

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10055
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VINCENT EDWARD HUMPHREY,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 91-CR-082-01-C
- - - - -
(July 21, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

Vincent Edward Humphrey argues that the district court clearly erred because (a) it failed to make an independent finding that "no reasonable jury could have believed [the] defendant's testimony," and (2) it failed to ground the "enhancement finding . . . upon independent corroborating evidence apart from the mere return of a guilty verdict by the jury."

This Court reviews sentences imposed under the Guidelines to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

determine whether the sentence was imposed in violation of law, as a result of an incorrect application of the Guidelines, or if the sentence is outside of the applicable sentencing range and is unreasonable. United States v. Howard, 991 F.2d 195, 199 (5th Cir.), cert. denied, 114 S.Ct. 395 (1993). Application of the Guidelines is a question of law subject to de novo review. Id. U.S.S.G. § 3C1.1 provides for an enhancement "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." Though the court may not penalize a defendant for denying his guilt as an exercise of his constitutional rights, a sentence may be enhanced if the defendant commits perjury. United States v. Laury, 985 F.2d 1293, 1308 (5th Cir. 1993); see United States v. Dunnigan, ___ U.S. ___, 113 S.Ct. 1111, 1116, 122 L.Ed.2d 445 (1993) (a witness testifying under oath or affirmation commits perjury if he "gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory"). This Court reviews a district court's finding of obstructive conduct for clear error. Laury, 985 F.2d at 1308.

If the defendant objects to a sentence enhancement for obstruction of justice based on his trial testimony, the district court must "review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out." Dunnigan, 113 S.Ct. at 1117. The

district court's determination that an obstruction-of-justice enhancement is required is sufficient if "the court makes a finding of an obstruction or impediment of justice that encompasses all of the factual predicates for a finding of perjury." Id. A separate and clear finding on each element of the alleged perjury, although preferable, is not required. Laury, 985 F.2d at 1308 (quoting Dunnigan, 113 S.Ct. at 1117).

At the resentencing hearing the district court's findings respecting Humphrey's trial testimony identified all of the factual predicates for the perjury definition set forth in Dunnigan: "the defendant was untruthful at trial with regard to material facts and [] there was willful intent to commit perjury." Moreover, in support of its findings that Humphrey committed perjury, the district court agreed with the Government (and specifically adopted as its own findings) that the portions of Humphrey's trial testimony which the Government identified in its memorandum in support of the obstruction adjustment were intentionally false as to material matters. In the memorandum, the Government showed that Humphrey committed perjury when he testified that (a) he did not participate in the drug sale that took place in the front rooms of the house; (b) he did not know that the cooperating individual was in the front rooms during the sale; (c) he had not met or talked to the cooperating individual prior to the trial; (d) he did not possess or throw a package of crack cocaine during the raid; (e) he was threatened by the police to make false statements to assist them; and (f) he told the police at the time of his arrest that he was employed.

The district court was not required to make an independent finding that no reasonable jury could have believed Humphrey's testimony or that other evidence existed (beyond that on which the jury relied) and is entitled to credit the testimony of the police officers over that of the defendant when making an obstruction-of-justice determination. United States v. Velgar-Vivero, 8 F.3d 236, 242 (5th Cir. 1993), cert. denied, 114 S.Ct. 1865 (1994). Because the district court made the findings required by Dunnigan and because an independent review of the record supports its findings respecting Humphrey's perjury, the district court did not clearly err in assessing the upward adjustment for obstruction of justice. See United States v. Butler, 988 F.2d 537, 544 (5th Cir.) (two-level increase for obstruction of justice is required when district court finds that defendant perjured himself at trial and the district court's findings are supported by the record), cert. denied, 114 S.Ct. 413 (1993).

AFFIRMED.