IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10217

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HOWARD WASHINGTON WOOD, a/k/a "Skelly,"

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas
(3:92-CR-365-D)

(February 8, 1995)

Before GOLDBERG, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:[*]

Citing several errors, Howard Washington Wood appeals the life sentence imposed upon him pursuant to his guilty plea to one count of 21 U.S.C. § 846, conspiracy to possess with intent to distribute five kilograms or more of cocaine and fifty grams or more of cocaine base. We affirm the sentence imposed by the district court.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I

Wood was named as one of sixty-one defendants in a three-count indictment filed on October 6, 1992, in federal district court in Dallas, Texas. Wood was charged only with a violation of count one, 21 U.S.C. § 846. On October 4, 1993, on the eve of trial, Wood entered a plea of guilty to this charge.[1] We now turn to examine the events leading up to his indictment.

At the time of his indictment, Wood was twenty-six years old and had been incarcerated since July 1990 on a charge related to this conspiracy. Born in Jamaica and raised in Brooklyn, New York, Wood was involved in the Anthony Allen family cocaine distribution organization, according to this guilty plea, from December 1986 to June 1991. This Brooklyn-based organization set up various retail "crack" distribution centers, known as "traps," in the Dallas, Texas, area. Wood was involved in several of the traps, but was particularly active in a trap located at 2614 Merlin (the "Merlin trap").

The Allen organization, through its complex network of suppliers, obtained cocaine from various sources in Miami, New York, Houston, Los Angeles, and Dallas. The organization consisted of several levels, from sellers, money counters, and recruiters to on-location managers and higher managers. Money was transported from Dallas to New York City via couriers and Western Union wire

[1]Several of his co-conspirators proceeded to trial and were convicted on charges related to this conspiracy.

transfers. During April and May 1990, the Merlin trap sold one kilogram of crack per day and brought in $100,000 per day.

The government's investigation showed that Wood was a secondary level manager in this organization. Initially a worker at one of the Dallas traps, Wood was eventually allowed to sell his own supply of crack in the Merlin trap and was familiar with the operations of the other Dallas traps. The government, through interviews with witnesses and the trial testimony of other defendants, estimated that while Wood was a part of the conspiracy, the Merlin trap sold between sixteen and one-half to forty kilograms of crack. Furthermore, the Merlin trap sold approximately forty-two kilograms of crack per month in April and May 1990. The government also showed that Wood recruited six workers from the New York area to work in Dallas, with Wood paying for one worker's airfare. Moreover, the government presented evidence that Wood used a gun to facilitate cocaine deals. The government also presented evidence that Wood traveled to Dallas in January 1990 with Anthony Allen for a meeting with suppliers to arrange cocaine shipments.

Wood had other brushes with the law related to the conspiracy before he was apprehended in July 1990. Wood was detained in the Dallas airport in April 1988 when he tried to transport 322.4 grams of cocaine to Dallas. Following a scuffle with police, he escaped, leaving behind the cocaine and identification. Wood was also detained in April 1989 by the New York Port Authority police at JFK

airport who seized $19,010 in cash from him. The police released him without first checking to see if he was wanted.

Wood maintains that in April 1989 he disassociated himself from the organization after he had a dispute with Allen. He claims that he began to distance himself from the organization because of this incident and never returned to Dallas again, except for a brief meeting in January 1990.

II

When Wood pled guilty to the one count of 21 U.S.C. § 846 in October 1993, he also agreed to a factual resume concerning the conspiracy. This resume broadly described the conspiracy, stating that it began around December 1986 and continued until June 1991. The resume also stated that the conspiracy involved several retail outlets in the Dallas area.

The district judge who had presided over the Allen conspiracy trial in October 1993 also conducted Wood's sentencing hearing on February 18, 1994. At this hearing, Wood objected to the presentencing report filed by the government. In its report and at the hearing, the government alleged that drug transactions by Wood's co-conspirators involving between fifteen and forty kilograms of crack cocaine could be attributed to Wood as "Relevant Conduct" under the 1993 United States Sentencing Guidelines ("Sentencing Guidelines") in calculating his base offense level. The government argued for an upward increase in Wood's base offense level for alleged Offense Characteristics (possession of a firearm)

and an Aggravating Role (manager in the conspiracy). The government also recommended a two-point downward adjustment based on Wood's acceptance of responsibility (the guilty plea). The district court agreed with the probation officer's calculation of the base offense level of 42 and increased the level by two points for the firearm possession and two points for Wood's "manager" status for a total of 46. The court then reduced the offense level by two points for Wood's acceptance of responsibility for a final offense level of 44. The court then adjusted the offense level to 43. Having calculated Wood's criminal history as category II, the court sentenced Wood to a term of life imprisonment, a mandatory five-year term of supervisory release following imprisonment, and a $50 mandatory special assessment.

Wood now appeals his life sentence.

