UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8844
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FELIX SOSA PANTOJA,

Defendant-Appellant.

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

(SA-91-CR-319)

(October 14, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

Felix Sosa Pantoja (Sosa)[1] was convicted by guilty plea of aiding and abetting the distribution of cocaine and sentenced to a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] Sosa is used by appellant in his brief as his surname, and, therefore, it is also used in this memorandum as appellant's surname.

70-month term of imprisonment, a three-year term of supervised release, and a $50 special assessment. Count 1 of the four-count indictment charged that on August 12, 1991 through August 21, 1991, Sosa and his co-defendant Inocencio Suo Barban (Barban), conspired to possess with intent to distribute, and did distribute, in excess of 500 grams of cocaine. Counts 2 and 4 charged that on August 12, 1991 and August 21, 1991, respectively, Barban distributed unspecified quantities of cocaine. Count 3 charged that on August 19, 1991, Sosa and Barban aided and abetted the distribution of an unspecified quantity of cocaine.

Sosa pleaded guilty to Count 3, and the Government dismissed the remaining count against him. The written plea agreement, signed by Sosa and his attorney, provided that:

> [t]he quantity of cocaine establishes the base offense level at 26 (Drug Quantity Table, § 2D1.1(c)). The adjustment for acceptance of responsibility will reduce the offense level to 24 (§ 3E1.1). Should the Court find that Mr. Sosa held a leadership role, the applicable offense level will be 26; should the Court find he was not a leader, the applicable offense level will be 24.
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> . . .
>
> If the Court follows all of the government's recommendations . . . the applicable sentencing range is 70 to 87 months. The government will recommend sentence at seventy months.

Sosa filed written objections to the PSR. He argued the evidence showed that he sold cocaine only on August 19, 1991. He denied that on August 7, 1991, he agreed with the agent "for a sale price of $1,200.00 for one ounce of cocaine," and argued that he

"did not receive $1,200.00 from any agent and did not hand cocaine to any agent." He conceded that the total amount of cocaine involved was 500.93 grams, but argued that he was responsible for only 83.79 grams, the amount involved in the August 19 sale. Sosa argued that he did not occupy a leadership role in the offense, and that he did not control the price of cocaine sold, or to be sold, by Barban. He argued that the court should not consider the uncorroborated hearsay statements of Barban.

At sentencing, Sosa argued that he was not involved in the transactions of August 12 and 21. In support, he offered a portion of the detention hearing testimony of DEA agent Holcomb:

> Q . . . [W]ith respect to the transaction that occurred on August 21st, you testified Mr. Sosa was not involved in those negotiations?
>
> A He was not present.
>
> No sir he was not.

Sosa also argued that Holcomb's testimony indicated that he was not involved in the August 12 transaction. Sosa argued that "[t]here's been some unfairness . . . in giving me that level 26, because I never had anything to do with the other charges," but he declined the court's offer to allow him to withdraw his guilty plea.

The court determined Sosa's offense level as 26, holding him responsible for over 500 grams of cocaine, and adding two points for his leadership role. Sosa was granted leave by the district court to file this out-of-time appeal.

This Court reviews a Guidelines sentence to determine whether the district court correctly applied the Guidelines to factual

findings that are not clearly erroneous. United States v. Manthei, 913 F.2d 1130, 1133 (5th Cir. 1990). A clearly erroneous finding is one that is not plausible in light of the record viewed in its entirety. Anderson v. Bessemer City, 470 U.S. 564, 573-76, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). Legal conclusions regarding the Guidelines are freely reviewed. Manthei, 913 F.2d at 1133. The district court may consider any evidence that has "sufficient indicia of reliability to support its probable accuracy," including evidence not admissible at trial, e.g., hearsay. U.S.S.G. § 6A1.3, comment.; Manthei, 913 F.2d at 1138. The PSR itself generally bears such indicia. United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990). The version of the Guidelines in effect from November 1, 1991 through October 31, 1992 applies to Sosa because he was sentenced in March 1992. United States v. Gross, 979 F.2d 1048, 1050-51 (5th Cir. 1992) (citing 18 U.S.C. § 3553(a)(4)).

A party seeking an adjustment must prove it by a preponderance of sufficiently reliable evidence. Alfaro, 919 F.2d at 965. A defendant who objects to consideration of information by the sentencing court bears the burden of proving that the information is "materially untrue, inaccurate or unreliable." United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). Findings about the quantity of drugs on which a sentence should be based are factual findings reviewed for clear error. United States v. Palomo, 998 F.2d 253, 258 (5th Cir.), cert. denied, 114 S. Ct. 358 (1993).

