IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4061

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CRAIG JOSEPH WASHINGTON,

Defendant-Appellant.

No. 93-4118

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DAVID JOHN MISERENDINO,

Defendant-Appellant.

No. 93-4187

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERT DAVID CANTWELL,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Louisiana
(91-CR-20055(1), 91-CR-20055(2), 91-CR-20055(10))

(January 10, 1994)

Before HENDERSON[*], SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[**]

Craig Washington, David Miserendino, and Robert Cantwell, three drug dealers engaged in a loose-knit conspiracy to import marihuana from Texas to Florida, appeal various applications of the Sentencing Guidelines (the "Guidelines"). Finding no error, we affirm.

I.

A deputy sheriff stopped a Ford pickup truck, and a search of the vehicle revealed 116 kilograms of marihuana. The police agreed to make a controlled delivery to the owner of the marihuana, Miserendino. Subsequent investigation revealed the existence of a loose-knit conspiracy of drug dealers in Florida who were obtaining drugs from Texas.

Washington and Miserendino were involved in financing the travel of various couriers. Washington received a commission on

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[*] Circuit Judge of the Eleventh Circuit, sitting by designation.

[**] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

loads that Miserendino brought back. The marihuana was distributed through various networks in Florida composed of Cantwell and others.

All three defendants were charged in a four-count information and pled guilty to possession with intent to distribute marihuana. Presentence investigation reports ("PSR's") were prepared to which the defendants filed objections. As information was gathered through the cooperation of the defendants, the PSR's were amended to reflect the level of cooperation.

The district court filed a memorandum addressing the objections raised by the defendants to their PSR's. The court adopted the factual findings in the PSR's, except as noted in the memorandum. Washington's offense level was 33 with a criminal history category of VI,[1] yielding a Guidelines range of 235 to 293 months' imprisonment. On a motion by the government, the court departed downward to 199 months' imprisonment, to be followed by five years' supervised release.

Miserendino was found to be a leader of the conspiracy, and the court enhanced his offense level by four points pursuant to U.S.S.G. § 3B1.1(a). His total offense level was 31 with a criminal history category of II, yielding a Guidelines range of 121 to 151 months' imprisonment. On a motion by the government, the court departed downward to 120 months' imprisonment, to be followed by four years' supervised release.

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[1] Washington's criminal history category was increased from IV to VI because of the career offender enhancement.

Cantwell's offense level was 19 with a criminal history category of II, yielding a Guidelines range of 33 to 41 months' imprisonment. The court sentenced him to 41 months' imprisonment, to be followed by five years' supervised release.

II.

Washington raises five issues on appeal. He claims that (1) the district court improperly restricted his right to comment on the PSR at sentencing; (2) he was denied his right to challenge the constitutionality of his prior convictions that rendered him a "career offender"; (3) the district court misapplied the career offender section of the Guidelines; (4) the district court improperly relied upon immunized statements in sentencing; and (5) the government breached the plea agreement with respect to relevant conduct. We review findings of fact under the "clearly erroneous" standard and legal application of the Guidelines de novo. United States v. Barbontin, 907 F.2d 1494 (5th Cir. 1990).

A.

Washington claims that the judge refused to let him comment on the PSR at sentencing, in violation of his Fifth Amendment right to allocution. He cites the district court's statement that a memorandum ruling had been issued regarding the objections to the PSR and that it would not permit the defendant to present further objections at sentencing.

A defendant has a Fifth Amendment right to allocution at sentencing. United States v. Posner, 868 F.2d 720 (5th Cir. 1989). Nevertheless, it is apparent that the district court did not restrict the defendant's right to object and comment at sentencing. In fact, the record reveals that Washington's counsel made lengthy comments at sentencing, addressing the defendant's career offender enhancement, his cooperation, his prior offenses, and the extent of his downward departure. The court permitted Washington to allocute, then asked whether he had anything further to present. We therefore conclude that the court did give Washington the opportunity to comment and object, and given the ample opportunity he had to file written objections to the PSR, we must reject this first claim.

B.

Washington next claims that he was not given an opportunity to challenge the constitutionality of the prior conviction used against him for the career offender enhancement. But he made no mention of this argument in his written objections to the PSR (which he had eight months to complete), and he did not raise the issue during sentencing. We do not entertain arguments made for the first time on appeal. United States v. Mourning, 914 F.2d 699, 704 (5th Cir. 1990).

119 C.

Washington claims that the district court misapplied the career offender section of U.S.S.G. § 4B1.1. Nevertheless, Washington's brief makes no specific mention of what errors were made in calculating the enhancement.

The district court adopted the recommendation of the PSR. Under § 4B1.1, a career offender is a defendant over the age of eighteen who commits an offense involving controlled substances and who has at least two prior felony convictions for crimes of violence or controlled substance offenses. Career offenders are automatically given a criminal history category of VI and a minimum base offense level. The PSR calculated his sentence correctly based upon a criminal history category of VI and a total offense level of 33.

Washington fails to specify how the calculations were wrong. But objections to the PSR must be specific to enable the court to correct inaccuracies. United States v. Ponce, 917 F.2d 846 (5th Cir.), cert. denied, 111 S. Ct. 1398 (1991). Washington's choice of offense level was not supported by the record, and his cooperation affects the level of departure, not the setting of the offense level.

D.

