

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7088
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FERNANDO VALDEZ-GUTIERREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR L 92-231-01)

(September 20, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Fernando Gutierrez appeals his sentence imposed after his plea of guilty of possession of more than 100 kilograms of marihuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Valdez-Gutierrez ("Valdez") was charged with marihuana offenses in four counts of an indictment. Pursuant to a plea agreement, he pleaded guilty on count 4, and the other counts were dismissed. The district court sentenced him to serve 60 months' imprisonment and four years' supervised release, the minimum provided by § 851(b)(1)(B).

II.

The relevant facts are stated in the presentence report ("PSR"), which the district court adopted, as follows. On September 7, 1992, border patrol agents were performing line-watch duties along the Rio Grande River about two miles south of the port of entry at Laredo, Texas. At about 9:45 p.m., the agents encountered several persons walking on a trail from the river toward Meadow Street. These persons were carrying large bundles, which the agents believed contained illegal narcotics. It appeared that Valdez was leading the other individuals.

When the agents identified themselves, all of the persons except Valdez dropped their bundles and ran toward the river. The person who was helping Valdez carry one bundle pushed it into Valdez, knocking him to the ground. This enabled one of the agents to apprehend Valdez. In the area, the agents found eight duffel-bag bundles containing about 500 pounds of marihuana. Valdez stated that the bundles and the persons who carried them had crossed the river in two rafts. One raft carried the marihuana;

the other carried Valdez and the others who were going to unload it.

III.

A.

Valdez contends that the district court erred by sentencing him to serve the mandatory minimum for possession with intent to distribute 100 kilograms or more of marihuana. He argues that only the one bundle he was carrying, which weighed about 63.5 pounds, should have been attributed to him. Valdez asserts that his sentence as a minimal participant should have been between 18 and 24 months, based upon a total offense level of 15.

"It is well-established law in this circuit that, as a general matter, the burden of proof at sentencing is by a preponderance of the evidence." United States v. Mergerson, 995 F.2d 1285, 1291 (5th Cir. 1993). Furthermore, "[a] district court's determination of the amount of drugs involved in an offense is protected by the clearly erroneous standard of appellate review." Id. at 1293.

"This circuit is part of an overwhelming majority of courts which have concluded that quantity is not an element of the offenses proscribed by § 841(a). Rather, quantity is relevant only at sentencing under § 841(b)." United States v. Royal, 972 F.2d 643, 650 (5th Cir. 1992) (citations omitted), cert. denied, 113 S. Ct. 1258 (1993). "The same standards govern the district court's drug quantity determinations for section 841(b) and the Sentencing Guidelines." United States v. Jones, 965 F.2d 1507,

1517 (8th Cir.), cert. denied, 113 S. Ct. 346, 439 (1992), 113 S. Ct. 2418 (1993).

The district court correctly advised Valdez at his rearraignment that he was pleading guilty only to having possessed marihuana with the intent to distribute it and that the quantity of marihuana and his resultant sentence would be determined later. In determining the sentence pursuant to § 841(b), the court also was correct in applying the relevant-conduct provision of the sentencing guidelines, as exemplified in the first Illustration[] of Conduct for Which the Defendant is Accountable under the Commentary to U.S.S.G. § 1B1.3. "[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Stinson v. United States, 113 S. Ct. 1913, 1915 (1993). Accordingly, the district court sentenced Valdez to the mandatory minimum provided by § 841(b)(1)(B) because it was greater than the maximum of the applicable guideline range. See U.S.S.G. § 5G1.1(b).

As in the illustration of § 1B1.3 referred to in the previous paragraph, Valdez "aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment)." Similarly, the objective of the venture in which Valdez participated was to transport all the marihuana on the raft across

the river without detection. Valdez admittedly knew that he was a member of a group of individuals whose goal was to smuggle eight bundles of marihuana into the United States. Therefore, the district court's finding that approximately 500 pounds of marihuana was attributable to Valdez for sentencing purposes was not clearly erroneous.

B.

Valdez contends, with no citation of authority, that imposition of the mandatory minimum sentence violated the Eighth Amendment's prohibition of cruel and unusual punishment because § 844(b) fails to take into consideration any mitigating factors. The Supreme Court has expressly rejected this argument, holding that it "has no support in the text and history of the Eighth Amendment." Harmelin v. Michigan, 111 S. Ct. 2680, 2701 (1991).

AFFIRMED.