IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8493
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROSENDO MONTES,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(A 91 CR 159 9)

(April 28, 1994)

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

PER CURIAM:*

I

Rosendo Montes was charged with conspiracy to possess with intent to distribute marijuana, two counts of possession with intent to distribute marijuana, and money laundering. Montes entered a plea agreement--but not a plea--while represented by retained counsel, James Wedding. Montes subsequently filed a

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

motion to substitute Heriberto Medrano as counsel, and Wedding filed a motion to withdraw as counsel of record. Montes also filed a motion to withdraw the plea agreement. The district court granted counsel's motions to withdraw and for substitution. Because Montes had not entered a guilty plea before the court, the district court determined that Montes's motion to withdraw the guilty plea was moot. Montes subsequently pleaded guilty to the conspiracy and money-laundering counts.

II

The facts, taken from the PSR, show that local authorities began investigating suspected illegal marijuana transactions in the Austin, Texas, area in February 1991. A surveillance team followed Chevrolet and Datsun pick-up trucks to the R & S Trucking Company and then onto the interstate highway. The Chevrolet pick-up truck, which was previously owned by Montes's brother, was being driven by Martine Chapa. Chapa was stopped for speeding by a local patrolman and was arrested because his license was suspended.

The authorities continued surveillance of the R & S Trucking Company and learned that Montes was involved in the suspicious activity. Confidential informants advised authorities that Montes, Jose Martinez, and Arnulfo Chapa were involved in a marijuana conspiracy. Pen register devices revealed that these individuals and their businesses, which included R & S Trucking, M.A.S. Investment Co., Inc., and M.A.S. Construction, were involved in the conspiracy.

Surveillance and confidential informants revealed that Montes was responsible for insuring that marijuana shipments were not detected by the authorities at the U.S. Border Patrol check points. Montes conducted counter-surveillance with a 1981 Ford wrecker equipped with a scanner and police frequencies. Montes also used a two-way radio to warn his associates of law-enforcement activity. Montes was assisted in trafficking by his two brothers, Heron and Mario, as well as Cleo Perkins and Robert Gonzalez. Montes and Martinez were equal partners in the conspiracy.

The shipments were transported to Austin and prepared for distribution. Arnulfo Chapa, assisted by his wife, brother, and others, distributed the drugs. Chapa distributed the marijuana to the Carter Organization of North Carolina, which was headed by Leslie George Carter.

The investigation revealed that Montes and Martinez shipped at least ten loads of marijuana, averaging between three hundred and four hundred pounds, between September 1990 and early 1991. Montes corroborated this information in a statement given to authorities in June 1992.

Gene Carter received a shipment of marijuana from Chapa on November 7, 1991, and was arrested while en route to North Carolina. A 1983 Freightliner was observed leaving R & S on November 8, 1991, and was followed to a point just south of San Antonio. The Freightliner and a forty-foot refrigerated trailer were stopped near Longview, Texas, on November 9, 1991. Jesus Vela

and Javier Garcia were arrested. Officers seized 294.2 pounds of marijuana from the trailer and a drug ledger. Jose Martinez and Arnulfo Chapa were arrested on that same date in a jeep that had initially trailed the tractor-trailer. Following the arrests and release on bond of Jose Martinez and Javier Garcia, pen registrations revealed that they had ongoing communications with Montes.

The investigation further revealed that Montes used M.A.S. Investments and M.A.S. Construction to launder illicit funds. Numerous vehicles and properties were purchased, used for drug activity, or sold at the direction of Montes. Montes was arrested on April 9, 1992, and a search warrant was obtained for his residence in Harlingen, Texas. Authorities recovered $1,499,320 in currency from Montes's back yard. An additional $61,396.76 was seized from bank accounts and certificates of deposits and $11,360 was found in a backpack.

Following the presentence investigation, the probation officer recommended that Montes be denied an adjustment for the acceptance of responsibility. The PSR reflected that the drug conspiracy involved at least 6,577 pounds of marijuana, which resulted in a base offense level of 32 on the conspiracy count. The probation officer recommended that Montes's offense level be increased by four levels because of his leadership role in the criminal activity involving five or more participants. The PSR recommended that Montes receive a combined total offense level of 37 and a criminal-

history category of I. Montes objected to the recommendation that he be denied a reduction for the acceptance of responsibility, and he also objected to the recommendation that his offense level be increased for a leadership role. Montes argued that these recommendations violated the terms of the plea agreement.

The district court overruled Montes's objection with respect to his leadership role in the offense based on ¶ 10 of the PSR. The district court gave Montes a two-point reduction for acceptance of responsibility. The district court sentenced Montes to concurrent terms of imprisonment of 210 months to be followed by a three-year term of supervised release.