Sosa argues that the court clearly erred in attributing Barban's conduct to him because: 1) Sosa refused to plead guilty

to conspiracy or take responsibility for the drugs Barban was charged with distributing and; 2) the court could not assume a conspiracy existed. However, the district court need not have found a conspiracy existed to attribute Barban's conduct to Sosa.

Under U.S.S.G. § 1B1.3(a)(1)(1991), a defendant's base offense level can be adjusted on the basis of

> all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense . . . or that otherwise were in furtherance of that offense . . . .

The commentary clarified that a defendant can be "otherwise accountable," in the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, for the conduct of others in furtherance of the execution of the jointly undertaken criminal activity that was reasonably foreseeable by the defendant. U.S.S.G. 1B1.3, comment. (n.1); United States v. Evbuomwan, 992 F.2d 70, 72 (5th Cir. 1993) (emphasis added). Under U.S.S.G. § 1B1.3(a)(2), a defendant's sentence may be based on "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." The commentary emphasizes that if "it is established that the conduct was [not] within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake," such conduct is not to be included in establishing the

defendant's offense level under this guideline. U.S.S.G. 1B1.3, comment. (n.1); Evbuomwan, 992 F.2d at 72.

Sosa argues that Barban's conduct was not relevant conduct under U.S.S.G. § 1B1.3(a)(1), or part of the same course of conduct or common scheme or plan as the offense of conviction under U.S.S.G. § 1B1.3(a)(2). He contends that Barban's conduct of August 21 was not foreseeable by him and exceeded the scope of any agreement between Sosa and Barbon shown by the Government.

The PSR reflected that in August 1991 Sosa was working as a construction contractor at a residence at 1102 W. Huisache in San Antonio; Barban worked for Sosa as a carpenter and remodeler. On August 7, 1991, an undercover agent went to 1010 Cameron[2] and was directed to 1102 W. Huisache, where he purchased 27.82 grams of cocaine from Sosa and Barban, the price of $1,200 having been negotiated between the agent and Sosa. On August 12, 1991, the agent purchased 55.84 grams of cocaine from Barban at 1010 Cameron, and prior to the sale, the agent asked Barban for a better price, but Barban responded that only Sosa could reduce the price.[3] When the agent asked Barban about buying a kilogram of cocaine, Barban said Sosa would determine the price. On August 19, 1991, the agent met with Sosa and Barban at 1102 W. Huisache and according to the PSR:

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[2] Sosa suggests that Barban was living at 1010 Cameron, see Reply brief, 2, but this is unclear in the record.

[3] Barban nonetheless did agree to discount the price $25.00 per ounce.

> [t]he UCA [undercover agent] explained he had $4,800.00 and asked how much cocaine he could buy. [Sosa] stated he only had three ounces of cocaine left which he would sell for $1,200.00 per ounce. The UCA agreed to buy the three ounces. [Sosa] then directed Barban to get the cocaine and to take [Sosa's] vehicle.[4] While Barban was gone, [Sosa] directed the UCA to a wash room at the rear of the residence where the UCA paid [Sosa] $3,600.00 for the cocaine. When Barban arrived, he entered the wash room and handed a gray plastic bag containing the cocaine to [Sosa], who in turn handed the bag containing 83.79 grams of cocaine to the UCA.

On August 21, 1991, the agent went to 1010 Cameron Street to purchase cocaine. Thereafter, the agent went to 1102 W. Huisache where the agent purchased 333.48 grams of cocaine from Barban. DEA Agent Holcomb testified that the negotiations of August 19 were connected with the transaction of August 21, because on August 19 the agent discussed obtaining larger quantities of cocaine with Sosa, and Sosa responded that it depended on availability.

The district court could have reasonably found, relying on the PSR, that the quantity of drugs involved in all transactions was attributable to Sosa for sentencing purposes pursuant to U.S.S.G. § 1B1.3, because the transactions of August 7, 12 and 21 were part of the same course of conduct or common scheme or plan as the offense of conviction, the transaction of August 19, or the district court could have reasonably found that Barban's conduct was "in furtherance of the execution of the jointly undertaken criminal activity that was reasonably foreseeable" to Sosa.

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[4] Sosa contended that the vehicle was not his vehicle. The title to the vehicle was in the name of his girlfriend of approximately seven years, Laura Cervantes.

U.S.S.G. § 1B1.3(a)(1), (2), comment. (n.1). The district court did not clearly err in finding that over 500 grams should be attributed to Sosa for sentencing purposes. United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990).

