UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8329
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT PEREZ, a/k/a Bobby Perez,
RICARDO TORREZ, a/k/a Chicken Man, and
DAVID RODRIGUEZ LOERA, a/k/a Weda,

Defendants-Appellants.

Appeals from the United States District Court for the
Western District of Texas
(W-92-CR-63-15)

(July 25, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Appellants-defendants David Loera (Loera), Robert Perez (Perez), and Ricardo Torrez (Torrez) (collectively appellants) were convicted of conspiring to possess with intent to distribute in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

excess of one hundred kilograms of marihuana, in violation of 21 U.S.C. §§ 846 and 841(a)(1). On appeal, appellants allege numerous points of error in their convictions and sentences. For the reasons explained below, we affirm.

Facts and Proceedings Below

From May of 1986 to May of 1992, Daniel Sosa Nieto (Nieto) headed a marihuana trafficking conspiracy which was operated out of a transmission repair shop in San Antonio, Texas. The organization purchased and packaged marihuana, then transported it from San Antonio to Saginaw and Flint, Michigan. The marihuana was driven from Texas to Michigan by drivers employed by the organization, and was sold to individuals who distributed the marihuana in Flint and Saginaw. The organization shipped an average of 1,000 pounds of marihuana per month for the 72 months of its existence.

Loera joined the conspiracy in the spring of 1988 and, thereafter, performed various functions for the Nieto organization. For a period of time he ran the organization's operations in Michigan. Later, he took over control of Nieto's corporation, Dawn, Inc., which operated night clubs in the San Antonio area for the purpose of laundering drug money.

Perez became associated with Nieto sometime in late 1985 or early 1986, and was a member of the conspiracy from its inception. He helped Nieto establish the distribution network in Michigan, and later returned to San Antonio where he worked at the transmission shop loading vehicles with marihuana.

Torrez was Nieto's largest customer in Michigan, receiving and reselling as much as eight hundred pounds of marihuana per month. Torrez would pay Nieto for marihuana when Torrez resold it and was

paid by his customers. Torrez operated three stash houses in Michigan and had numerous individuals working on his behalf.

On August 11, 1992, a fourteen-count Superseding Indictment was filed in the United States District Court for the Western District of Texas, naming twenty-five defendants, including appellants. On December 3, 1992, a jury found Loera, Perez, and Torrez guilty on Count Two of the Superseding Indictment, which charged them, as well as twenty-two others, with conspiring to possess and distribute in excess of one hundred kilograms of marihuana, in violation of 21 U.S.C. §§ 846 and 841(a)(1). The district court sentenced Loera to 360 months of imprisonment; Perez and Torrez were sentenced to terms of imprisonment of 240 months. Thereafter, appellants timely filed a notice of appeal to this Court.

Discussion

Appellants raise several claims of error, including the following contentions: (1) the improper denial of Loera's motion to suppress evidence found in a search of his home; (2) the limitation on the impeachment of three witnesses called by Perez and Torrez; (3) the government's withholding of information that would have assisted in the impeachment of a witness; (4) the sentencing attribution of an excessive amount of marihuana to Perez; (5) the erroneous assignment of a three-point offense level increase for Torrez's role as a manager or supervisor; and (6) the failure to assign a two-level reduction for Torrez's acceptance of responsibility. We consider these issues in this order.

I. Denial of Loera's Motion to Suppress

On April 28, 1992, DEA Special Agent Thomas Wade (Wade) applied for a warrant to search David Loera's residence. The majority of what the application listed as "Items to be Seized" were records of the importation, transportation, or sale of marihuana.[1] In support of the application, Wade submitted a fifty-eight-page affidavit. A magistrate judge issued the warrant on the date of the application. Wade executed the warrant on May 4, 1992 and, pursuant to the search, seized a trash compactor containing marihuana residue, packaging material, a wedding ring, miscellaneous photographs and documents, a briefcase with documents, and three firearms. Prior to the trial, Loera moved to suppress evidence seized in the search of his residence, contending that the affidavit supporting the search warrant contained information that was stale and was also insufficient to establish a nexus between the Nieto organization and Loera's residence. The district court heard argument and, subsequently, denied the motion. Loera now argues that the district court erred in denying his motion to suppress.

