UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8787
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BRIAN CHARLES BRAU,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

(P-93-CR-54-10)

(August 25, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

Pursuant to a plea agreement, Bryan Charles Brau pleaded guilty to an information charging him with possession with the intent to distribute marijuana, in exchange for the dismissal of a count in a multi-count indictment charging Brau and others with

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

conspiracy to possess with the intent to distribute over 100 kilos of marijuana. Brau challenges his sentence in this appeal. The facts of the offense are as follows: Ruben Chapa-Ibarra, Jr. ran a smuggling enterprise, transporting marijuana from the Big Bend area of Texas to the Dallas, Texas metroplex. Brau's girlfriend, Joyce Roller Price, became involved in the transportation of the marijuana loads, using recreational vehicles as the primary method of transportation, from 1987 through November 1992. She recruited her brother, Roy Virgil Thomason, to assist her in November 1988. Brau's involvement occurred in 1992. Brau entered his plea of guilty on August 24, 1993 and was sentenced on November 1, 1993.

The probation officer set Brau's base offense level at 30, based upon the transportation of 1,600 pounds (725.7 kilos) of marijuana on four separate trips to the Big Bend area, including the trip on November 2, 1992, the basis of the count of conviction.[1] Brau objected to this, arguing that he had no knowledge of any marijuana being transported on any trip except the November 2nd one. At sentencing, Brau reasserted his dispute with the PSR's facts as to the number of trips and the resulting amount of drugs. Price testified that there were only three trips made in the autumn of 1992, not four, and that the last trip occurred in November. She claimed that no marijuana was transported during the September trip. The October trip, she said, did involve the transportation of marijuana, but Brau was not aware

[1]The probation officer used the 1992 edition of the Guidelines.

of its presence. She said Brau learned that marijuana was being transported during the November trip. After this trip, Price said Brau ended his relationship with her. On cross-examination, Price adhered to her story that there were only three autumn trips and that Brau participated in the third one only. Price initially denied that she and Brau traveled to the Big Bend area during April 1992. After the presentation of exhibitory evidence to the contrary, however, Price admitted that they did in fact make a trip during that month, but she stated that the trip was purely recreational in purpose. Price also denied or did not recall making certain statements to law enforcement agents and to Brau.

The district court overruled the objection, finding implausible the scenario that Brau was unaware of his girlfriend's activities while on the Big Bend trips.[2] The district court did not expressly adopt the PSR at sentencing, but it did utilize the PSR's offense level, criminal history category, and respective sentencing range. Also, in the judgment, the court marked the box indicating that it had adopted the PSR. After granting the Government's motion for downward departure, the court sentenced Brau to 48 months imprisonment.

OPINION

Brau argues that the district court erred in attributing 1,600

[2]After overruling the objection, the district court stated, "I think anybody with Mr. Brau's perception, anybody with his intelligence, anybody that is the least bit aware of things is going to know that marijuana is being hauled. I don't think you stay in a motel and let your girl friend [sic] or whoever you are living with go off and then later on say, well, I didn't know there was any marijuana there. That just stretches my beliefs too far."

pounds of marijuana to him in setting his base offense level. By assuming a literal interpretation of what the district court said in overruling his objections, Brau argues that the district court improperly applied § 1B1.3 and failed to make the required findings. A district court's factual findings are reviewed for clear error. See United States v. Puig-Infante, 19 F.3d 929, 942 (5th Cir. 1994), petition for cert. filed, (U.S. June 22, 1994) (No. 93-9760). "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." Id. Application of the guidelines, however, is reviewed de novo. See United States v. Mejia-Orosco, 867 F.2d 216, 218 (5th Cir.), cert. denied, 492 U.S. 924 (1989).

Section 2D1.1(a)(3), used in determining the base offense level for drug trafficking offenses, utilizes two quantities of drugs in setting the base level: "drugs with which the defendant was directly involved [under § 1B1.3(a)(1)(A)], and drugs that can be attributed to the defendant in a conspiracy as part of his `relevant conduct' under § 1B1.3(a)(1)(B)." United States v. Carreon, 11 F.3d 1225, 1230 (5th Cir. 1994). "Relevant conduct" under subsection (a)(1)(B) is "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." § 1B1.3(a)(1)(B). The PSR stated that Brau accompanied Price and her brother on their last four trips, in the autumn of 1992, transporting a total of 1,600 pounds of marijuana. Price paid Brau for his efforts. This information was based upon statements made by Price and her brother to law enforcement agents.

In setting the base offense level, reference was given to both subsections, (a)(1)(A) and (a)(1)(B); see also § 1B1.3, comment. (n.2(a)(1)) (noting that it is possible for conduct to fall under more than one subsection of the guideline). Although the PSR referred to subsection (a)(1)(B), the report failed to specify when Brau became aware of Price's marijuana smuggling or when he agreed to undertake the joint criminal activity.

"[A] presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the sentencing guidelines." United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990) (footnote omitted). "If information is presented to the sentencing judge with which the defendant would take issue, the defendant bears the burden of demonstrating that the information cannot be relied upon because it is materially untrue, inaccurate or unreliable." United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991); see United States v. Young, 981 F.2d 180, 185 (5th Cir. 1992), cert. denied, 113 S. Ct. 2454, 2983 (1993). Brau presented the testimony of Price to rebut the PSR's information that Brau was involved in four trips and 1,600 pounds of marijuana. As such, the disputed facts created an issue of credibility for the district court to decide. See United States v. Sherbak, 950 F.2d 1095, 1101 (5th Cir. 1992).

We view the district court's ruling on the objections as a determination that Price's testimony was not credible. Thus, Brau failed to meet his burden in demonstrating the inaccuracy of the

PSR. See Angulo, 927 F.2d at 205. The district court's statements at sentencing (utilizing the offense level and sentencing range from the PSR), as well as its indication in the judgment that it had adopted the PSR, constitute adoption of the PSR by reference.

By adopting the PSR, the district court adopted the PSR's finding that Brau participated in the joint activity of four trips involving 1,600 pounds of marijuana and was paid for his efforts. Thus, any question as to the lack of specific findings concerning Brau's reasonable foreseeability of the joint activity and concerning when Brau agreed to the jointly-conducted activity, is answered by the district court's reliance on the PSR. See Carreon, 11 F.3d at 1231 ("allow[ing] the district court to make implicit findings by adopting the PSR" (footnote omitted)). Brau's conduct falls under subsection (a)(1)(A), and not under subsection (a)(1)(B), and therefore findings regarding foreseeability and time of commencement of relevant conduct are unnecessary.

AFFIRMED.