IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8356
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ERNEST ROGER OLIVO a/k/a
Desparado,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(W-92-CR-63-8)

(February 17, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

I

Ernest Roger Olivo, a/k/a "Desparado," was indicted along with twenty-four other defendants and charged in six counts of a fourteen-count superseding indictment with various drug-related and money-laundering offenses. Olivo pleaded guilty to all six

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

counts--conspiracy and attempt to possess with the intent to distribute, establishing and maintaining a location for the unlawful distribution of marijuana, money laundering, aiding and abetting, and carrying a firearm in relation to a drug-trafficking offense.

The PSR determined that the base offense level for Counts Two, Four, Six, and Seven (the counts referring to the overall marijuana conspiracy) totalled 38 for a conspiracy involving 34,030 kilograms or 75,000 pounds of marijuana. The base offense level for Count Eleven, the money-laundering charge, was 23, and adjustments were added pursuant to U.S.S.G. § 2S1.1(b)(1) for Olivo's knowledge of the funds's illegal source and under § 2S1.1(b)(2)(B) based on the amount of money involved, more than $100,000. Count Thirteen, carrying a firearm in relation to a drug-trafficking felony, was not included in the PSR determinations because the offense carries a five-year mandatory consecutive term. The combined adjusted offense level was 38 as it was the greater of the separate groups of offenses. The PSR recommended a three-level reduction for acceptance of responsibility, making the total offense level 35. A two-point adjustment under § 4A1.1(d) was made to Olivo's criminal history for Olivo's committing these offenses while on probation. The PSR recommended a guideline range of 188 to 235 months imprisonment based on a total offense level of 35 and a criminal history category of II, but noted that Count Four, the attempt charge, carried a maximum punishment of 60 months and Count

Thirteen, the firearms count, carried a 60-month mandatory consecutive sentence.

Olivo submitted objections to the PSR, challenging the recommendation that he be held accountable for 34,020 kilograms or 75,000 pounds of marijuana for a base offense level of 34, the entire amount of drugs attributed to the conspiracy, instead of a lesser amount of 6,332.25 kilograms. He also objected to the statement in the PSR that he had admitted assisting in the bookkeeping for the Michigan operation. Olivo challenged the failure of the PSR to award a reduction for his role in the offense. Finally, Olivo objected to the 2-point increase under his criminal history calculation, asserting that he was not under probation at the time of the offense because his probation had been revoked as a result of a DWI conviction.

Rejecting Olivo's objections, the district court pronounced concurrent sentences of 188 months as to Counts Two, Six, Seven, and Eleven, a concurrent 60 months for Count Four, mandatory consecutive 60 months for Count Thirteen, a five-year supervised release term for Count Two, and three-year supervised release terms for the remaining counts, all to be served concurrently, and a $300 special assessment. The judgment entered by the court reflected that Olivo received a sentence of 188 months for Count Four, instead of 60 months. Olivo received permission from the district court to file this out-of-time notice of appeal.

II

Olivo argues that the district court erred by basing Olivo's sentence on the total amount of marijuana attributed to the conspiracy. He contests the district court's implicit findings that he was involved in the conspiracy for six years and that he reasonably foresaw that the organization transported from Texas to Michigan an average of 1,000 pounds per week. Olivo asserts that he was merely a "foot soldier" in this conspiracy and disagrees with the probation officer's determination that he assisted with the organization's bookkeeping because of his illiteracy.

The district court's findings regarding the quantity of drugs on which a sentence should be based are factual findings reviewed for clear error. U.S. v. Mitchell, 964 F.2d 454, 457 (5th Cir. 1992). A district court may consider the total quantity of drugs involved in the conspiracy, provided that the defendant knew or should have known that at least such amount was involved in the conspiracy. U.S. v. Vela, 927 F.2d 197, 201 (5th Cir.), cert. denied, 112 S.Ct. 214 (1991).

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. U.S. v. Patterson, 962 F.2d 409, 414 (5th Cir. 1992). The focus is on the amount involved in the conspiracy. U.S. v. Giraldo-Lara, 919 F.2d 19, 21 (5th Cir.

1990). The sentencing court, moreover, is not limited to actual amounts seized or specified in the indictment. Id. The PSR provides that Olivo was involved in the conspiracy since the organization's inception in 1986 and that he helped establish the "stash house" locations in San Antonio, Texas, and in Burt, Michigan. Olivo personally admitted to transporting one load, 80 pounds, of marijuana per month. Moreover, the drug ledgers seized by the agents indicated that 1,000 pounds of marijuana per month was transported from San Antonio to Saginaw, Michigan. Also, the PSR clearly indicates that Olivo should have known that approximately 75,000 pounds of marijuana was involved in this conspiracy. From his personal and weekly involvement in either transporting or breaking up and packaging the loads of marijuana, establishing the various locations in both Texas and Michigan, and actively negotiating the purchases with the informants, it is evident that he understood the organization's sophisticated involvement. See PSR ¶¶ 109-116.

