

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8475
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

PABLO ARIAS PUIG,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-93-CR-39-(1))

(March 29, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:¹

Puig challenges his guideline sentence following his guilty plea. We find no error and affirm.

I.

Pablo Arias Puig, the defendant, and Fidel Aguilar, III, were named in a five-count indictment charging them with conspiracy to distribute cocaine, possession of firearms in a school zone, distribution of cocaine, and distribution of cocaine within 1000

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

feet of an elementary school. Puig entered a guilty plea to count one - conspiracy to distribute cocaine and count five - distribution of cocaine within 1000 feet of a school. The factual basis accompanying the plea agreement stated that Puig and Aguilar conspired together to distribute cocaine from June of 1992 through January 25, 1993. The factual basis stated that Puig sold Aguilar one-half ounce of cocaine for \$400 cash on January 25, 1993, within 1000 feet of an elementary school. Further, the factual basis stated that Puig was Aguilar's supplier and that Aguilar had purchased cocaine at least twice a week from Puig during the entire course of the conspiracy. The district court accepted Puig's plea and sentenced him to 100 months of imprisonment on each count, with the terms of imprisonment to be serve concurrently. Puig timely filed a notice of appeal.

II.

A.

Puig first argues that the district court was clearly erroneous in finding that the conspiracy involved approximately 950 grams of cocaine, an amount that would result in an offense level of 26 under U.S.S.G. § 2D1.1. In his objections to the PSR, Puig asserted that he should be held accountable for 210.13 grams of cocaine. On appeal, Puig argues that he should be held accountable for an amount less than 25 grams. In both the district court and on appeal, the basis of Puig's argument is the same - that the testimony of codefendant Aguilar was unreliable. The district

court found that Aguilar's statements given at the time of his arrest were reliable and true.

Factual findings of the district court made in applying the sentencing guidelines are reviewed under a clearly erroneous standard. **See United States v. Morales-Vasquez**, 919 F.2d 258, 263 (5th Cir. 1990). To prevail in his claims that the district court committed clear error, Puig must demonstrate that the version of the events given by Aguilar at the time of his arrest relied on by the district court was "'materially untrue, inaccurate[,] or unreliable.'" **United States v. Kinder**, 946 F.2d 362, 366 (5th Cir. 1991), **cert. denied**, 112 S.Ct. 2290 (1992).

Puig contends that Aguilar made later statements that were inconsistent with the information he provided at the time of his arrest. The district court made the following determination.

[C]omparing Mr. Aguilar's statements immediately after his arrest, when he wouldn't know the damaging effect his admissions would have, and his recanting of that after he had legal advice and would well know what he had done to himself, it's got to be the conclusion that it's more likely he was being truthful and accurate before he realized it would be beneficial to him to not admit the extent of his dealings. So, the court finds that to be reliable and true

This account of the evidence is plausible and the district court's finding regarding the amount of cocaine involved in the offense is not clearly erroneous.

B.

Puig argues next that the district court improperly enhanced his offense level for the possession of a firearm during the commission of the offense under U.S.S.G. § 2D1.1(b)(1). Puig

asserts that the district court was clearly erroneous in finding that it was not "clearly improbable that [the gun] was connected with the offense." In **United States v. Webster**, 960 F.2d 1301, 1310 (5th Cir.), **cert. denied**, 113 S.Ct. 355 (1992), the court held that fact finding related to this enhancement was reviewed for clear error.

The court also held that "[o]nce it is established that a firearm was present during the offense, the district court should apply the enhancement unless it is clearly improbable that the weapon was connected with the offense." **Id.** In this case, the conspiracy in question ran from June 1992 to January 1993. It is undisputed that a search of Puig's resident in November 1992 uncovered two pistols. In **Webster**, the court upheld the enhancement related to a drug conspiracy when a gun was found behind stacks of plates in the kitchen of the defendant's restaurant. **See** 960 F.2d at 1310. In this case, the guns were found in Puig's resident during the conspiracy and Puig has presented nothing to show that the district court was clearly erroneous in finding that it was not clearly improbable that the weapons were connected to the drug trafficking conspiracy.

C.

Puig argues finally that the district court erred in denying his request for a two point reduction in offense level because he accepted responsibility for 13.86 grams of cocaine sold to Aguilar on January 25, 1993. He asserts that he did not need to accept responsibility for anything else because as discussed above no

reliable evidence supported holding him accountable for a large amount of cocaine.

In determining whether a defendant qualifies for an adjustment under § 3E1.1(a), consideration may be given to whether the defendant truthfully admitted the conduct comprising the offense of conviction and whether he truthfully admitted or falsely denied any additional relevant conduct for which he was accountable. Section 3E1.1 comment. (n.1) (a). Under the 1992 version of the provision, "[a] defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility. **Id.** In this case, the district court determined that Puig was responsible for more than 13.86 grams of cocaine. Puig did not remain silent on this issue, but has continued to deny it through his appeal. The record supports the district court's denial of the reduction for acceptance of responsibility and that finding was not clearly erroneous.

AFFIRMED.