We review the denial of a motion to suppress evidence seized pursuant to a warrant to determine first whether the good faith exception to the exclusionary rule applies, and second whether the warrant was supported by probable cause. *United States v. Satterwhite*, 980 F.2d 317, 320 (5th Cir. 1992); *United States v.*

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[1] The application also listed as items to be seized: (1) marihuana and evidence of marihuana packaging; (2) drug trafficking proceeds; and (3) firearms.

Leon, 104 S.Ct. 3405 (1984). If the good-faith exception applies, we need not reach the question of probable cause, unless the case involves a "novel question of law whose resolution is necessary to guide future action by law enforcement officers and magistrates." *Illinois v. Gates*, 103 S.Ct. 2317, 2346 (1983) (White, J., concurring); *see also Satterwhite*, 980 F.2d at 320; *United States v. Webster*, 960 F.2d 1301, 1306 (5th Cir.), *cert. denied*, 113 S.Ct. 355 (1992).

In *Leon*, *supra*, the Supreme Court held that, even if an affidavit upon which a search warrant is based is insufficient to demonstrate probable cause, evidence seized by law enforcement officers acting in objectively reasonable good-faith reliance upon the warrant is admissible. 104 S.Ct. at 3420-21. "Issuance of a warrant by a magistrate normally suffices to establish good faith on the part of law enforcement officers who conduct a search pursuant to the warrant." *United States v. Craig*, 861 F.2d 818, 821 (5th Cir. 1988). There are four exceptions to this general rule, but only the third is at issue here; *i.e.*, whether the warrant was based on an affidavit "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'"[2] *Leon*, 104 S.Ct. at 3421 (quoting *Brown*

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[2] The four exceptions are:

> "[1] if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth[;] . . . [2] where the issuing magistrate wholly abandoned his judicial role[;] . . . [3] [if] a warrant [is] based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely

v. Illinois, 95 S.Ct 2254, 2265-66 (1975)). Our review of the reasonableness of an officer's reliance is *de novo*.

The fifty-eight-page affidavit, prepared by DEA Agent Wade, states that, based upon his experience and training, individuals who deal in illegal controlled substances often keep evidence of that activity in their homes. The affidavit details the workings of the Nieto organization, describing drug trafficking activities occurring as early as 1986 and as late as October 1991. With particular regard to Loera, the affidavit provides information furnished by a confidential informant that the informant had picked up marihuana at Loera's residence. The affidavit also relates that Loera was a key member of the Nieto organization, that he controlled Nieto's nightclub operations, and that he organized drivers for deliveries from Texas to Michigan.

"[I]f 'the information of the affidavit clearly shows a longstanding, ongoing pattern of criminal activity, even if fairly long periods of time have lapsed between the information and the issuance of the warrant, the information need not be regarded as stale.'" *Craig*, 861 F.2d at 822 (quoting *United States v. Webster*, 734 F.2d 1048, 1056 (5th Cir. 1984)). Here, although much of the information contained in Agent Wade's affidavit concerns events that occurred more than one year prior to issuance of the warrant, the affidavit demonstrates a "long-standing, ongoing pattern of

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> unreasonable[]'; [and] [4] . . . [where the] warrant [is] so facially deficientSQ*i.e.*, in failing to particularize the place to be searched or the things to be seizedSQthat the executing officers cannot reasonably presume it to be valid." *Leon*, 104 S.Ct. at 3421 (quotations and citations omitted).

criminal activity." *Id*. Furthermore, the type of evidence sought in the warrantsQ*i.e.*, "records of drug-trafficking activitysQ'is of the sort that can reasonably be expected to be kept for long periods of time in the place to be searched.'" *United States v. Kleinebreil*, 966 F.2d 945, 949 (5th Cir. 1992) (quoting *Craig*, 861 F.2d at 823). Finally, the search warrant was issued on the same day that the grand jury handed down the first indictment naming Loera as a defendant in this case. Hence, it was reasonable to assume that Loera might begin hiding, transferring, or destroying evidence in response to the indictment. *Cf*. *Kleinebreil*, 966 F.2d at 949.

