UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8186
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LARRY GENE COBB,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(W 90 CR 2)

(October 21, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Larry Gene Cobb appeals his sentence for possession of methamphetamine with intent to distribute. We affirm.

I.

The police investigation of Larry Gene Cobb began when law enforcement authorities received reports from informants suggesting that Cobb was involved in the distribution of methamphetamine in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Waco, Texas. The informants reported that William Carl Morgan, Jr., the owner of Waco Auto Salvage, was one of Cobb's distributors. The informants also reported that at least a half pound of methamphetamine per week was sold out of the office at Waco Auto Salvage. According to the informants, Cobb would either remain on the premises or frequent the premises until the methamphetamine was sold in order to help Morgan sell it.

Based on these reports, the Waco police department conducted a six-month investigation of Cobb and his connection to Waco Auto Salvage. While conducting surveillance of Waco Auto Salvage, the police observed Cobb coming and going on an almost daily basis. Waco Police Officer Paul Harris testified at the sentencing hearing that on some days there would never be a car at the business, but on other days, including days Cobb was there, the parking lot was "full of cars, people coming and going on a steady basis for several hours." According to Officer Harris, in his experience, such activity suggested that illegal drugs were being sold from Waco Auto Salvage.

Finally, in November 1989, federal, state, and local law enforcement officers executed a search warrant at Cobb's residence and seized several bags of methamphetamine in powdered form from Cobb's person, as well as a number of firearms, drug paraphernalia, and $2,468 cash from his residence. The methamphetamine seized weighed 11.06 grams, and the firearms included a Rugger mini 14 rifle, and a semi-automatic pistol with a clip and 14 rounds of ammunition.

On the same day, the officers also executed a search warrant

at Waco Auto Salvage, where they found 89.83 grams of methamphetamine, $10,293 cash, and assorted packaging and paraphernalia associated with the distribution of methamphetamine.

On June 4, 1990, Cobb pled guilty to a superseding information charging him with possession of methamphetamine with the intent to distribute, a violation of 21 U.S.C. § 841(a)(1). In exchange for his plea, the government moved to dismiss the original indictment charging him with conspiracy to distribute methamphetamine, and the district court granted the motion.

In preparing Cobb's presentence report, the probation officer attributed the 89.83 grams of methamphetamine found at Waco Auto Salvage to Cobb. Added to the 11.06 grams of methamphetamine seized from Cobb's person, the quantity of drugs used to determine his base offense level was 100.89 grams of methamphetamine. Cobb's base offense level also was increased two levels for the firearms found at his residence, and reduced two levels for his acceptance of responsibility.

Finding it "probable that Mr. Cobb was aware of and involved in the distribution taking place at Waco [Auto] Salvage," the district court, on October 2, 1990, accepted the attribution of the 89.83 grams to Cobb and sentenced him to 63 months imprisonment followed by five years of supervised release and imposed a $3,000 fine and a $50 mandatory assessment. The defendant now seeks to have that sentence vacated and asks that his case be remanded to the district court for resentencing.

II.

The defendant presents four arguments why his sentence should be vacated. First, the defendant argues that the district court erred in attributing an excessive quantity of drugs to him. Second, he maintains that the district court erred in refusing to reduce his base offense level because of his mitigating role in the offense. Third, he contends that the district court erred in assessing the specific characteristic for firearm possession against him. Finally, he asserts that the district court erred in sentencing him for possession of a Schedule II controlled substance because methamphetamine has not been reclassified properly from Schedule III to Schedule II. Having considered each of these arguments, we affirm the sentence imposed by the district court.

A.

The defendant first challenges the attribution of the 89.83 grams of methamphetamine found at Waco Auto Salvage to him. He argues that the informants' reports relied on by the district court connecting him to Waco Auto Salvage lacked the necessary indicia of reliability.

As our cases indicate, a specific factual finding by a district court as to the quantity of drugs involved will be reviewed only for clear error. **United States v. Kinder**, 946 F.2d 362, 366 (5th Cir. 1991), **cert. denied**, ___ U.S. ___, 112 S.Ct. 1677, 118 L.Ed.2d 394, **and cert. denied**, ___ U.S. ___, 112 S.Ct. 2290, 119 L.Ed.2d 214 (1992). Such findings will be disturbed only if they are implausible in light of the entire record. **United States v. Alfaro**, 919 F.2d 962, 966 (5th Cir. 1990).

