

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8309  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VALENTE LICON-HERNANDEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. P-92-CR-102-4

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(October 29, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:\*

Valente Licon-Hernandez (Licon) argues that the district court failed to comply with the requirements of Fed. R. Crim. P. 32 during the sentencing hearing. Specifically, Licon asserts that the district court did not make any findings on the issue of whether Licon participated in an escape attempt.

During an evidentiary hearing Licon denied that he knew anything about the escape attempt or that he planned to escape.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

A government official who investigated the attempted escape presented his findings at the hearing and summarized the statements of three inmates who implicated Licon in the offense.

Under Rule 32, if the comments, testimony, or evidence introduced by the defendant or his 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).

This Court affords the district court a certain degree of discretion in implementing Rule 32(c) and U.S.S.G. § 6A1.3(b), p.s. (the relevant policy statement in the guidelines):

The method by which the district court chooses to address the requirements of Rule 32(c) and guideline 6A1.3(b) in a given case is for that court to select. As the guidelines direct, "[t]he sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law." Sentencing Guideline 6A1.3, commentary.

United States v. Rodriguez, 897 F.2d 1324, 1327 (5th Cir.), cert. denied, 498 U.S. 857 (1990) (citing United States v. Burch, 873 F.2d 765, 767-68 (5th Cir. 1989)). Licon challenged the probation officer's determination that he participated in the escape attempt at the jail. Thus a factual dispute materially affecting sentencing existed that required resolution with specific fact findings.

The district court stated that he would "accept as correct the statements of fact that are contained in the presentence report, . . . both the original and the addendum." By so doing, the court at least implicitly compared the conflicting positions of the probation officer and the defense and found the probation officer's facts more credible. See United States v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992). "Rule 32 does not require a catechismic regurgitation of each fact determined and each fact rejected when they are determinable from a PSR that the Court has adopted by reference." Sherbak, 950 F.2d at 1099.

The single question at issue during the evidentiary hearing was whether Licon was involved in the escape attempt. In addition to adopting the facts contained in the PSR, the court also adopted the probation officer's recommendation concerning the applicable guideline range, which corresponded to the increase in the sentence that the probation officer deemed necessary to adequately reflect the more serious nature of Licon's offense in light of his escape attempt. Although Licon asserts that the district court made no determinations concerning his credibility, the court stated that it believed that Licon had lied under oath in testifying about his involvement in the escape attempt. Licon's reliance on United States v. Morgan, 942 F.2d 243 (4th Cir. 1991), is unpersuasive. We permit an implicit finding based on the district court's adoption of the PSR. Compare Sherbak, 950 F.2d at 1098-99 with Morgan, 942 F.2d at 245-46. Because the district court clearly resolved the disputed facts pursuant to Rule 32(c)(3)(D), Licon's sentence is AFFIRMED.

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