IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4617

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALLEN JACK HOOKER, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(4:92cr52(2))

(November 15, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Allen Jack Hooker, Jr., was convicted of attempted possession with intent to distribute 50 kilograms or more of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846. He was sentenced to 124 months imprisonment and three years of supervised release and fined $5000. Hooker appeals his sentence. We affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. BACKGROUND

On October 31, 1992, Allen Jack Hooker, Jr. (Hooker) and co-defendants Allen Jack Hooker, Sr. (Hooker's father), Grace Helms Hooker (Hooker's stepmother), Juan Soto, and Randal Pease were arrested in Lewisville, Texas, after Hooker, Soto, and Pease negotiated the purchase of 200 pounds of marijuana from undercover police officers posing as drug suppliers. On November 12, 1992, a federal grand jury returned a four-count indictment charging Hooker and the other co-defendants with attempted possession with intent to distribute 50 kilograms or more of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846 (count one); conspiracy to possess 100 kilograms or more of marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846 (count three); and the use of certain forfeitable property in the commission of the offenses charged in the preceding counts (count four). The indictment also charged only Hooker's father and stepmother with possession with intent to distribute 500 grams or more of cocaine in violation of 21 U.S.C. § 841(a)(1) (count two).

On January 7, 1993, pursuant to a plea bargain agreement, Hooker pleaded guilty to count one of the indictment and agreed not to contest the forfeiture allegations contained in count four. In exchange for Hooker's guilty plea, the government agreed to dismiss count three and not to charge Hooker with any other criminal violations arising directly or indirectly from the

investigation, except for crimes of violence or Title 26 offenses.

The district court adopted as its factual findings those facts related by the probation officer in the pre-sentence investigation report (PSI). The district court found that

Hooker had been in a Missouri State prison, where he met Juan Soto, another inmate serving time on a narcotics charge. After Hooker had been paroled and during the time Soto was on furlough, Hooker and Soto sought marijuana to sell, and Soto contacted an individual in New Braunfels, Texas, whom Soto believed to be a person who could supply them with marijuana. That individual turned out to be a confidential informant working with the police department in New Braunfels.

On or about October 28, 1992, Hooker and Soto traveled to Lewisville, Texas, where they had arranged to meet with the informant and other "sellers" in order to purchase 200 pounds of marijuana. Before leaving Missouri, Hooker recruited Randal Pease to drive Hooker's car from Missouri to Texas and to chauffeur Hooker around while Hooker "visited his relatives." Pease was unaware that Hooker had hidden $60,000 in the car.

When Hooker, Soto, and Pease met the "sellers" in a motel in Lewisville, Hooker agreed to buy 200 pounds of marijuana from them at $500 per pound. Hooker and Pease then drove to the home of Hooker's father and stepmother, leaving Soto with the "sellers." Hooker, Hooker's father, and Pease returned a short

time later. Hooker, leaving his father in a car outside, reentered the motel room and dumped $100,000 in cash on the bed. Hooker also told the "sellers" that the man in the car outside was his father, who knew what was going on and who had a kilogram of cocaine that was for sale for $22,000. Hooker's father then returned home.

After arresting Hooker, Soto, and Pease, the undercover officers went to Hooker's father's home, where a consent search yielded $10,000 in the stepmother's purse, 628 grams of cocaine, and many ledgers that appeared to contain records of drug transactions. Hooker's father and stepmother were also arrested, although they told the officers that the cocaine belonged to Hooker.

Based on the 200 pounds of marijuana that Hooker attempted to purchase and the 626 grams of cocaine that agents found at the elder Hooker's home, the probation officer preparing Hooker's PSI determined that Hooker's base offense level under the United States Sentencing Guidelines (Guidelines) was 26. He also considered Hooker to have been a leader or organizer of a criminal activity involving five or more persons and accordingly assigned a four-level increase. However, for Hooker's acceptance of responsibility, the probation officer subtracted two points, leaving a total offense level of 28.

Hooker objected to the PSI, claiming that many of the facts related therein were inaccurate or untrue, but offered no evidence to rebut those facts. After considering Hooker's

objections, the district court accepted as its findings the facts related in the PSI and sentenced Hooker to 124 months imprisonment and three years of supervised release and to pay a $5000 fine. This appeal ensued.

II. STANDARD OF REVIEW

This court reviews a Guidelines sentence to determine whether the district court correctly applied the Guidelines to factual findings that are not clearly erroneous. United States v. Manthei, 913 F.2d 1130, 1133 (5th Cir. 1990); United States v. Murillo, 902 F.2d 1169, 1172-73 (5th Cir. 1990). Legal conclusions regarding the Guidelines are freely reviewed. Manthei, 913 F.2d at 1133. The district court may consider any evidence that has "sufficient indicia of reliability to support its probable accuracy," including evidence not admissible at trial. U.S.S.G. § 6A1.3, comment.; Manthei, 913 F.2d at 1138. The PSI itself bears such indicia. United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990).

