

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7541
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REGINALD DANIEL WALKER,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 4:93-CR-7
- - - - -
(July 19, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

Reginald Daniel Walker appeals his sentence for conspiracy to distribute cocaine base ("crack cocaine") contending that the district court erred in attributing to him for sentencing purposes 17 grams of crack cocaine that his co-defendant, Cox, had in his actual possession at the time of their arrest. He also contends that the district court erred in enhancing his base offense level two points for Cox's possession of a dangerous weapon.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Walker confessed to his involvement in the drug-trafficking scheme, stating that he and Cox had received other packages containing approximately one-half kilogram of crack cocaine each. The district court found that the 17 grams was from an earlier shipment to the co-defendants.

As long as the total amount of drugs to be distributed by a conspiracy is foreseeable by an individual conspirator, that conspirator is to be sentenced on the basis of the total amount of drugs distributed by the conspiracy, not just by the amount distributed by the individual conspirator. United States v. Patterson, 962 F.2d 409, 414 (5th Cir. 1992). The focus is on the amount involved in the conspiracy. United States v. Giraldo-Lara, 919 F.2d 19, 21 (5th Cir. 1990). The district court's findings regarding the quantity of drugs on which a sentence should be based are factual findings reviewed for clear error. United States v. Mitchell, 964 F.2d 454, 457 (5th Cir. 1992). The finding that Cox's possession of 17 grams from an earlier shipment was foreseeable by Walker is not clearly erroneous.

Walker contends that he did not, actually or constructively, possess the weapon carried by Cox. Walker suggests that this Court has misinterpreted § 2D1.1 by allowing its application when a weapon was "present," but the defendant did not actually or constructively possess a weapon. This panel may not overrule previous panel decisions absent en banc reconsideration or a superseding contrary decision of the Supreme Court. Matter of Dyke, 943 F.2d 1435, 1441-42 (5th Cir. 1991).

Section 2D1.1(b) provides for a two-level increase "if a dangerous weapon was possessed." The "adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1, comment. (n.3). The Government must prove possession by a preponderance of the evidence. United States v. Mergerson, 4 F.3d 337, 350 (5th Cir. 1993), cert. denied, 114 S.Ct. 1310 (1994). When another individual involved in the offense possessed the firearm, the Government must show that the defendant could have reasonably foreseen that possession.

The PSR provided that Cox was known to carry a firearm. According to Cox, Walker knew that Cox had a weapon on his person the day they picked up the package. The district court adopted the PSR's attribution to Walker of knowledge of that firearm. The information in the PSR had the requisite indicium of reliability, see United States v. Vela, 927 F.2d 197, 201 (5th Cir.), cert. denied, 112 S.Ct. 214 (1991), and Walker did not meet his burden of proving that it was materially untrue. See United States v. Rodriguez, 897 F.2d 1324, 1328 (5th Cir.), cert. denied, 498 U.S. 857 (1990). The district court's decision to apply § 2D1.1(b)(1) was not clearly erroneous.

AFFIRMED.