III

Montes first argues that the government breached the plea agreement by providing the probation officer with information that Montes gave during a debriefing with agents. Montes argues that the information obtained from his debriefing was improperly relied upon in determining that he held a leadership role in the offense. Montes argues that the district court did not make an express determination that the government possessed the information prior to Montes's debriefing.

The plea agreement provided that U.S.S.G. § 1B1.8 was applicable to any information provided by Montes in connection with his cooperation with the government. If a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and the government agrees that self-

incriminating information provided pursuant to such agreement will not be used against the defendant, "then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement." § 1B1.8(a). However, this provision "shall not be applied to restrict the use of information . . . known to the government prior to entering into the cooperation agreement." § 1B1.8(b)(1).

The facts herein are unusual in that, although both Montes and the government were under the impression that they had reached a plea agreement containing a § 1B1.8 stipulation at the time that Montes provided information to the government, Montes subsequently withdrew his acceptance of that plea agreement. However, the later agreement that provided the basis for Montes's plea broadly incorporates the government's promise not to use material proscribed by § 1B1.8. Based on the reasonable understanding of the agreement by the parties, the § 1B1.8 stipulation should be applicable to the information obtained from Montes during the debriefing.

In objecting to the PSR's categorization of Montes as a leader, defense counsel argued that the probation officer improperly relied on information provided by Montes to the government during a debriefing in 1992. The probation officer responded that she relied on information obtained through statements given on March 17, 1992, and that Montes's June 1992 statement merely corroborated the information. The district court

found that the probation officer was relying on information independent from that presented by Montes. The district court further stated that it was relying on the information in ¶ 10 of the PSR in determining that Montes was properly classified as a leader of the offense.

The probation officer testified in court that the government was in possession of information establishing Montes's leadership role in the offense prior to Montes's debriefing. Montes's counsel did not cross-examine the officer. Montes merely argued that the Government obtained the information from the debriefing, but he did not present any testimony or affidavits to rebut the probation officer's testimony. Therefore, the district court's determination was not clearly erroneous.

Montes cites several cases in support of his argument that the government improperly relied on information discovered during his debriefing. The facts of those cases are distinguishable from the facts herein.

Montes has not shown that the district court's finding that the Government did not breach the plea agreement was clearly erroneous.

IV

Montes makes a separate argument in his brief that he disputed the PSR finding that he was a leader or organizer and that the district court failed to make an explicit finding that five individuals were involved in the conspiracy or that the

organization was "otherwise extensive." The district court stated that it was relying on information contained in the PSR. Montes argues that the PSR did not contain reliable evidence that he directed or supervised five participants in the offense.

"If the defendant was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive," the offense level is to be increased by four levels. § 3B1.1(a). Seven factors should be considered in making a leadership finding. They are "(1) the exercise of decision-making authority; (2) the nature of participation in the commission of the offense; (3) the recruitment of accomplices; (4) the claimed right to a larger share of the fruits of the crime; (5) the degree of participation in planning and organizing the offense; (6) the nature and scope of the illegal activity; and (7) the degree of control and authority exercised over others." U.S. v. Barreto, 871 F.2d 511, 512 (5th Cir. 1989) (quoting U.S.S.G. § 3B1.1, comment. (n.3)).

The PSR reflected that Montes and Jose Martinez were the leaders of the organization and that they shared the profits equally. Montes was responsible for importing the marijuana into the country. Montes supervised directly his two brothers, Heron and Mario, as well as Cleo Perkins and Robert Gonzalez. The PSR also revealed that a number of other individuals were involved in the conspiracy.

The findings in the PSR constitute reliable evidence. Lghodaro, 967 F.2d at 1030. Montes has not provided any evidence to rebut the information in the PSR. In fact, Montes appears to be conceding that he provided the incriminating information during the debriefing. The district court was free to adopt the information in the PSR, and, therefore, his finding that Montes held a leadership role in the conspiracy was not clearly erroneous. Mir, 919 F.2d at 943.

V

Montes next argues that he "believed" that a U.S.S.G. § 5K1.1 motion for reduction would be filed if he cooperated with the government. Montes argues that he fully complied with the agreement by debriefing with the agents.

Under the plea agreement, the government retained absolute discretion to move for a downward departure pursuant to § 5K1.1 after evaluating the assistance provided by Montes. Because the government was not obligated to move for a downward departure, Montes is not entitled to relief unless the refusal to file the motion was based on an unconstitutional motive. See U.S. v. Garcia-Bonilla, 11 F.3d 45, 47 (5th Cir. 1993). Montes is not arguing that the refusal was based on an unconstitutional motive, but merely asserts that he provided substantial assistance to the government. Montes did not present any evidence in the district court that the prosecutor denied him the opportunity to provide

substantial assistance. The government's failure to file the § 5K1.1 motion was not plain error.

