

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-9106
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTHUR JACKSON SAMPLE,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:92-CR-141-Y(7)
- - - - -
(March 23, 1995)

Before GARWOOD, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

In this direct criminal appeal, Arthur Jackson Sample, convicted by guilty plea of distribution of cocaine base, disputes the fifteen kilograms of cocaine base attributed to him for sentencing purposes. The Government must prove sentencing factors by a preponderance of the evidence. United States v. Mourning, 914 F.2d 699, 706 (5th Cir. 1990) (statutorily overruled in part on another issue). "The district court's findings about the quantity of drugs on which a sentence should

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

be based are factual findings which [this court] review[s] for clear error." United States v. Mitchell, 964 F.2d 454, 457 (5th Cir. 1992). "The PSR is considered reliable and may be considered as evidence by the trial judge in making factual sentencing determinations." United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992).

The offense level for a defendant convicted of controlled substance distribution generally is determined by reference to the relevant-conduct guidelines. See § 1B1.3(a).

[I]n the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), [relevant conduct includes] all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense[.]

§ 1B1.3(a)(1)(B). In determining the defendant's accountability for the conduct of others, the court must first determine the scope of the criminal activity the defendant agreed to jointly undertake. § 1B1.3, comment. (n.2). The conduct of others that was in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct for purposes of this provision. Id.; see United States v. Carreon, 11 F.3d 1225, 1233-34 (5th Cir. 1994).

The district court did not clearly err in determining that Sample's criminal activity went beyond the scope of the offense to which he pleaded guilty, that he was involved in the

organization, and that the distribution of fifteen kilograms of cocaine base was reasonably foreseeable to him. According to codefendant Boston, Sample sold \$100 pieces, between ten and twenty per day. Boston heard Sample tell an individual named Reggie Ellis that he could get him a kilogram of cocaine if he wanted it. According to Boston, Sample was involved in the organization long enough and deeply enough to know how much crack cocaine the organization sold each week. Further, an FBI agent confirmed Sample's involvement in the organization in an interview with the probation officer. The agent revealed that approximately two years ago the FBI knew that Sample controlled drug-trafficking out of the Prince Hall Apartments in Ft. Worth but lacked enough evidence to arrest Sample. Sample had the burden of demonstrating that the information relied upon by the district court was materially untrue. United States v. Vela, 927 F.2d 197, 201 (5th Cir.), cert. denied, 502 U.S. 875 (1991). He did not present any evidence at the sentencing hearing to discharge this burden. The district court judge's finding that Sample was responsible for more than fifteen kilograms of crack cocaine is not clearly erroneous.

AFFIRMED.