IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8271

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DOMINGO S. RODRIGUEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP-92-CR-285-3)

(April 4, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Domingo S. Rodriguez pled guilty to possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), as well as to conspiracy to possess and distribute cocaine and marijuana with intent to distribute in violation of 21 U.S.C. § 846. Subsequently, he was sentenced to concurrent sixty-month prison terms and to concurrent four-year periods of supervised

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

release. Additionally, Rodriguez was ordered to pay a special assessment of $100. Rodriguez requested in forma pauperis status, but the district court determined that Rodriguez's appeal was frivolous and consequently denied the request. Proceeding pro se, Rodriguez paid the filing fee and now challenges his conviction. After reviewing his claims, we affirm the judgment of the district court.

I. BACKGROUND

In June of 1992, Chris Perez, a special agent with the Bureau of Alcohol, Tobacco & Firearms, was informed by other law enforcement personnel that Martin Galvan-Rodriguez wanted to sell drugs and firearms in El Paso, Texas. Galvan-Rodriguez and Perez began negotiations and were later joined by Rodrigo Valles Montes. In July of 1992, after several aborted attempts at a transaction, Perez was notified by Galvan-Rodriguez that cocaine and marijuana were available for purchase. The two men met in a motel room, and Galvan agreed to sell Perez cocaine for $22,000 per kilogram and to make the marijuana available after the cocaine was delivered.

Perez, along with another law enforcement officer, went to the location in El Paso where the cocaine was to be delivered. They were followed to that location by Montes and Galvan-Rodriguez. A short time later, an automobile driven by Robert Castillo arrived. Rodriguez was a passenger in that car. Perez approached the car, and Rodriguez opened up a bag containing

something. Next, Rodriguez left the car and tried to give the bag to Perez, but Montes intervened. Montes and Perez then entered Perez's vehicle, while Rodriguez waited outside. Perez opened the bag, discovered two kilograms of cocaine, and gave the arrest signal. Rodriguez and the other men were arrested, and subsequently, a small bag of marijuana was discovered in the automobile in which Rodriguez had arrived.[1]

Rodriguez, Montes, Castillo, and Galvan-Rodriguez were indicted by a grand jury in a two-count indictment for possession of cocaine with intent to distribute and for conspiracy to possess cocaine and marijuana with intent to distribute. Additionally, the government notified all of the defendants that it intended to seek enhanced penalties pursuant to 21 U.S.C. § 841 (b)(1)(B)(ii)(II).

During the proceedings surrounding the case, Rodriguez's attorney indicated that Rodriguez intended to plead guilty to the charges. In a January 11, 1993 docket call, Rodriguez's attorney commented that he "had previously informed the Court that we would be ready to enter a plea of guilty," but that he needed time to investigate "the possibility of state charges arising out of the same incident that haven't been disposed of." The district court allowed Rodriguez's counsel time to investigate

[1] In his presentence interview, Rodriguez did not dispute these facts. He does argue, however, that he was not involved in negotiations for marijuana or firearms. Rodriguez avers that he was asked to deliver the cocaine in exchange for $300, and that he asked his friend, Castillo, to give him a ride to make the drop-off.

those charges, and on January 29, 1993, Rodriguez's counsel stated that, "we have discussed with the state authorities on the other side their disposition of charges based on the same circumstances, on the same facts. And we're ready to enter a guilty plea in this case . . . pending the State delivering to us a letter declining those cases . . . ."

Just over a month later, Rodriguez appeared before the district court and pleaded guilty to the indictment. Before accepting the plea, the district court, through an interpreter, engaged Rodriguez in a colloquy. During this colloquy, Rodriguez informed the district court that he understood that he was giving up the right to a trial, and Rodriguez stated that he understood the charges against him. Although Rodriguez claimed that was not involved with the marijuana negotiations, he stated that he was going to plead guilty to the cocaine conspiracy.[2]

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[2] During the discussion of the charges, this exchange took place:

THE COURT[:] Mr. Domingo Rodriguez, do you understand the charges in both counts?