Washington further claims that the district court improperly relied upon immunized statements. The court considered, as relevant conduct, quantities of marihuana about which Washington pro-

vided information to the government. He claims that such quantities should not have been used against him at sentencing.

The plea agreement provides, in part,

> [A]ny statements made by the defendant during the cooperation phase of this agreement shall not be used against the defendant in any subsequent prosecution unless and until there is a determination by the court that the defendant has breached this agreement. However, the United States government will be free to use at sentencing in this case any of the statements and evidence provided by the defendant . . . .

Washington claims that the plea agreement is "internally contradictory" and must "give way" to the more settled treatment of such statements and evidence as immunized. But § 1B1.8(a) provides that such statements and evidence are not to be used against the defendant, "except to the extent provided in the agreement."

The plea agreement unambiguously allows the use of information provided by the defendant at sentencing. It restricts the government's use of such information in the prosecution of the defendant, but the relevant conduct provision of the Guidelines, § 1B1.3, allows the court to consider the total quantity of drugs involved in the criminal conduct, including amounts not charged in the indictment. United States v. Mendoza-Burciaga, 981 F.2d 192 (5th Cir. 1992). Section 1B1.8(a) does not restrict the government's right to use the information provided by Washington, as the plea agreement expressly permitted it.

E.

Lastly, Washington argues that the government breached the plea agreement by including greater quantities of marihuana in

Washington's relevant conduct than Washington expected. By signing the plea agreement, Washington reasonably believed that he would be held accountable only for the 116 kilograms of marihuana. The court's consideration of other amounts of drugs as relevant conduct represents a breach of the plea agreement by the government.

This argument is without merit. The Guidelines allow all relevant conduct to be considered at sentencing, not just those acts charged in the indictment or conviction. Washington's belief that he was not responsible for the other drugs does not change the plain meaning of the plea agreement. Moreover, it is questionable whether Washington really believed that only the 116 kilograms of marihuana would be used against him. He signed an "Affidavit of Understanding of Maximum Penalty and Constitutional Rights" that indicated that his sentence could range from five to forty years. And he stated to the court, when he entered his plea, that he understood that the Guidelines would apply to his case and that he would be bound by his plea even if his sentence were more severe than expected. He confirmed that the relevant conduct was accurate and that no undisclosed promises were made to him. Thus, he has no recourse now.

III.

Miserendino raises one issue on appeal, contending that there was insufficient evidence to support the district court's finding that he was a leader and organizer of the conspiracy (which re-

sulted in a four-level enhancement). Miserendino argues that the court relied upon the PSR's findings of fact, which were supported by "unsworn assertions." He claims that there should have been a hearing pursuant to § 6A1.3(b) to determine whether he was a leader.

Section 6A1.3(a) requires that the court resolve any disputed factors for sentencing and ensures that the parties have an adequate opportunity to present information. It is within the judge's sound discretion to determine procedures to resolve such disputes. United States v. Pologruto, 914 F.2d 67 (5th Cir. 1990). Section 6A1.3(b) requires the court to resolve disputed sentencing factors in accordance with FED. R. CRIM. P. 32. There is no requirement that the district court conduct an evidentiary hearing.

The district court notified Miserendino of its tentative findings and gave him an opportunity to object. The court overruled his objections, giving specific reasons for its finding of fact: Miserendino was the owner of the marihuana, at least five individuals were involved in the transportation, and he actively financed the travel. The court found that these factors outweighed his assertion that he was only one link in the chain, that he did not recruit accomplices, that he did not claim a larger share of the profits, and that he did not exercise control over anyone (except two of the couriers). While "unsworn assertions . . . do not provide, by themselves, a sufficiently reliable basis on which to sentence [a] defendant," United States

v. Patterson, 962 F.2d 409, 415 (5th Cir. 1992), the PSR stated that the facts were corroborated by telephone records, rental car receipts, hotel records, and cellular phone records. Therefore, the district court was justified in relying upon them.

When a fact contained in the PSR is disputed and the defendant objects to the court's specific finding, the defendant has the burden of showing that the fact is materially untrue, inaccurate, or unreliable. United States v. Young, 981 F.2d 180 (5th Cir. 1992), cert. denied, 61 U.S.L.W. 3804 (U.S. 1993). The defendant failed to offer rebuttal evidence; the court therefore was free to adopt the PSR's facts without a more specific explanation. United States v. Rodriguez, 897 F.2d 1324, 1327 (5th Cir. 1990). Thus, the court was not clearly erroneous in its finding of a leadership role.

IV.

Cantwell raises one issue on appeal. He argues that the district court erred in failing to decrease his offense level by two points for his minor role pursuant to § 3B1.2(b). Cantwell states that he was never found to be in actual possession of the amount of marihuana to which he pled guilty, he never made trips to transport or pick up marihuana, and did not assist in the importation of the marihuana. Cantwell was, however, a frequent receiver of marihuana from the shipments into Florida. Under the comment to § 3B1.2, a defendant's participation is not minor

unless he is "substantially less culpable than the average participant."

It was Cantwell's burden to provide evidence of his minor role. Without any such showing, his consistent role as a distributor over a period of time precludes the finding that he was a minor participant. See, e.g., United States v. Thomas, 963 F.2d 63, 65 (5th Cir. 1992); United States v. Geraldo-Lara, 919 F.2d 19, 22 (5th Cir. 1990).

AFFIRMED.