III. DISCUSSION

Hooker raises numerous issues on appeal. We look at each of these in turn.

A. Relevant Conduct

Hooker first contends that the district court erred by considering the 628 grams of cocaine discovered in determining Hooker's base offense level. He bases this contention on the

facts that he was not indicted for possession of cocaine, that he did not plead guilty to possession of cocaine, and that no evidence was evinced that he possessed, attempted to possess, or intended to distribute the cocaine. He also contends that inclusion of the 628 grams of cocaine in his sentence calculation violated his plea agreement because it amounted to prosecution for a cocaine offense. We disagree.

Section 1B1.3 of the Guidelines holds a defendant liable for conduct relevant to the offense of conviction, i.e., conduct the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes. See U.S.S.G. § 1B1.3(a)(1)(A) (Nov. 1992). The Guidelines therefore provide that a court can consider a defendant's involvement with quantities of drugs not specified in the count of conviction as long as they were part of the same course of conduct or part of a common scheme or plan as the offense of conviction. See U.S.S.G. § 1B1.3(a)(2) (Nov. 1992); United States v. Mendoza-Burciaga, 981 F.2d 192, 198 (5th Cir. 1992), cert. denied, ___ S. Ct. ___ (Oct. 18, 1993); United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990). The defendant's involvement with these drugs needs only to have "occurred during the commission of the offense of conviction" for this involvement to be considered as relevant conduct. U.S.S.G. § 1B1.3(a)(1) (Nov. 1992).

Furthermore, in determining sentence, a district court may properly consider any relevant evidence "without regard to its admissibility under the rules of evidence applicable at trial,

provided that the information has sufficient indicia of reliability to support its probable accuracy." Alfaro, 919 F.2d at 964 (quoting U.S.S.G. § 6A1.3(a)). A defendant who objects to consideration of information by the sentencing court bears the burden of proving that the information is "materially untrue, inaccurate or unreliable." United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). A defendant who disputes information in his PSI without presenting rebuttal evidence fails to carry his burden, and the district court is free to adopt the facts in the PSI without further inquiry. See Mir, 919 F.2d at 943; United States v. Mueller, 902 F.2d 336, 346 (5th Cir. 1990).

Hooker's PSI, which the district court adopted as its findings of fact, states that Hooker told the undercover officers during his negotiations to purchase 200 pounds of marijuana that his father had cocaine which was for sale for $20,000, implying an offer to sell by Hooker. That Hooker was making such an offer is supported by the testimony of one of the undercover officers that "Hooker, Jr. made a statement that they [i.e., Hooker and at least one other person] had a kilo of cocaine either in the car or at the house" for sale for $22,000 (emphasis added). Although Hooker asserted that he made no such offer and that the cocaine in question was not his, he offered no rebuttal evidence. Hence, the district court did not clearly err in finding that Hooker offered the cocaine for sale during the same scheme in which he attempted to purchase the 200 pounds of marijuana.

Moreover, the inclusion of uncharged drugs in the sentencing calculation is not the equivalent of a prosecution. United States v. Kinder, 946 F.2d 362, 367 (5th Cir. 1991), cert. denied, 112 S. Ct. 1677, and cert. denied, 112 S. Ct. 2290, appeal after remand, 980 F.2d 961 (5th Cir. 1992), cert. denied, 113 S. Ct. 2376 (1993). The government thus kept its part of the plea agreement not to charge Hooker with any other criminal violations arising directly or indirectly from the investigation. Hooker's contention is without merit.

B. Use of the Correct Guidelines Manual

Hooker next maintains that because his sentencing took place in April 1993, the probation officer incorrectly used the 1992 Guidelines Manual and instead should have used the 1993 Guidelines Manual in computing his recommended sentence in the PSI. He thus contends that the district court, in adopting the sentence recommended in the PSI, erred in sentencing Hooker pursuant to the 1992 Guidelines Manual.

Section 1B1.11 of the Guidelines states that "the court shall use the Guidelines Manual in effect on the date that the defendant is sentenced." U.S.S.G. § 1B1.11 (Nov. 1992). Hooker was sentenced in April 1993. The 1993 Guidelines Manual becomes effective November 1, 1993. Therefore, the 1992 Guidelines Manual was in effect at the time Hooker was sentenced, and the district court did not err in sentencing Hooker pursuant to that Manual.