We conclude that the affidavit contained sufficient "indicia of probable cause" so that the officers' reliance on the warrant was objectively reasonable and in good faith. Because the good-faith exception to the exclusionary rule applies, we do not reach the issue of probable cause.

II. Limitation on Impeachment Examination

Both Perez and Torrez argue that the district court improperly limited the cross-examination of certain government witnesses. During the trial, Perez's counsel attempted to question government witness Donna Unser Stowe about testimony she gave before the grand jury that handed down the indictment in this case. The government objected to this line of questioning, arguing that counsel failed to lay a proper predicate, and the district court sustained the objection. Torrez's counsel also attempted to question two government witnesses, Jill Silva and Kay Stall, about their grand jury testimony; once again the government objected based on

counsel's failure to lay a proper predicate, and the court sustained the objection. In all three cases, however, after the court sustained the government's objections, neither Perez's counsel nor Torrez's counsel made an offer of proof to the district court regarding the testimony they sought to elicit.

A trial court's rulings admitting or excluding evidence will not be reversed except for abuse of discretion. *United States v. Wicker*, 933 F.2d 284, 289 (5th Cir.) (citing *Muzyka v. Remington Arms Co., Inc.*, 774 F.2d 1309 (5th Cir.1985)), *cert. denied*, 112 S.Ct. 419 (1991). Under Federal Rule of Evidence Rule 103, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . (2) [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." FED.R.EVID. 103(a)(2). On all three matters, there is no showing of substantial rights of the parties affected in the exclusion of this evidence. Moreover, appellants did not make an offer of proof, nor is the substance of the excluded evidence apparent from the record. Hence, we do not reach the merits of appellants' claims on appeal because neither Perez nor Torrez preserved the error for appeal.

III. Withholding of Information

Next, Perez argues that his impeachment of government witness Ella Ramsey was impaired by the government's withholding of information obtained during her debriefing by the DEA, and that such withholding violated *Giglio v. United States*, 92 S.Ct. 763

(1972) and the Jencks Act, 18 U.S.C. § 3500. Perez alleges that this debriefing took place on December 3, 1991, and that during the debriefing Ramsey made statements inconsistent with a statement she later made at trial that indicated Perez was active in the organization in June 1987.[3] Perez alleges that this was prejudicial to his sentence (he asserts no prejudice as to the finding of guilt).

As authority for his factual allegations, Perez cites paragraph forty-five of his presentence investigation (PSR). However, neither this citation nor any other part of the record support Perez's contentions. Paragraph forty-five of the PSR states: "On December 3, 1991, the DEA debriefed another CI [(Confidential Informant)] who was offered use immunity in exchange for information and testimony about the CI's activities with the Daniel Nieto Organization."[4] Perez raises this contention for the first time on appeal, although the PSR was available to him prior to sentencing. Because there is no basis in the record for Perez's factual contentions, we cannot evaluate the merits of his claim and therefore decline to reach its merits, if any. *See United States v. Dula*, 989 F.2d 772, 776 (5th Cir.), *cert. denied*, 114 S.Ct. 172 (1993). We express no opinion as to whether or not Perez may

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[3] In his original brief on appeal, Perez says the debriefing was December 3, 1992, the last day of trial; in his reply brief Perez says the date was December 3, 1991.

[4] Perez contends that "[b]ased on [the PSR's description of the CI], there can be no question that the CI was Ellen Ramsey." However, without some record evidence indicating that the CI referred to in paragraph forty-five of the PSR was in fact Ramsey, we cannot make such a deductive leap.

appropriately seek relief under 28 U.S.C. § 2255.