Sosa contends that the district court's finding that he was responsible for more than 500 grams of cocaine was clearly erroneous because the evidence only established that 17 ounces (481.1 grams) was distributed or negotiated by anyone, and the Government waived the right to use any other alleged sale, namely the sale of August 7, for any purpose. In support of his waiver argument, he cites to the following portion of a record bench conference at the detention hearing:

> MR. DURBIN: (for the Government) I just want to make sure that there, that the court is not misled and that you are not misled.
>
> But it is my understanding that there were prior . . . meetings between [the agent] and Sosa.
>
> However, we have not charged those and don't intend to charge those.
>
> . . .
>
> MR. DURBIN: And I'm not relying on those for purposes of this hearing --
>
> MR. TORRES: (for Sosa) Okay.
>
> MR. DURBIN: -- or anything else.
>
> But I just want to make sure that I don't sit silent where I know that the record may.

Sosa did not question a witness at the detention hearing regarding the prior meeting, apparently in reliance on the Government's oral statement that it would not use the August 7 transaction for any

purpose. See id. Sosa correctly argues that at sentencing, the Government contended that the August 7 transaction was part of the same course of conduct as the offense of conviction.

We are not persuaded by Sosa's argument. First, the plea agreement, which is signed by Sosa and his attorney, provides that the Government would recommend a base offense level of 26, and a sentence of 70 months to the district court. The recommended base offense level is apparently based on a quantity of cocaine over 500 grams. Thus, it is unlikely that Sosa relied on the Government's statement at the detention hearing regarding the August 7 cocaine transaction. Second, the district court determined Sosa's base offense level as 26 and sentenced him to a 70-month term of imprisonment, as the Government had recommended in the plea agreement. Third, after it became clear that the district court was going to sentence Sosa on the basis of more than 500 grams of cocaine, the district court gave Sosa the opportunity to withdraw his guilty plea, but Sosa declined the offer. Finally, as the Government convincingly argues, "nothing in the prosecutor's statement at the detention hearing, nor the fact that the offense was not charged, barred the district court from relying on the information for purposes of sentencing." See § 1B1.3, comment. (n.1).

Sosa argues that the Government failed to "prove up" the amount of cocaine involved in the August 7 transaction. However, the PSR, in addition to providing other details of the August 7 transaction, showed that 27.82 grams were involved.

Sosa requests a re-weighing of the cocaine listed in the PSR because, he argues, when the amounts are added together, the total is exactly 500 grams, not 500.93 grams, and "[t]he difference in sentencing between 499.99 grams and 500 grams is two points. At 500.93 grams, if the lab is off by a tenth of a gram or so, it is harmless error. But at exactly 500 grams, a tenth of a gram is harmful error." See PSR ¶¶ 10-13. The drug quantities involved in the transactions were:

1. August 7 - 27.82 grams (PSR ¶ 10);
2. August 12 - 55.84 grams (PSR ¶ 11);
3. August 19 - 83.79 grams (PSR ¶ 12);
4. August 21 - 333.48 grams (PSR ¶ 13).

The Government correctly argues that Sosa's assertion is unfounded -- the amounts listed in the PSR do add up to 500.93 grams and not 500 grams.

Sosa argues that the district court erred in determining that he should receive two points for his role in the offense as a leader-organizer because the overwhelming evidence indicated that he was not a leader-organizer. See U.S.S.G. § 3B1.1(c).

Seven factors should be considered in making a leadership finding: "(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." United States v. Barreto, 871 F.2d 511, 512 (5th Cir. 1989) (quoting § 3B1.1, comment. (n.3)). A reviewing court will not disturb a district court's factual findings regarding a defendant's role in a criminal activity unless those findings are clearly erroneous. Barreto, 871 F.2d at 512.

The court adopted the information contained in the PSR in determining that the leadership enhancement was appropriate. The PSR reflected that

> [Sosa] had a leadership role in the instant offense. Barban worked for [Sosa] as a carpenter/remodeler. Transactions took place at a work site supervised by [Sosa]. On separate occasions, [Sosa] directed Barban to go and get the drugs the UCA was to purchase. Upon his return, Barban would hand the drugs to [Sosa] who in turn handed them to the UCA. When the UCA asked who was to get paid, [Sosa] identified himself.

The record supports the inference that Sosa controlled the price and quantity of the cocaine sold to the agent. Testimony indicated that Sosa told the agent that he liked to deal in small circles because "if anything ever happens, he'll know who to come after . . . if anything ever went wrong, and that, even if he was arrested and served three to five years, he would still come out and know who to come after." The evidence was sufficient to find that Sosa had a leadership role in the offense, and, thus, the district court's finding was not clearly erroneous.

AFFIRMED.