C. Acceptance of Responsibility

Hooker also argues that he qualified for a three-level reduction in his offense level for his acceptance of responsibility instead of the two-level reduction he was given. However, because Hooker failed to raise an objection at sentencing to the factual basis on which the district court determined his reduction level, he cannot raise the issue for the first time on appeal. United States v. Mourning, 914 F.2d 699, 703 (5th Cir. 1990) ("In a plea bargain case, this court will not review challenges to the factual basis of a guideline's applicability which have not been preserved by objection in the district court."). We therefore do not address his argument.

D. Leadership Role

Hooker further contends that the district court erred in assessing an increase in his base offense level for taking a leadership role in a criminal activity involving at least five individuals. He bases this contention on the government's admission at his detention hearing that "the government's position in this case is a sliding scale of who needs to be held, starting with Mr. Soto at the top and Mr. Pease at the bottom" and that thus Soto was the most culpable. He also maintains that the criminal activity at issue in this case did not involve five participants.

The Guidelines provide that more than one person may be deemed a leader or organizer for sentencing purposes. See U.S.S.G. § 3B1.1, comment n.3 (Nov. 1992). In making the

determination of whether a defendant is a leader or organizer, the district court is to consider such factors as "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, [and] the claimed right to a larger share of the fruits of the crime." Id.

Although the district court found that Soto arranged the marijuana purchase, the court also found that Hooker's participation in the criminal activity at issue was multi-faceted: Hooker provided the cash for the attempted marijuana purchase, negotiated with the "sellers" at the motel, recruited Pease to transport part of the purchase money from Missouri to Texas, and paid the expenses of the defendants who were staying at the motel where the marijuana purchase was to take place. Furthermore, Hooker offered no evidence to refute this description of his participation.

The indictment in this case listed five defendants, all of whom the district court found to be involved in a common plan or scheme to engage in drug trafficking. As reported in the PSI, and uncontested by Hooker, (1) Hooker's father and stepmother were found in possession of $10,000 cash and drug ledgers; (2) Hooker's father admitted that he frequently brought cocaine to their home where it was repackaged and sold in Missouri; (3) Pease became aware of the drug transactions in progress and did nothing to remove himself from involvement; and (4) Soto made the phone contacts to set up the marijuana purchase and was present

in the motel room with Hooker when Hooker told the undercover agents that "they" had a kilogram of cocaine for sale. The district court, therefore, did not err in determining Hooker's leadership role in a criminal activity which involved at least five participants and increasing his base offense level accordingly.

E. Statements in Hooker's PSI

Hooker also argues that his PSI contains numerous misleading statements. Specifically, he argues that statements about his prior arrests, substance abuse, and prosecutions which did not result in arrest--information contained under the heading "Other Criminal Conduct" in the PSI--prejudiced him at sentencing.

Rule 32(c)(2)(A) of the Federal Rules of Criminal Procedure mandates that a PSI contain information of the defendant's prior criminal record. Moreover, such information was not used in determining Hooker's sentence. His argument is therefore without merit.

F. Two Hundred Pounds of Marijuana

Hooker further contends that 200 pounds of marijuana, or 90.72 kilograms, should not have been attributed to him in sentencing because the indictment and the plea agreement were for an offense involving 50 kilograms. Again, we disagree.

The indictment charged and Hooker pleaded guilty to an offense involving the intent to distribute 50 kilograms or more of marijuana in violation of 21 U.S.C. § 841(b)(1)(C). The district court found that Hooker was involved in the negotiation

to purchase 200 pounds of marijuana for $500 per pound, and Hooker offered no evidence to rebut this finding. Therefore, the district court did not err in attributing 200 pounds of marijuana to Hooker in determining Hooker's sentence.

G. $5000 Fine

Finally, Hooker contends that the district court improperly assessed a $5000 fine against him because he filed a financial affidavit showing his lack of assets and was represented by appointed counsel.

"The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." U.S.S.G. § 5E1.2(a) (Nov. 1992); see also United States v. Voda, 994 F.2d 149, 154 n.13 (5th Cir. 1993); United States v. Matovsky, 935 F.2d 719, 722 (5th Cir. 1991). Although Hooker filed an affidavit showing his lack of assets, Hooker's PSI reported that Hooker had stated "that when he went to prison in Missouri in 1986, he had several hundred thousand dollars[,] . . . that he used this all the while he was in prison[,] . . . [and] that he took what was left when he got out of prison and used it to try to purchase the marijuana involved in this case." Although Hooker originally objected to this statement in his PSI, he withdrew his objection at sentencing. Hooker has therefore not established that he is unable to pay the fine or is unlikely to be able to pay in the future. Thus, the district court did not err in imposing the $5000 fine on Hooker.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.