IV. Relevant Amount of Marihuana

Perez also challenges his sentence. He argues that the district court attributed to him an excessive amount of marihuana in connection with his relevant conduct under the United States Sentencing Guidelines (the Guidelines). Under section 2D1.1(a)(3) of the Guidelines, the offense level of a defendant convicted of a drug trafficking offense is determined by the quantity of drugs involved in the offense. This quantity includes both drugs with which the defendant was directly involved, and drugs that can be attributed to the defendant in a conspiracy as part of his "relevant conduct" under section 1B1.3(a)(1) of the Guidelines. Section 1B1.3(a)(1) defines relevant conduct for conspiratorial activity as the "all *reasonably foreseeable* acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1)(B) (emphasis added).

The sentencing court may make an approximation of the amount of marihuana reasonably foreseeable to each defendant, and an individual dealing in a large amount of controlled substances is presumed to recognize that the drug organization with which he deals extends beyond his "universe of involvement." *United States v. Thomas*, 963 F.2d 63, 65 (5th Cir. 1992). When calculating the amount foreseeable to a defendant, a court may consider the defendant's relationship with co-conspirators and his role in the conspiracy. *United States v. Devine*, 934 F.2d 1325, 1338 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 954 (1992). "In arriving at this

estimate the court may consider any information that has 'sufficient indicia of reliability to support its probable accuracy.'" *Thomas*, 963 F.2d at 64-65 (citations omitted).

We will uphold the factual findings made by a district court in its determination of a defendant's relevant conduct for sentencing purposes unless that figure is clearly erroneous. *United States v. Maseratti*, 1 F.3d 330, 340 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1096 (1994); *United States v. Buckhalter*, 986 F.2d 875, 879 (5th Cir.), *cert. denied*, 114 S.Ct. 203 (1993).

Perez's PSR concluded that the Nieto organization transported an average of 1,000 pounds of marihuana per month for the 72-month period beginning May 1986 and ending May 1992. An extra 3,000 pounds was added to this amount in connection with a separate shipment, for a total of 75,000 pounds, or 34,020 kilograms. The PSR recommended that Perez be held accountable for the full amount. Perez objected to the PSR, contending that his involvement in the Nieto organization ended in 1988.

At sentencing, Perez asserted that his active participation in the conspiracy ended when he stopped driving in 1986, and he suggested that the correct time period for which he should be held accountable was 1986 through 1988, for a total of 24 months. The district court noted that by its calculation, Perez's involvement in the conspiracy from May 1986 through 1988 totalled 32 months, for a relevant amount of 32,000 pounds. Perez did not object to this calculation. Now, for the first time on appeal, Perez complains that the evidence is insufficient to support the district court's calculation of drug quantity. Because we do not review

factual sufficiency claims when raised for the first time on appeal, we dismiss Perez's claim. *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1163 (5th Cir. 1992).

Even if we were to consider Perez's claim, however, the district court did not clearly err in concluding that Perez was involved with the conspiracy for thirty-two months. Perez's PSR reported that Perez was with the Nieto organization at its inception in 1985 or 1986. At the sentencing hearing, DEA Agent Wade testified that Perez participated in the conspiracy at least until late 1988 or 1989, after which time Wade had no information regarding Perez's involvement in the organization. After reviewing the information available to the district court, we conclude the court's finding is plausible in light of the record read as a whole. Thus, the court did not err in concluding that it was reasonably foreseeable to Perez that 32,000 pounds of marihuana was transported during his tenure with the Nieto organization.

V. Manager/Supervisor Finding

At sentencing, the district court assigned Torrez a three-point increase in offense level for being a manager or supervisor under section 3B1.1 of the Sentencing Guidelines. Section 3B1.1(b) provides that "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase [the offense level] by 3." Torrez contends that the court erred in its application of the Guidelines. Torrez argues that although he controlled an organization that distributed marihuana that was purchased from Nieto, he exercised no managerial control in the

Nieto organization, and thus should not be considered a manager in connection with the offense of conviction.

We will uphold a sentence imposed under the Sentencing Guidelines so long as it is the result of a correct application of the Guidelines to factual findings which are not clearly erroneous. *United States v. Zuniga*, 18 F.3d 1254 (5th Cir. 1994) (citation omitted). The determination of a defendant's role in an offense is factual in nature, subject to review for clear error. *Id*.