III

Wood raises seven points of error allegedly made by the district court in determining his sentence. He first challenges the sufficiency of the evidence to support the district court's finding that fifteen or more kilograms of crack cocaine were attributable to him as relevant conduct under the Sentencing Guidelines. Second, he questions the sufficiency of the evidence to support the district court's finding that he possessed a dangerous weapon during the course and scope of his participation in the conspiracy. Third, Wood contends that there is insufficient evidence to support the district court's finding that he was a

"manager" in the conspiracy. Fourth, he argues that the district court incorrectly calculated his offense level by calculating upward adjustments beyond the offense level of 43, thereby rendering his two-point downward adjustment worthless. Finally, Wood makes several constitutional challenges to his sentence. He argues that his sentence violates the Confrontation Clause of the Sixth Amendment because his sentence was enhanced based on an alleged hearsay statement. He next argues that the Sentencing Guidelines violate the Eighth Amendment's proscription against cruel and unusual punishment because there is a grossly disproportionate leap in the severity of punishment at offense level 43 (life imprisonment) when compared to the incremental increases leading up to offense level 42. Finally, Wood contends that contends that the sentence in this case violates the Eighth Amendment's proscription against the imposition of cruel and unusual punishment because the life sentence imposed upon him is grossly disproportionate to his crime.

We now turn to address each point of error.

IV

A

Wood first challenges the district court's determination of the quantity of cocaine attributable to him as a part of the conspiracy, with this quantity being used to calculate his base offense level. The district court accepted the pre-sentence report's findings that in excess of fifteen kilograms of crack were

attributable to him as relevant conduct within the scope of the conspiracy. The base offense level under Sentencing Guidelines § 2D1.1(c)(1) was level 42. Wood argues that the amounts of crack distributed by his co-conspirators in 1990 were not within the scope of his conspiratorial agreement, and that the government failed to establish this beyond a preponderance of the evidence. He contends that he had withdrawn from the conspiracy in April 1989 and was in New York during the peak months of April and May 1990. Finally, Wood asserts that mere awareness of such transactions is not enough for sentence enhancement under section 1B1.3 of the Sentencing Guidelines. See United States v. Evbuomwan, 992 F.2d 70, 72 (5th Cir. 1993).

Section 1B1.3(a)(1)(B) of the Sentencing Guidelines states that in the case of jointly undertaken criminal activity, the base offense level "shall be determined on the basis of . . . 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." We have previously held that "[a] district court's findings about the quantity of drugs implicated by the crime are factual findings reviewed under the `clearly erroneous' standard." United States v. Rivera, 898 F.2d 442, 445 (5th Cir. 1990). Under this standard, "`[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety the court of appeals may not reverse it even though convinced that had it been sitting as the

trier of fact, it would have weighed the evidence differently.'" United States v. Rogers, 1 F.3d 341, 342 (5th Cir. 1993)(citing Anderson v. City of Bessemer City, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)).

The district court considered several sources of information in making its decision. United States v. Rivera, 898 F.2d 442, 445 (5th Cir. 1990). In his plea agreement, Wood admitted that he had been part of a conspiracy to possess with intent to distribute and to distribute five kilograms or more of cocaine and fifty grams or more of crack. In the factual resume, Wood admitted that he was a member of the charged conspiracy, which began about December 1986 and continued until about June 1991. At the sentencing hearing, a government detective offered evidence that based upon trial testimony and cooperating co-conspirator statements, approximately 16 to 42 kilograms of crack were reasonably foreseeable quantities of the drug within the scope of Wood's jointly undertaken criminal activity. Wood objected to this finding, but offered no evidence in rebuttal. Consequently, the court found that based upon a preponderance of the evidence that fifteen kilograms or more of crack were attributable to Wood, agreeing with the presentencing report's calculation of an offense level of 42.

"The district court has broad discretion in considering the reliability of the submitted information regarding the quantities of drugs involved." United States v. Martinez-Moncivais, 14 F.3d 1030, 1039 (5th Cir.), cert. denied, 115 S.Ct. 72, 130 L.Ed.2d 27

(1994). Credibility determinations in a sentencing hearing "are peculiarly within the province of the trier-of-fact." United States v. Sarasti, 869 F.2d 805, 806 (5th Cir. 1989). Moreover, it is proper for a sentencing court to rely on a "presentencing report's construction of the evidence to resolve [a] factual issue, rather than relying on the defendant's version of the facts." United States v. Beard, 913 F.2d 193, 199 (5th Cir. 1990).

After considering the arguments, we cannot find that the district court's determination of quantity is clearly erroneous. Although Wood maintains that he was not in Dallas during the period when the Merlin trap was selling one kilogram of crack a day, he made no claims of withdrawal from the conspiracy in his plea agreement. He admitted in his plea agreement that he had been involved in a conspiracy to sell and distribute cocaine and crack from December 1986 to June 1991. Moreover, in January 1990 he attended a high level meeting in Dallas during which members of the conspiracy arranged for more shipments of cocaine, which were to be turned into crack. The agent also presented evidence that during this same period in January, Wood had assisted in converting cocaine to crack for distribution at the Merlin trap. Furthermore, the agent's actual numbers for the Merlin trap were derived from statements taken from cooperating co-conspirators, and the agent had taken special care not to double-count. As an active member of the conspiracy, he remained accountable for his own conduct and the foreseeable acts of his co-conspirators committed in furtherance of

the conspiracy. United States v. Maseratti, 1 F.3d 330 (5th Cir. 1993). For the foregoing reasons, we affirm the district court's determination of his offense level.