"A defendant who objects to the use of information [in a PSR] bears the burden of proving that it is `materially untrue, inaccurate or unreliable.'" U.S. v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991), cert. denied, 112 S.Ct. 1677, 2290 (1992) (citation omitted). Olivo offered no evidence that the information in the PSR was materially untrue. Moreover, a review of the record, particularly the PSR, shows that the court did not clearly err by

using 75,000 pounds of marijuana as the amount of drugs to calculate the total offense level. Mitchell, 964 F.2d at 457.

III

Next, Olivo contends that he was not on probation at the time of the instant offenses and that he should not have received a two-level adjustment to his criminal history score pursuant to § 4A1.1(d).

Olivo contests the district court's adding of the two points asserting that the probated sentence had been revoked. Olivo argues that he received a DWI conviction on February 29, 1988, and was sentenced to twenty-four months probation which was revoked on June 13, 1989, at which time he received a thirty-day jail sentence. Olivo urges that a review of § 4A1.2(k)(1) and § 4A1.2, comment. (n.11) indicates that the intent of the Sentencing Guidelines was to merge a sentence revocation back into its underlying conviction and to allow the probated sentence to be completely discharged for sentencing purposes.

Under § 4A1.1(d), the district court adds two levels to a defendant's criminal history category "if the defendant committed the instant offense while under any criminal justice sentence, including probation." U.S. v. Baty, 931 F.2d 8, 10 (5th Cir. 1991). Section 4A1.2(k) covers probation revocations and other conditional sentences if the original term of imprisonment imposed did not exceed one year and one month. The defendant must have actually served a period of imprisonment or incarceration. See §

4A1.2, comment. (n.2). This provision is inapplicable as Olivo received a sentence of probation for 24 months. A sentence of probation is treated as a sentence under § 4A1.1(c) unless a condition of probation requiring imprisonment of at least sixty days was imposed. See § 4A1.2, comment. (n.2). Under § 4A1.1(c), one point is added, up to a total of four points, for each prior sentence not counted in §§ 4A1.1(a) or (b), which require three points for each sentence exceeding one year and one month and two points for each sentence exceeding at least sixty days but not more than one year and one month, respectively. See § 4A1.1(c).

The indictment charges and the PSR notes that the offense conduct took place from on or about May 1, 1986, to April 27, 1992.[1] Olivo was arrested for driving while intoxicated on November 6, 1987; he was placed on probation for 24 months on February 29, 1988. His probation was revoked on June 13, 1989, at which time he was sentenced to 30 days in jail. The probation officer responded that there was no doubt that Olivo was on probation when he committed part of the instant offense. Ruling on this objection, the district court inquired:

> THE COURT: I'm almost inclined to ask how he [Olivo] got revoked if he was never on probation.
>
> MR. MOODY: [Attorney for Olivo] Yes, Your Honor.

[1]Paragraph 2 of the PSR obviously contains a typographical error regarding the dates on which the conspiracy allegedly ended as it reads that Count Two alleges "continuing until on or after April 27, 1991," when the indictment actually reads to April 27, 1992.

> THE COURT: It would seem to me that the writers of the Guideline intended that someone who committed a criminal act while on probation should be punished more severely and held more culpable than someone who does not, and the fact that that probation was later revoked shouldn't affect that. I'll overrule that objection, and you'll have that for New Orleans.

Olivo's contention that he was not on probation is belied by the PSR which clearly states that a 24-month probationary period was imposed on February 29, 1988, for a DWI conviction. Even if his probation was ultimately revoked on June 13, 1989, Olivo was, as the probation officer claims, under a criminal justice sentence during the initial stages of the marijuana conspiracy within the meaning of § 4A1.1(d). The district court did not err in adjusting his criminal history category by two levels for being on probation at the time of the offense.

IV

Olivo argues that there is a discrepancy between the sentence imposed on Count Four during the sentencing hearing, sixty months, and the sentence shown on the Judgment, 188 months. Olivo concedes that if this is merely a clerical error, then it could be corrected pursuant to Fed. R. Crim. P. 36 or remanded for correction in accordance with Rule 35(a).

Although the district court correctly pronounced the maximum term of punishment on Count Four of sixty months during the hearing, the Judgment does not reflect such a sentence. However, the government appropriately argues that because the district court imposed concurrent sentences of 188 months for Counts Two, Six,

Seven, and Eleven, and an additional consecutive term of 60 months for Count Thirteen, this clerical mistake has no consequence. Olivo, nonetheless, will be required to serve 248 months. If a discrepancy exists between an orally imposed sentence and a written order of judgment and commitment, the oral sentence controls. U.S. v. Shaw, 920 F.2d 1225, 1231 (5th Cir.), cert. denied, 111 S.Ct. 2038 (1991). The controlling sentence in this case, therefore, is the one announced during the sentencing hearing, which provides for a sentence of sixty months on Count Four, to be served concurrently with the other sentences imposed. A clerical error in a judgment "arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders." FED. R. CRIM. P. 36. The district court merely needs to correct the error in the judgment and commitment order. The court, therefore, has committed no reversible error, but the case is hereby REMANDED to allow the district judge to correct the judgment to show a sentence of sixty months on Count Four instead of 188 months.

V

For the reasons stated herein, the sentence of Ernest Roger Olivo is

AFFIRMED and REMANDED for entry of corrected judgment.