MR. RODRIGUEZ[:] I do understand. I didn't do any negotiation with them for marijuana.

THE COURT: Okay. . . . You did the cocaine but no marijuana., is that right?

. . . .

MR. RODRIGUEZ[:] I didn't speak with any agent about any marijuana . . . .

. . . .

THE COURT[:] All right, but you're going to plead guilty to the cocaine conspiracy, is that right.

The district court then advised Rodriguez:

> that even under those circumstances [Rodriguez's lack of involvement in the marijuana conspiracy], the range of punishment of these offenses would be the following: You could be sentenced by the Court to not less than five or more than forty years imprisonment. You could be sentenced to pay a fine of up to $2,000,000 as a maximum, or the Court could do both, that is, sentence you to imprisonment and also impose a fine.

Rodriguez replied that he understood. The district court also advised Rodriguez that he would be subject to not less then four years of supervised release following any term of imprisonment. The district court reiterated that Rodriguez, by pleading guilty, gave up his right to trial, and the court informed Rodriguez that through his plea, he also was waiving his rights to confront and cross-examine witness, to call witnesses to testify in his defense, and to remain silent. Rodriguez stated that he understood that all of these rights would be lost if he entered a guilty plea.

Finally, Rodriguez assured the court that his plea was voluntary: that no one had used force or threatened him in order to make him enter the plea; that no one's promise induced him to enter the plea; and that he was pleading guilty of his own free will. After hearing these admonitions and listening to the factual basis of the charges, the district court accepted Rodriguez's plea. Subsequently, Rodriguez was sentenced.

Rodriguez argues that the district court erred: in failing to find that Rodriguez was a minor or minimal participant in the

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> Mr. RODRIGUEZ[:] I will to the cocaine.

conspiracy; in failing to hold a factual hearing to resolve that issue; in sentencing him to the same punishment as his co-defendants; and in accepting his guilty plea as voluntary.

II. STANDARDS OF REVIEW

We are reluctant to upset a district court's determination of whether a defendant is entitled to a reduction in sentence as a minimal or minor participant in the conspiracy under U.S.S.G. § 3B1.2. Accordingly, we have stated that, "the district court's refusal to grant . . . [a] reduction under [U.S.S.G. § 3B1.2] is entitled to great deference and should not be disturbed except for clear error." United States v. Devine, 934 F.2d 1325, 1340 (5th Cir.), cert. denied, 502 U.S. 929 (1991).

In examining the adequacy of a plea colloquy, we review for harmless error. United States v. Johnson, 1 F.3d 296, 302 (5th Cir. 1993) (en banc). Further, "[t]o determine whether [an] error is harmless (i.e., whether the error affects substantial rights), we focus on whether the defendant's knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty." Id. On the other hand, the acceptance of a guilty plea is deemed a factual finding that there is an adequate factual basis for the plea as required by Federal Rule of Criminal Procedure 11(f). We review this finding under the clearly erroneous standard. United States v. Adams, 961 F.2d 505, 509 (5th Cir. 1992).

III. DISCUSSION

A. Sentencing Claims

Rodriguez's first claim surrounds the district court's use of the presentence report in determining his sentence. Specifically, Rodriguez argues that, "the [d]istrict [c]ourt made no attempt to evaluate the factual accuracy of the issues which were objected to by all of the defendants." According to Rodriguez, "[t]he procedures used by the district court failed to fulfill the requirements of [Fed. R. Crim. P. 32(c)(3)(D)], and thus, the matter must be returned to the district court for resentencing." We, however, disagree.