VI

Montes next argues that the government breached the agreement by supporting the probation officer's recommendation that he not receive a reduction for an acceptance of responsibility.

The written plea agreement did not address the issue of acceptance of responsibility. After the district court accepted Montes's guilty plea, the prosecutor confirmed that the Government would not oppose the reduction if Montes complied with the terms of the plea agreement.

During the sentencing hearing, defense counsel pointed out that the government had agreed that it would not oppose a three-point reduction for acceptance of responsibility if he abided by the conditions of his plea. The government responded that the debriefing agents had reported that Montes had complied with the terms of the plea agreement and that they "have no problem with what he's done." The government then noted that the PSR reflected the reason why the probation officer had a valid concern about recommending the reduction for acceptance of responsibility. The government did not change its position with respect to Montes's cooperation nor did it assert an opposition to the reduction. Later during the hearing, the probation officer gave her reasons for recommending the denial of a reduction for acceptance of responsibility, and the government did not participate in the

discussion. The government complied with its agreement not to oppose the reduction for the acceptance of responsibility.

VII

Montes next argues that he was denied the effective assistance of counsel by his first counsel, James Wedding. Montes argues that Wedding agreed to the plea bargain prior to Montes agreeing to its terms, which resulted in Montes being debriefed by the government against his will. Montes also argues that Wedding filed no motions on his behalf. Montes argues that, because his counsel's incompetence was so clear, the issue of ineffectiveness could be addressed for the first time on appeal. Montes also argues that his plea was based on the erroneous advice of counsel because he believed that he would receive credit for acceptance of responsibility, that a § 5K1.1 motion would be filed, and that the debriefing information would not be used against him.

Generally, a claim of ineffective assistance of counsel cannot be resolved on direct appeal unless it has been first raised before the district court. Kinsey, 917 F.2d at 182. This court has, however, occasionally resolved claims of inadequate representation, but only if the record contains substantial details about counsel's conduct.

Although this issue was not addressed by the district court, it can be disposed of on appeal because it is clearly without merit. Montes withdrew his acceptance of the plea agreement negotiated by Wedding prior to entering a guilty plea before the

court. Therefore, Montes cannot prove that he was "prejudiced" as a result of Wedding's representation. Additionally, Montes cannot demonstrate prejudice because he entered into the same plea agreement after Wedding had withdrawn as counsel from the case and he was represented by new counsel. This claim is thus without merit.

VIII

Montes argues that the district court failed to address a Fed. R. Crim. P. 11 core concern because he advised Montes erroneously that the maximum penalty for the money laundering count was ten years. The proper penalty for the money-laundering violation in question is imprisonment for not more than twenty years. See 18 U.S.C. § 1956(a)(1). Any claim that a district court has failed to comply with Rule 11 is now viewed for harmless error. U. S. v. Johnson, 1 F.3d 296, 301-02 (5th Cir. 1993) (en banc).

During the rearraignment, the district court properly advised Montes that the maximum possible term of imprisonment for the conspiracy count was twenty years, but then commented that such penalty "doesn't sound right to me." Defense counsel then stated the maximum penalty was ten years and the prosecution, citing a different statute from that alleged in the indictment, also stated that the maximum penalty was ten years. The district court also advised Montes that the maximum term of imprisonment that could be imposed for both offenses to which he was pleading guilty was

thirty years. The PSR stated the proper maximum penalty for each count.

Montes received concurrent terms of imprisonment of 17 1/2 years. Montes has not argued that he would not have entered the guilty plea if he had been aware that a twenty-year sentence could have been imposed on the money-laundering count. The fact that Montes pleaded guilty after being advised of the possibility of a thirty-year sentence indicates that, even if Montes had been aware of the possible twenty-year sentence, it is not likely he would have entered a different plea. Therefore, the error was harmless.

Montes also argues that his conviction should be overturned because the district court did not read the indictment to him nor did it provide Montes with equivalent information. Montes waived the reading of the indictment at the rearraignment. Montes assured the district court that he had read the indictment and had discussed the charges contained therein and any possible defenses to the charges with his counsel. Montes stated that he understood the charges and that he had no questions about the charges. The government then summarized the factual basis reflecting the commission of offenses, and Montes agreed that the summary was a correct statement of his conduct. The record does not reflect that the district court failed to ascertain that Montes understood the nature of the charges made against him.

IX

Montes argues that the district court failed to make a finding as to the quantity of drugs that Montes could have reasonably foreseen was involved in the conspiracy.

Federal Rule of Criminal Procedure 32(c)(3)(D) requires the district court to make findings as to the correctness of factual findings in the presentence report which are controverted by the defendant. The district court's failure to comply with this provision may be raised for the first time on appeal. U.S. v. Manotas-Mejia, 824 F.2d 360, 368 (5th Cir.), cert. denied, 484 U.S. 957 (1987). A district court, however, is not required to make a finding or determination of the correctness of information contained in the PSR "unless the defendant asserts `with specificity and clarity each factual mistake' of which he complains." U. S. v. Hurtado, 846 F.2d 995, 998 (5th Cir.), cert. denied, 488 U.S. 863 (1988).

