

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4148
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM MICHAEL MERRILL,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 91-CR-20055 (6)
- - - - -
(March 22, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:*

Section 3B1.1(b) of the Sentencing Guidelines provides for a three-point increase in the offense level "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive[.]" The district court's determination that Merrill was a supervisor is a finding of fact reviewed for clear error. See United States v. Pierce, 893 F.2d 669, 676 (5th Cir. 1990).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

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In making its sentencing decisions, the district court may properly consider any relevant evidence "provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a). Because the presentence report (PSR) is reliable, it may be considered as evidence. United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992). However, objections which are merely in the form of unsworn assertions do not bear sufficient indicia of reliability to be considered. Id.

The PSR indicates that Merrill shipped marijuana belonging to a co-defendant, allowed his home to be used as a "stash house" for three or four shipments of marijuana, transported money from drug sales on three or four occasions, and "put together" some marijuana loads for transportation. These facts show that Merrill was more than just a drug courier and that he procured, stored, and shipped marijuana. At sentencing, Merrill submitted no rebuttal evidence challenging these underlying facts. He challenged only the PSR's ultimate factual conclusion that he was a supervisor, and he presented a letter from the Assistant United States Attorney expressing the opinion "that the facts of this case do not warrant classifying [Merrill] as a supervisor." Thus, the district court's finding that Merrill was a supervisor was based on information that was sufficiently reliable to have probable accuracy and was not clearly erroneous.

A district court is not required to depart downward because the Government files a § 5K1.1 motion. United States v. Damer, 910 F.2d 1239, 1240-41 (5th Cir.), cert. denied, 498 U.S. 991

(1990). The district court's application of § 5K1.1 is reviewed for an abuse of discretion. Id at 1241. Although the district court refused to depart downward, it sentenced Merrill to the lower end of the applicable guideline range in recognition of his cooperation. Thus, Merrill was rewarded for cooperating, and the district court did not abuse its discretion in refusing to grant the Government's § 5K1.1 motion for departure. See Damer, 910 F.2d at 1241.

The sentence is AFFIRMED.