

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5498
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BURTON EDWARD BAILEY, JR.,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 93-CR-119-2
- - - - -

(May 18, 1994)

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

PER CURIAM:*

"Review of sentences imposed under the guidelines is limited to a determination whether the sentence was imposed in violation of law, as a result of an incorrect application of the sentencing guidelines, or was outside of the applicable guideline range and was unreasonable." United States v. Matovsky, 935 F.2d 719, 721 (5th Cir. 1991). The sentencing judge is in a unique position to evaluate whether a defendant has accepted responsibility. United States v. Brigman, 953 F.2d 906, 909 (5th Cir.), cert. denied, 113 S.Ct. 49 (1992). This Court applies a very deferential

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

standard of review to a district court's refusal to credit a defendant's acceptance of responsibility. See United States v. Thomas, 12 F.3d 1350, 1372 (5th Cir.), petition for cert. filed, (U.S. April 11, 25, 1994) (No. 93-8655 and No. 93-8862) (applying "clearly erroneous" standard and noting, that there "appear[ed] to be no practical difference" between that standard and the "without foundation" or "great deference" standards used in other cases) (internal quotations and citations omitted).

The defendant bears the burden of proving that he is entitled to the downward adjustment, United States v. Kinder, 946 F.2d 362, 367 (5th Cir. 1991), cert. denied, 112 S.Ct. 2290 (1992), and is not entitled to a reduction simply because he has entered a guilty plea. U.S.S.G. § 3E1.1 comment. (n.3); see United States v. Shipley, 963 F.2d 56, 58 (5th Cir.), cert. denied, 113 S.Ct. 348 (1992). A defendant cannot deny part of his relevant criminal conduct and receive a reduction for acceptance of responsibility as to the conduct that he has admitted. United States v. Smith, 13 F.3d 860, 865-66 (5th Cir. 1994); see United States v. Kleinebreil, 966 F.2d 945, 953-54 (5th Cir. 1992).

In making sentencing decisions, the district court properly considers 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 PSR is reliable, it may be considered as evidence. United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992). Objections in the form of unsworn assertions, however, do not bear sufficient indicia of

reliability to be considered. Id. If no relevant affidavits or other evidence are submitted to rebut the information contained in the PSR, the court is free to adopt its findings without further inquiry or explanation. United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990).

The probation officer reported that during his interview with Bailey, Bailey denied key elements of his involvement in the offense during his interview with his probation officer. Bailey objected but did not present evidence to refute the probation officer's report. Consequently, the district court properly relied on the information in the PSR.

Bailey's argument that the district court erroneously denied him acceptance of responsibility in order to equalize his sentence with Landry's sentence is also without merit. Taking all of the district court's comments in context, the trial court consistently based its denial of acceptance of responsibility on Bailey's reluctance, until the time of his sentencing, to accept responsibility for his conduct. Timeliness of the defendant's conduct in manifesting acceptance of responsibility is a relevant factor to be considered in awarding a downward adjustment for acceptance of responsibility. See U.S.S.G. § 3E1.1 comment. (n.1 (g), (h)). The district court did not err in refusing to grant Bailey a three-point downward adjustment for acceptance of responsibility.

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.