The Federal Rules of Criminal Procedure provide that:

> If the comments of the defendant and the defendant's counsel . . . allege any factual inaccuracy in the presentence investigation report . . . the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

Fed. R. Crim. P. 32(c)(3)(D). As Rodriguez properly notes, under this provision, "[t]he court is required to resolve specifically disputed issues of fact if it intends to use those facts as a basis for its sentence." United States v. Rodriguez, 897 F.2d 1324, 1327 (5th Cir.), cert. denied, 498 U.S. 857 (1990). We have also stated, however, that, "the finding need not be in any particular form, as long as this Court is able to determine from the record whether the district court found the challenged fact in favor of or against the defendant and whether the fact

affected the sentence." United States v. Reese, 998 F.2d 1275, 1285 (5th Cir. 1993).

The presentence investigation report concluded that, "[a]ccording to available information, it appears that Rodriguez is equally culpable to codefendants Montes and Galvan-Rodriguez as he was fully aware of the negotiations and was an active participant in the conspiracy." At Rodriguez's sentencing hearing, Rodriguez's counsel informed the court that:

> There simply is no showing that Mr. Rodriguez did any act in furtherance of anything having to do with a marijuana transaction. And I've also asked the Court to grant an adjustment for minor participation on his participation on his behalf when it's obvious from the Government's version the facts that this man did nothing in the whole deal more than pick up a package and move it and drop it off.

The district court specifically addressed Rodriguez's contentions, sustaining the objection "as far as whether or not [Rodriguez] count[ed] in the marijuana." The district court also discussed Rodriguez's other claim, ruling "as far as the other objection that you made concerning role in the offense, I'll have to overrule that. I don't think he qualifies as a minor participant in this particular case and under the scenario that I recall hearing in evidence."

It is clear that the district court specifically addressed Rodriguez's objections, finding that the evidence did not support Rodriguez's objection that he was a minor participant and agreeing not to consider the marijuana conspiracy in sentencing. In short, the district court made "a finding as to the allegation" or determined "that no such finding is necessary

because the matter controverted will not be taken into account in sentencing." Thus, the district court met the requirements of Rule 32(c)(3)(D). See United States v. Charroux, 3 F.3d 827, 836 (5th Cir. 1990) (finding that a district court's specific reference to each disputed issue in a PSR and its indication that the defendant's objections were without merit "satisf[ied] Rule 32(c)(3)(D)"); United States v. Puma, 937 F.2d 151, 155 (5th Cir. 1991) (noting that district court's express rejection of defendant's challenge to presentencing report satisfied the requirements of Rule 32(c)(3)(D)), cert. denied, 502 U.S. 1092 (1992).

In addition to the procedure followed by the district court, Rodriguez also challenges the district court's determination that he was not a minimal or a minor participant in the conspiracy. Notably, Rodriguez does not dispute the facts underlying the cocaine conspiracy; instead, he argues that given the facts of the case, the district court erred in not finding that he was a minor participant. Again, however, we disagree with Rodriguez's contentions.

The sentencing guidelines provide for a reduction in the offence level by four levels "i[f] the defendant was a minimal participant in any criminal activity" and by two levels "[i]f the defendant was a minor participant in any criminal activity." U.S.S.G. § 3B1.2. The guidelines define minimal participants as defendants "who are plainly among the least culpable of the those involved in the conduct of the group." U.S.S.G. § 3B1.2, note 1;

see also Devine, 934 F.2d at 1340 (discussing the guidelines). Similarly, the guidelines describe a minor participant as "any participant who is less culpable than most other participants, but whose role could not be described as minimal." U.S.S.G. § 3B1.2, note 2; see also Devine, 934 F.2d at 1340.

In the instant case, the district court found that Rodriguez was not a minor participant, and we find no clear error in that conclusion. We have noted that the fact that others are more culpable than a defendant "does not imply that [the defendant] was a `minor' participant." United States v. Mueller, 902 F.2d 336, 346 (5th Cir. 1990). Additionally, we have stated, that, "[a] district court may find that a defendant was a courier and not a minimal or minor participant." United States v. Hewin, 877 F.2d 3, 5 (5th Cir. 1989); accord United States v. Velasquez, 868 F.2d 714, 715 (5th Cir. 1989); United States v. Buenrostro, 868 F.2d 135, 138 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990).

