

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10161,
94-10176
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOSE OMAR LOPEZ AND FIDEL ANGEL SILVA,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-44-Y (3) & (5))

(December 16, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:¹

Lopez and Silva appeal their sentences following their distribution of cocaine convictions pursuant to a guilty plea. We affirm Lopez's conviction and rescind the order consolidating Silva's appeal with that of Lopez and direct Silva to either brief any non-frivolous issues or file an **Anders** brief.

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Jose Omar Lopez and Fidel Angel Silva each pleaded guilty pursuant to a written plea agreement to one count of distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). Lopez was sentenced to sixty-three months' imprisonment, followed by five years' supervised release, and Silva was sentenced to seventy-eight months' imprisonment, followed by five years' supervised release.

The factual resume, to which Lopez and Silva agreed, provided that on September 9, 1992, Silva, aided by Lopez, knowingly distributed approximately 242.9 grams of cocaine. Drug Enforcement Administration Special Agent Ivan Lugo, acting undercover, purchased the cocaine from Silva. Lopez acted as Silva's bodyguard during the transaction.

In the Presentence Report ("PSR"), the probation officer attributed approximately 518 grams of cocaine to Lopez based upon the total amount of cocaine delivered to Lugo on September 9, 1992, as well as on two other occasions when Lopez was either present or nearby. The PSR also recommended a two-level enhancement of Lopez's base offense level for possession of a firearm during the commission of the offense. Lopez objected to the PSR's finding attributing 518 grams of cocaine to him for sentencing purposes and to the two-level enhancement for possession of a firearm.

At the sentencing hearing, the district court overruled both objections. These appeals followed and were consolidated.

II.

A.

Lopez argues first that the district court erred in overruling his objection to the PSR's recommendation that he be held accountable for 518 grams of cocaine. He contends that the other two transactions included in the PSR's calculations were not reasonably foreseeable to him given his small role in the conspiracy. The district court overruled Lopez's objection on the basis that Lopez was not "merely present" during the two other transactions, but that he was acting as a bodyguard for others involved in the conspiracy.

We review factual findings, such as the amount of drugs for which an individual shall be held accountable at sentencing, for clear error. **United States v. Maseratti**, 1 F.3d 330, 340 (5th Cir. 1993), **cert. denied**, 114 S. Ct. 1096 (1994). Under the Sentencing Guidelines, a defendant is accountable for all relevant conduct. U.S.S.G. § 1B1.3(a)(1). A participant in jointly undertaken criminal activity is responsible for co-conspirators' conduct if that conduct was "in furtherance of the jointly undertaken criminal activity" and "reasonably foreseeable in connection with that criminal activity." **Id.**, comment. (n.2).

The trial testimony connected appellant Lopez to drug transactions on July 22, 1992 and on August 26, 1992 in addition to the September 9, 1992 transaction discussed above. Agent Lugo testified that on July 22, 1992, he went to the residence of Jose Alberto Lopez to purchase cocaine. During the 138.6 gram

transaction, Lugo observed appellant Lopez arrive in a vehicle and enter the living room of the residence, from which he could overhear the conversation while the transaction took place. Lopez was also standing outside the bar in which another transaction involving 138.6 grams of cocaine occurred on August 26, 1992. In addition, Silva's statements identified Lopez as Silva's bodyguard. Based on this testimony, the district court's finding that Lopez was accountable for 518 grams of cocaine for sentencing purposes does not constitute clear error.

Lopez argues next that the district court improperly enhanced his base offense level by two points pursuant to U.S.S.G. § 2D1.1(b)(1) for possession of a firearm during the commission of the offense. Lopez contends that the enhancement was inapplicable because the government failed to prove Lopez's use of a gun beyond a reasonable doubt and because the government dismissed the firearm charge in Lopez's indictment.

Possession of a firearm during the commission of the offense justifies a two-level enhancement pursuant to § 2D1.1(b)(1). **United States v. Pofahl**, 990 F.2d 1456, 1486 (5th Cir.), **cert. denied**, 114 S. Ct. 266 (1993). The government need only establish possession by a preponderance of the evidence. **United States v. Webster**, 960 F.2d 1301, 1310 (5th Cir.), **cert. denied**, 113 S. Ct. 355 (1992). "The adjustment should be applied if the weapon was present unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1, comment. (n.3). It is immaterial that the charge against Lopez for use of a firearm in

connection with a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1) was subsequently dismissed as part of the plea agreement. **See United States v. Hewin**, 877 F.2d 3, 5 (5th Cir. 1989).

We review the district court's factual determination under § 2D1.1(b)(1) only for clear error. **Webster**, 960 F.2d at 1310. The district court overruled Lopez's objection to the suggested enhancement in the PSR, stating that the court remembered "what the trial testimony was."² Agent Lugo testified at trial that during the September 9, 1992 transaction Lopez had a "9 mm. handgun stuck in the waistband of his pants on the side in plain view." When Lugo asked Silva about the weapon, Silva replied, "Don't worry, that's not for you. I told him that you're cool. . . . he's my bodyguard. That's for protection." In light of this testimony, the district court's finding that Lopez had a gun that was likely connected to the offense was not clearly erroneous.

B.

In his motion to consolidate the appeals of Lopez and Silva, counsel stated that "the issue upon appeal in each of these cases is the same." In the consolidated appellate brief, however, counsel for Silva states that upon review of "the trial, guilty plea, and sentencing portions of the transcript of proceedings," he discovered no plain error. Counsel requests this court to conduct an independent appellate review in the interest of justice to

²Lopez entered his plea of guilty during the jury's deliberations after his trial had been completed.

determine whether the district court committed plain error in sentencing Silva.

However, counsel did not file a motion to withdraw pursuant to **Anders v. California**, 386 U.S. 738 (1967), and his present brief does not suffice as a motion to withdraw under **Anders**. The brief neither mentions **Anders**, nor represents a good faith compliance with the requirements of **Anders**. Moreover, before we can dismiss his appeal pursuant to **Anders**, Silva must be given notice and an opportunity to respond. **See id.** at 744.

We therefore rescind the order granting Silva's motion to consolidate the appeals and direct Silva's counsel to advise this court within fifteen days whether he intended in his brief to demonstrate that he found no non-frivolous issues for appeal. If so, counsel must file a motion to withdraw and a brief in accordance with **Anders** within 30 days. If not, counsel should file a supplement to his brief within fifteen days that properly discusses any non-frivolous issues for appeal.

III.

For the foregoing reasons, Lopez's sentence is affirmed. The order consolidating Silva's appeal into this proceeding is rescinded, and counsel is directed to follow the instructions set forth above.

AFFIRMED.