Montes did not file an objection to the calculation of the base offense level in the PSR, and at the sentencing hearing defense counsel acknowledged that the base offense level was properly calculated. Because Montes did not dispute the factual findings regarding the drug quantity involved in the conspiracy, the district court did not err in failing to make explicit findings on the issue.

X

Montes next argues that the district court erred in failing to find that he was entitled to an additional one-point reduction for the acceptance of responsibility. Montes argues that it is not clear that the district court was aware that it had the discretion to award a three-point reduction.

"Review of sentences imposed under the guidelines is limited to a determination whether the sentence was imposed in violation of law, as a result of an incorrect application of the sentencing guidelines, or was outside of the applicable guideline range and was unreasonable." U.S. v. Matovsky, 935 F.2d 719, 721 (5th Cir. 1991). This court has not "ultimately defined what standard applies in reviewing a district court's refusal to credit acceptance of responsibility." U.S. v. Cartwright, 6 F.3d 294, 304 (5th Cir. 1993). The court has applied a "clearly erroneous" standard, "without foundation," and "great deference," and has found that there is "no practical difference between the three standards." Id.

The PSR recommended that Montes receive no reduction for the acceptance of responsibility. However, following Montes's allocution at the sentencing hearing, the district court determined that Montes had expressed remorse for his wrongdoing and questioned the probation officer about the proper reduction of the offense level for the acceptance of responsibility. The following colloquy then occurred at the hearing.

> THE COURT: What's the - - if you gave him acceptance of responsibility, is it two points or three points?
>
> THE PROBATION OFFICER: A two level is --
>
> THE COURT: So it would be 35?
>
> THE PROBATION OFFICER: Yes, sir, which would be 168 to 210 months.
>
> [DEFENSE COUNSEL]: And the recommendation of the government Your Honor, the position was for three levels off.
>
> THE COURT: Okay. The court is then going to sustain that objection based on the comments of the defendant personally to the court and finds that he has accepted responsibility and reduce it to a Level 35, 168 months to 210 months.

R. 5, 26.

We have held that § 3E1.1(b) contains a tripartite test that directs the sentencing court to grant an additional one-level decrease in the defendant's offense level for the acceptance of responsibility if three elements are found to exist. See U.S. v. Tello, 9 F.3d 1119, 1124-25 (5th Cir. 1993). The elements are (1) the defendant qualifies for the basic two-level decrease for acceptance of responsibility under § 3E1.1(a); (2) the defendant's offense level is 16 or greater prior to the application of subsection (a); and (3) the defendant timely assisted authorities by (a) providing complete information to the government concerning his own involvement in the offense; or (b) by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently. Id. at

1124-26. If the stated criteria are met, the defendant is entitled "as a matter of right" to the additional one-level decrease. U.S. v. Mills, 9 F.3d 1132, 1138-39 (5th Cir. 1993). If a district court errs in applying § 3E1.1(b), the sentence must be reversed in the absence of a finding of harmless error. Tello, 9 F.3d at 1129.

Montes met the criteria of the first two elements of the Tello tripartite test, and it is arguable that he timely provided the prosecution with information concerning his role in the offense. The district court erred in not addressing whether Montes was entitled to an additional one-point reduction for acceptance of responsibility under § 3E1.1(b). Further, based on the district court's statements at the hearing, it is not clear that the district court was aware of the availability of the additional one-level decrease.

Based on a total offense level of 35 and a criminal history category of I, the guideline sentencing range was 168-210 months. See U.S.S.G. Sentencing Table. If the offense level of 34 was the proper level, the guideline sentencing range would have been 151-188 months. Id. Montes's assessed term of 210 months was not included in the range. Therefore, the error is not harmless. See Tello, 9 F.3d at 1129-30.

Following remand, the district court should determine if Montes is entitled to an additional one-level decrease for the acceptance of responsibility.

XI

Montes argues for the first time in his reply brief that the government breached the plea agreement by promising that he would not be sentenced to more than ten years on the money-laundering count. Montes also argues for the first time in his reply brief that the district court violated Rule 11 by providing him with incorrect information concerning the charge in count seven. We will not address issues raised for the first time in a reply brief. U.S. v. Prince, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, 493 U.S. 932 (1989).

XII

In conclusion, we AFFIRM the district court in all respects except its failure to grant Montes an additional one-point reduction for acceptance of responsibility. We REMAND to allow further consideration of this point in a manner not inconsistent with this opinion.

AFFIRMED in part and REMANDED in part.