IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8623
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HECTOR MANUEL COLON, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-93-CR-52-2)

(March 18, 1994)

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

PER CURIAM:*

Defendant-Appellant Hector Manuel Colon, Jr. was convicted on a plea of guilty for violating 21 U.S.C. § 841(a)(1), possession with intent to distribute cocaine, and 18 U.S.C. § 2, aiding and abetting. Colon appeals his sentence, claiming reversible error by

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the district court (1) for making an upward adjustment of offense level based on determination that Colon's role was that of an organizer, leader, manager or supervisor; (2) for purportedly violating Fed. R. Crim. P. 32 by relying on facts contained in the Presentence Investigation Report (PSR) without explaining the findings with sufficient specificity; and (3) for using the quantity of cocaine under negotiation rather than the quantity actually produced for the "sting" sale by the government undercover agent. Finding no reversible error, we affirm Colon's sentence.

I

FACTS AND PROCEEDINGS

Co-defendant Richard Barron contacted an undercover narcotics officer, Sergeant Joe Coy, to purchase cocaine. Barron was told by Sergeant Coy that he would sell one kilogram of cocaine for $19,000, to which Barron responded that "his people would not pay that much," but that he would talk to them. Barron later reported that Colon had rejected the $19,000 offer but had countered with a price of $18,000. Eventually the parties settled on a price of $18,500.

Barron arranged a meeting at a truck stop to consummate the sale. When Barron and Colon arrived at the scene, they assured Sergeant Coy that they had the money. Colon asked to inspect the drugs before allowing Sergeant Coy to see the money, and remarked that it did not feel like a full kilo. Barron then announced that they wanted to conduct the sale at a different location. Sergeant Coy returned to his car to discuss the situation with the officer

accompanying him and a decision was made to arrest the pair immediately. A plastic bag containing $18,500 was found under Colon's seat in Barron's car.

Colon eventually entered a plea of guilty to the above-said charges. In accordance with U.S.S.G § 2D1.1(a)(3), (c)(9), the probation officer determined the base offense level to be 26 (at least 500 grams but less than 2 kilograms of cocaine). Given that Colon exercised authority over the final price, inspected the cocaine at the sale, supplied all of the cash for the purchase, andSQaccording to BarronSQclaimed a larger share of the profits, the probation officer determined that a two-level upward adjustment was warranted under § 3B1.1(c) for Colon's supervisory role in the offense. No downward adjustment was made for acceptance of responsibility.

At the sentencing hearing, the district court overruled Colon's objection to the drug quantity used to calculate the offense level but agreed with Colon that he was entitled to an adjustment for acceptance of responsibility and reduced the offense level by three. As for Colon's objection to the upward adjustment for an aggravating role, the district court stated that it "believ[ed] that the most important factor is the matter of all the money being Mr. Colon's and that the two-point increase is appropriate in this case." Applying a total offense level of 25 to a criminal history category of V yielded a guideline imprisonment range of 100-125 months. The district court adopted the factual findings contained in the PSRSQexcept for the above noted reduction

in total offense level by three for acceptance of responsibilitySQ and imposed a term of imprisonment of 100 months. Colon timely appealed.

II

ANALYSIS

A. Upward Adjustment for Role in the Offense

On appeal, Colon renews his contention, without pertinent citation, that the district court erred in finding that he played a supervisory role. Colon grounds his argument on the fact that only two individuals were involved in the offense and there was no evidence that Colon exercised control over Barron. A sentencing court's decision to increase an offense level for a defendant's aggravating role is a factual determination that we review for clear error. United States v. Rodriguez, 897 F.2d 1324, 1325 (5th Cir.), cert. denied, 111 S.Ct. 158 (1990).

In making sentencing decisions, the district court properly considers any relevant evidence "provided that the information has sufficient indicia of reliability to support its probable accuracy." § 6A1.3(a). As the PSR is reliable, it may be considered as evidence. United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992). Objections in the form of unsworn assertions, however, do not bear sufficient indicia of reliability to be considered. Id. If no relevant affidavits or other evidence is submitted to rebut the information contained in the PSR, the court is free to adopt its findings without further inquiry or explanation. United States v. Mir, 919 F.2d 940, 943 (5th Cir.

1990).

The PSR indicates that Colon had decision-making authority respecting the price, the quantity, and the quality of the cocaine; that Colon provided all of the money for the purchase, presumably entitling him to a larger share of the profits; and that Colon participated in the sale transaction. These facts show that Colon was not a silent partner, rather that he was instrumental in organizing and supervising the transaction. At sentencing, Colon submitted no rebuttal evidence challenging these underlying facts, but challenged only the PSR's ultimate conclusion that the two-level adjustment under § 3B1.1(c) was warranted, relying, as noted on the involvement of only two individuals in the transaction, and the conclusionary assertion that he (Colon) did not exercise control over Barron.