Rodriguez admitted to delivering a substantial quantity of drugs. His co-conspirators entrusted him with tens of thousands of dollars worth of contraband, which, with full knowledge of its nature, Rodriguez agreed to deliver. We find no clear error in the district court's determination that Rodriguez's delivery of the contraband did not make him a minor participant in the crime. See United States v. Zuniga (upholding denial of reduction under U.S.S.G. § 3B1.1 when defendant was heroin courier).[3]

[3] Rodriguez raises the argument that he was a minimal participant for the first time on appeal. Accordingly, we review this claim for plain error. United States v. Calverley, 37 F.3d

Rodriguez also claims that the district court erred in sentencing him to a term of incarceration equal to or greater than his codefendants despite the fact that Rodriguez was not involved in the marijuana negotiations. This claim is also meritless. Rodriguez does not and cannot suggest that his sentence exceeded the guideline or statutory range, and, as we have noted, a defendant "cannot base a challenge to his sentence solely on the lesser sentence given by the district court to his codefendant." United States v. Boyd, 885 F.2d 246, 249 (5th Cir. 1989).

B. Voluntariness of the Plea

Rodriguez also asserts that his plea was not knowingly and willingly made; rather he claims that his plea was coerced by his attorney. Additionally, Rodriguez argues that his plea was not knowing or voluntary in that he expected that he would receive a lesser term than his codefendants; an expectation "derived from the advi[c]e of the attorney and the failure of the court to alert the defendant, prior to h[i]s agreement to plead guilty, that the court was constrained by law to sentence him to a statutory minimum." Finally, Rodriguez claims that his plea was coerced by "the government's use of its peremptory challenges" in

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160 (5th Cir. 1994) (en banc), petition for cert. filed, March 3, 1995. For the reasons described above, we also find there was no plain error by the district court in not characterizing Rodriguez as a minimal participant.

violation of Batson v. Kentucky, 476 U.S. 79 (1986). All of these claims are without merit.

We have noted that "[f]or a plea to be knowing and voluntary, `the defendant must be advised of and understand the consequences of the [guilty] plea.'" United States v. Gaitan, 954 F.2d 1005, 1011 (5th Cir. 1992) (quoting United States v. Pearson, 910 F.2d 221, 223 (5th Cir. 1990), cert. denied, 498 U.S. 1093 (1991)). Understanding the "consequences" of a guilty plea "with respect to sentencing, mean[s] only that the defendant must know the maximum prison term and fine for the offense charged. As long as [the defendant] understood the length of time he might possibly receive, he was fully aware of his plea's consequences." Pearson, 910 F.2d at 223 (second alteration in original) (internal quotation and citation omitted); accord United States v. Young, 981 F.2d 180, 184 (5th Cir. 1992); Gaitan, 954 F.2d at 1011.

In the instant case, before accepting the plea, the district court explicitly discussed the consequences of the plea with Rodriguez. The district court explicitly informed Rodriguez that he "could be sentenced by the Court to not less than five or more than forty years imprisonment. You could be sentenced to pay a fine of up to $2,000,000 as a maximum, or the Court could do both." Rodriguez told the district court that he understood the penalties which he was subjected to by his guilty plea. Accordingly, we find that Rodriguez was fully aware of the consequences of his plea.

Rodriguez's argument that he was somehow coerced into pleading guilty by the composition of the jury is equally unavailing. Long before the jury was selected in the trial of one of his codefendants, Rodriguez, through counsel, indicated his intention to plead guilty, asking for a continuance before entering his plea only to investigate "the possibility of state charges arising out of the same incident that haven't been disposed of." Simply put, there is nothing in the record to indicate that the composition of the jury in any way coerced Rodriguez to plead guilty.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM.