

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3558
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

COREY GANNON THOMAS,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CR-92-589 "H" (4)
- - - - -
(May 18, 1994)

Before HIGGINBOTHAM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Corey Gannon Thomas pleaded guilty to possessing more than two kilograms of cocaine with intent to distribute, and his sentence was based on that amount. The factual basis of the plea states that he possessed slightly more than two kilograms. The district court's factual finding regarding that amount is not clearly erroneous. See United States v. Montoya-Ortiz, 7 F.3d 1171, 1179 (5th Cir. 1993).

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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 rejected Thomas's argument that the sentence should not have been based on two kilograms because he did not have the actual ability to distribute that amount. We review the district court's legal conclusions regarding the Sentencing Guidelines de novo. Id.

Thomas relies on United States v. Garcia, 889 F.2d 1454, 1457 (5th Cir. 1989), cert. denied, 494 U.S. 1088 (1990). Garcia holds that a defendant convicted of distribution of eight ounces of cocaine may be sentenced on the basis of the eight ounces that he actually distributed plus eight additional ounces that he negotiated to distribute but never actually distributed. Id. Garcia's crime of conviction was a choate offense, but his sentence was properly based on completed and uncompleted distribution. Id. That holding comports with U.S.S.G. § 2D1.1, comment. (n.12), which addresses a quantity "under negotiation in an uncompleted distribution."

In the instant case, there is no uncompleted amount. Thomas actually possessed two kilograms, and he was sentenced on the basis of that amount. Garcia is inapposite.

This appeal borders on being frivolous. We caution counsel. Federal Public Defenders are like all counsel subject to sanctions. They have no duty to bring frivolous appeals; the opposite is true. See United States v. Burleson, ___ F.3d ___ (5th Cir. May 18, 1994, No. 93-2619).

AFFIRMED.