Torrez's PSR identified him as a manager or supervisor in the Nieto organization. He was Nieto's largest retailer in the Saginaw area. He operated three stash houses and managed numerous individuals in the off-loading, storage, and distribution of wholesale quantities of marihuana. The PSR recommended a three-point increase for his role in the offense.

At sentencing, the district court determined that Torrez unquestionably was a manager or supervisor of his own organization, and that Torrez's distribution ring was "the life blood of the Nieto organization." The court heard arguments on whether, given that he was convicted for his role in the Nieto organization, his role as a manager/supervisor of his own distribution ring justified the three-point increase. The court concluded that assigning an increase for Torrez's role in the scheme comported with the purpose of section 3B1.1; the court stated that it assigned the increase "because of concerns about relative responsibility, and it is likely that persons who exercise a supervisory role in the commission of an offense tend to profit more from it and present a greater danger to the public and are more likely to recidivate."

Accordingly, the court adopted the findings and calculation in the PSR.

On appeal, Torrez does not deny his participation in the Nieto conspiracy, nor does he maintain that the court erred in its characterization of his role; rather, he urges that the court misapplied the Guidelines by looking beyond the offense of conviction for this purpose. This contention is foreclosed by a clarifying amendment to the Guidelines, effective November 1, 1990, and by Fifth Circuit precedent. An amendment to the commentary accompanying U.S.S.G. § 3B1.1 clarified whether a court should consider collateral conduct in determining a defendant's role in the offense. The new introductory comment provides:

> "The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct), *i.e.*, all conduct included under § 1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction." U.S.S.G. § 3B1.1, intro. comment.

Section 1B1.3 allows a court to consider such acts and omissions "that were part of the same course of conduct or common scheme or plan as the offense of conviction" in making sentencing decisions. U.S.S.G. § 1B1.3(a)(2). *See also United States v. Mir*, 919 F.2d 940, 945 (5th Cir. 1990) ("It is not the contours of the offense charged that defines the outer limits of the transaction; rather it is the contours of the underlying scheme itself."). Clearly, Torrez's distribution ring was part of the larger conspiracy and, thus, his management and supervision of the distribution ring is relevant conduct for the purpose of sentencing. Hence, we conclude that the district court correctly applied the Guidelines in

considering Torrez's role in the offense.[5]

VI. Acceptance of Responsibility

Finally, Torrez argues that the district court improperly denied him a two-level reduction for acceptance of responsibility because it did not make any findings regarding his objection to the PSR's recommendation that the reduction be denied.

Rule 32 of the Federal Rules of Criminal Procedure "requires the court either to make specific findings as to all contested facts contained in the PSR that the court finds relevant in sentencing, or determine that those facts will not be considered in sentencing." *United States v. Hooten*, 942 F.2d 878, 881 (5th Cir. 1991); FED.R.CRIM.P. 32(c)(3)(D). Rule 32 does not, however, "require a catechismic regurgitation of each fact determined and each fact rejected," *United States v. Sherbak*, 950 F.2d 1095, 1099 (5th Cir. 1992); "instead, we have allowed the district court to make implicit findings by adopting the PSR. This adoption will operate to satisfy the mandates of Rule 32 when the findings in the PSR are so clear that the reviewing court is not left to 'second-guess' the basis for the sentencing decision." *United States v. Carreon*, 11 F.3d 1225, 1231 (5th Cir. 1994).

In the case *sub judice*, the district court adopted the findings and recommendation of the PSR. The PSR concluded that Torrez had been untruthful during his debriefing, tried to minimize

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[5] We also reject Torrez's contention that the district court refused to find the requisite number of people involved. We construe the district court's comments, on which Torrez relies, to relate only to the Nieto organization *per se*, and not to Torrez's own organization.

his participation in the conspiracy, and pleaded not guilty to the charges against him. Because the district court adopted these findings, and because the findings are manifestly clear, we will not "second-guess" the basis for the sentencing decision. Accordingly, we affirm the district court's decision not to grant Torrez a reduction for acceptance of responsibility.

Conclusion

For the reasons stated above, appellants' arguments are rejected and their convictions and sentences are hereby

AFFIRMED.