Adjustment for an aggravating role is appropriate, however, if the criminal activity involves more than one person, Ch.3, Pt.B, intro. comment.; there is no requirement that the criminal activity involve three or more. A sentencing court is instructed to increase a defendant's offense level by two if the court finds that the defendant was "an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b)." § 3B1.1(c). More than one person may qualify as a leader or organizer of a criminal association. § 3B1.1, comment. (n.3). <u>See</u> <u>United States v. Peters</u>, 978 F.2d 166, 170 (5th Cir. 1992) (district court was not clearly erroneous in determining that both defendants in two-person conspiracy were organizers of criminal

activity).

Exercise of control over others involved in the criminal activity is but one factor that a sentencing court should evaluate in determining whether a defendant is a leader or an organizer, or a manager or a supervisor; other factors include:

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

§ 3B1.1, comment. (n.3). Based on the evidence contained in the PSR, the district court's finding that Colon was "an organizer, leader, manager, or supervisor" under § 3B1.1(c) was not clearly erroneous. See United States v. Vaquero, 997 F.2d 78, 84 (5th Cir.) (adjustment under § 3B1.1(c) was appropriate given that the defendant made the decision to purchase the cocaine and decisions respecting the quantity, price, delivery, and transport of the drugs), cert. denied, 114 S.Ct. 614 (1993).

B. Sufficiency of Factual Findings

Colon also argues that the district court erred by failing to make specific findings as to whether he was an organizer, a leader, a manager, or a supervisor. Although Fed. R. Crim. P. 32 requires sentencing courts to make findings regarding any controverted facts in the PSR or state that those facts will not be taken into account in sentencing, Colon cites no authority requiring the sentencing court to isolate whether it determined Colon to be an organizer or a leader or a manger or a supervisor in order to assess the

adjustment authorized under § 3B1.1(c). Such findings may be necessary under subparagraphs (a) and (b) of § 3B1.1; the background commentary makes clear, however, that subparagraph (c) takes into account that the distinction between organization and leadership and that of management and supervision is of less significance and tends to be less clearly delineated in relatively small criminal enterprises. § 3B1.1, comment. (backg'd.). In United States v. Mejia-Orosco, 867 F.2d 216, 221-22 (5th Cir.), cert. denied, 109 S.Ct. 3257 (1989), we held that a district court is not required under § 3B1.1 (four-level upward adjustment required if defendant was organizer or leader of criminal activity) to make findings of fact more specific than that the defendant was a "leader" or "organizer." See also Rodriguez, 897 F.2d at 1327 (holding that the decision not to make specific fact-findings under § 3B1.1 is within the discretion of the sentencing court). In the instant case, the district court adopted the PSR's findings that Colon was a supervisor for purposes of § 3B1.1(c) over Colon's unsubstantiated objections; no further findings were required.

C. Quantity of Drugs

Colon also contends that the district court erred in the determination of his base offense level when it used the quantity of cocaine for which he negotiated the purchaseSQone kilogramSQ rather than the amount that Sergeant Coy actually brought to the meetingSQfifteen ounces. He argues that the instant offense involved a completed distribution of fifteen ounces of cocaine and that the district court clearly erred in sentencing him using the

weight under negotiation; he concedes, however, that "the transaction was never completed, and Barron and Colon were arrested before either the drugs or money changed hands."

A district court's finding on the relevant quantity of drugs is reviewed only for clear error. United States v. Devine, 934 F.2d at 1325, 1337 (5th Cir.), cert. denied, 112 S.Ct. 954 (1992). The court's finding will not be deemed to be clearly erroneous unless we are "left with the definite and firm conviction that a mistake has been committed." United States v. Pofahl, 990 F.2d 1456, 1480 (5th Cir.), cert. denied, 114 S.Ct. 266 (1993).

"[W]hen an offense involves `negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount,' minus any amount that the defendant did not intend to produce or was not reasonably capable of producing." United States v. Salinas, No. 93-8318, slip op. at 2 (5th Cir. November 17, 1993) (unpublished; copy attached) citing U.S.S.G. § 2D1.1(c) comment. (n.12) (Nov. 1992). This proposition clearly covers Colon's situation.

Colon's argument that the offense involved a completed distribution is contradicted by his own concessionSQactually, insistenceSQthat the arrest occurred "before either the drugs or the money changed hands." Colon does not dispute that when he arrived at the truck stop he had both the intent and the ability to purchase one kilogram of cocaine from Sergeant Coy. Accordingly, the district court did not clearly err in using the weight under

negotiation for purposes of calculating Colon's offense level pursuant to § 2D1.1(c).

III

CONCLUSION

For the foregoing reasons, Colon's sentence is, in all respects,

AFFIRMED.