating that for out-of-court declarations "by an *unidentified* informant" (emphasis added) to be considered, there should be good cause for nondisclosure and sufficient corroboration by other means. We note that this particular provision is inapplicable because here it is clear that the informant was not unidentified, but was rather plainly known to Guerrero, who had personally met and dealt with him on more than one occasion. *Cf. United States v. Herrera*, 928 F.2d 769, 773-74 (6th Cir. 1991). Moreover, Guerrero did not request disclosure of the informant's identification during the sentencing hearings, and did not object to nondisclosure; nor did he seek the production of the informant as a witness. The district court held two sentencing hearings. Testimony providing ample corroboration of the informant was introduced. His information was shown to be reliable as to the

offense of conviction, and he had provided reliable information on at least one other occasion. There was also certain other corroborating evidence. Guerrero had had a false compartment adjoining the gas tank of his vehicle, in which cocaine was concealed. He indicated no surprise when the informant mentioned three kilograms.

Guerrero contends that the informant's response concerning the number and quantities of other transactions was not itself corroborated. But corroboration in part may give adequate reason to believe the other statements of the informant. *Cf. Illinois v. Gates*, 103 S.Ct. 2317 at 2335 (1983); *Alabama v. White*, 110 S.Ct. 2412, 2417 (1990).

The district court determined that Guerrero's relevant conduct involved five or more kilograms of cocaine, and we review this determination only for plain error. *United States v. Young*, 981 F.2d 180 at 185 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2454, 2983 (1993). No such error has been shown. *Id.* See also *United States v. Rogers*, 1 F.3d 341, 343-44 (5th Cir. 1993); *United States v. Lopez-Gonzalez*, 916 F.2d 1011, 1014-15 (5th Cir. 1990).

Guerrero's other complaint is that the district court improperly denied him a reduction in offense level for acceptance of responsibility. We review the district court's ruling on whether a defendant has accepted responsibility under a standard even more deferential than the clearly erroneous standard. See *United States v. Watson*, 988 F.2d 544, 551 (5th Cir. 1993), *cert. denied*, U.S. LEXIS 160 (U.S. Jan. 10, 1994). Only a defendant who

"clearly demonstrates acceptance of responsibility for his offense" is entitled to the reduction. Sentencing Guidelines § 3E1.1(a). Guerrero contends that because the district court declined to enhance his offense level for obstruction of justice based on his statement indicating he was involved with only one kilogram, therefore he should have been entitled to a finding of acceptance of responsibility. However, this contention ignores the fact that the government has the burden to show obstruction of justice for such purposes, while the burden is on the defendant to establish that he has clearly demonstrated acceptance of responsibility. See *Watson*, 988 at 551. No error or abuse of discretion is shown in the denial to Guerrero of the acceptance of responsibility reduction.

Guerrero's conviction and sentence are accordingly

AFFIRMED.