Any information used in sentencing must bear some indicia of reliability to support its probable accuracy. U.S.S.G. § 6A1.3(a). The district court, however, has wide discretion in evaluating the reliability of information and in deciding whether to consider it. **Kinder**, 946 F.2d at 366. Moreover, a defendant who objects to the use of information 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), **aff'd**, 979 F.2d 210 (5th Cir. 1992).

In this case, the district court's decision to attribute the 89.83 grams of methamphetamine to Cobb was not clearly erroneous. Two informants reported to law enforcement officers that large amounts of methamphetamine were being sold from Waco Auto Salvage and that Cobb was present during these transactions. Officer Harris testified at the sentencing hearing that these informants had provided reliable information in the past and that their names remained confidential for their safety.

Based on these reports, the officers began their surveillance of Waco Auto Salvage, observing Cobb's frequent presence, as well as customer traffic associated with the sale of illegal drugs.

Following his arrest, Morgan told agents that Cobb had initiated him into the drug business, that Cobb had been supplying him with drugs, and that only recently had their roles switched with Morgan supplying Cobb.

The surveillance of Waco Auto Salvage and Morgan's admissions corroborate the information supplied by the unidentified informants and thus provide it with the necessary indicia of reliability.

Moreover, Cobb failed to present any evidence at the sentencing hearing to prove that this information should not be relied upon by the district court, as it was his burden to do. Therefore, based on the entire record, it was plausible, and not clear error, for the district court to find that Cobb had an awareness of and involvement in the activities at Waco Auto Salvage.

Cobb further argues that the government should have been required to prove the quantity of drugs attributable to him by clear and convincing evidence. Our cases, however, hold that the proper standard of proof is by a preponderance of the evidence, **see, e.g., Alfaro**, 919 F.2d at 965.

Cobb also argues that the government breached the plea agreement by advocating the attribution of the drugs found at Waco Auto Salvage to him. Neither the plea agreement nor the superseding information specified the quantity of drugs involved. The government, however, did agree to refrain from prosecuting Cobb for other known violations committed in the Western District of Texas. The plea agreement was not breached though, because as we have explained: "Consideration of relevant conduct in the selection of a defendant's sentence within the range of permissible punishment established by Congress for his offense of conviction is not the equivalent of prosecuting the defendant for an offense additional to his offense of conviction." **United States v. Hoster**, 988 F.2d 1374, 1378 (5th Cir. 1993).

B.

Cobb argues next that the district court erred in failing to reduce his offense level based on his minor participation in the

criminal activity. Although Cobb raised this issue in his written objections to the presentence report, he failed to raise it at sentencing, and thus, the district court did not make a specific finding on it. Indeed, Cobb failed to present any evidence at the sentencing hearing on this issue, despite bearing the burden of establishing that he was entitled to such a reduction. **See United States v. Cuellar-Flores**, 891 F.2d 92, 93 (5th Cir. 1989).

As we have noted before, "issues raised for the first time on appeal 'are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice.'" **United States v. Garcia-Pillado**, 898 F.2d 36, 39 (5th Cir. 1990). Since a sentence reduction based on a defendant's mitigating role involves factual determinations and not pure questions of law, it would be particularly inappropriate for us to entertain such an argument for the first time on appeal.

C.

Cobb contends next that the district court erred in increasing his offense level for the firearms found at his residence. At sentencing, however, defense counsel conceded the legal argument and withdrew the objection to the enhancement. The district court thus did not make a finding as to whether or not it was clearly improbable that the weapons found at the residence were connected to the offense. We also decline to entertain this argument for the first time on appeal.

D.

Finally, Cobb argues that the district court erred in sentencing him for possession with the intent to distribute a

Schedule II controlled substance. He argues that methamphetamine has not been properly reclassified from Schedule III to Schedule II. This issue also was not presented to the district court. Although this argument does involve a pure question of law, we have rejected the same argument previously, **see United States v. Allison**, 953 F.2d 870, 873-74 (5th Cir.), **cert. denied**, ___ U.S. ___, 112 S.Ct. 2319, 119 L.Ed.2d 238 (1992); **Kinder**, 946 F.2d at 368, and therefore, no manifest injustice will occur if we do not consider it in this case for the first time on appeal.

III.

Having found that the district court did not commit clear error in attributing the 89.83 grams of methamphetamine found at Waco Auto Salvage to Cobb, and having found that the appellant's other arguments were not properly preserved for our review, we affirm the sentence imposed by the district court.

AFFIRMED.