B

Wood next challenges the district court's two-point increase in his offense level for his possession of a dangerous weapon during the conspiracy pursuant to U.S.S.G. § 2D1.1(b)(1). The party seeking an upward adjustment in the sentence level must prove facts necessary to support the adjustment by a preponderance of the evidence. United States v. Alfaro, 919 F.2d 962, 965 (5th Cir. 1990). We review these factual findings for clear error. Id. at 966.

Wood acknowledges that the Federal Rules of Evidence do not apply in sentencing proceedings, see Fed. R. Evid. 1101(d)(3), but stresses that under the Sentencing Guidelines the information used as a basis for sentencing must have "sufficient indicia of reliability to support its probable accuracy." See U.S.S.G. § 6A1.3(a). With these tenets in mind, Wood argues that the district court erred in crediting "hearsay testimony based on an admitted felon's self-serving allegation" as a basis for this upward enhancement. Moreover, he argues that such hearsay testimony should not be credited at a sentencing hearing unless other evidence exists to corroborate the hearsay statement, citing United States v. Miele, 989 F.2d 659, 664 (3d Cir. 1993). Although his argument may be appealing, he misreads Miele.

The commentary to Sentencing Guideline § 6A1.3 specifically permits consideration of testimony at sentencing hearings that would not be admissible at trial. The commentary states that "[i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. . . . Reliable hearsay evidence may be considered." U.S.S.G. § 6A1.3, commentary (1993). In the sentencing hearing, the detective testified that Wood had possessed a gun during a drug deal based on his interview with one of Wood's co-conspirators. This co-conspirator had appeared and testified as a government witness in the October 1993 trial. The co-conspirator advised the detective that he had seen Wood "cover" a drug deal in Dallas with a gun during late 1988 or early 1989. This information is plausible because it dovetails with other evidence placing Wood in Dallas at the same time. Moreover, the district judge who presided at Wood's sentencing hearing had also presided at the trial of his co-conspirators; thus, he had the opportunity to observe and evaluate this particular co-conspirator's veracity. Because this information was sufficiently reliable, the district court's finding that Wood possessed a gun during a drug transaction was not clearly erroneous. Therefore, we affirm the district court's two-point enhancement of his sentence.

C

Wood next challenges the sufficiency of the evidence to support the district court's finding that he held the role of a secondary manager in the conspiracy, thereby increasing his offense level by two points under Sentencing Guideline § 3B1.1(c). As the party seeking the sentencing adjustment, the government was required to establish the factual predicate justifying an adjustment by a preponderance of the evidence. United States v. Alfaro, 919 F.2d 962, 965 (5th Cir. 1990). Reviewing facts for clear error, we consider whether the district court's factual finding that Wood was a manager is plausible in the light of the record as a whole. Id. at 965-66.

The Sentencing Guidelines clearly state that "[t]o qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward adjustment may be warranted [for a defendant who]. . . exercised management responsibility over the property, assets, or activities of a criminal organization." U.S.S.G. § 3B1.1, cmt. 2. Among the factors to consider in determining the management status of a defendant is whether the person recruited accomplices. Id. at cmt. 4.

Wood argues that the government based this manager accusation on a single piece of evidence, that he had managed a cooperating co-conspirator for one week at the Merlin trap in 1987. According to the Sentencing Guideline commentary, this information alone

would be enough to classify him as a manager. The government, however, presented more evidence that established that Wood was a manager. From interviews with his accomplices, the detective determined that Wood began working as a runner, was elevated to a manager at the traps, helped obtain cocaine, and collected money from sales at the traps. Finally, the government presented evidence that while in New York Wood recruited workers for the Dallas traps, even providing money for one worker's airfare. Considering the culpability of this evidence, the district court clearly did not err in determining that Wood was a secondary manager in this conspiracy, and, consequently, the two-point enhancement was proper.

D

Wood next focuses his arguments on the downward adjustment the district court made for his acceptance of responsibility. We review de novo the determination of legal principles utilized in arriving at a guideline sentence. United States v. Mourning, 914 F.2d 699, 704 (5th Cir. 1990). Wood argues that in granting him a two point downward adjustment under Sentencing Guideline § 3E1.1(a), the court improperly calculated his offense level, thereby depriving him of any meaningful benefit in the reduction. Specifically, the district court calculated Wood's base offense level at 42, then added two points for possession of a weapon, then added two more points for manager status, for a total of 46. The district court then reduced his offense level from 46 to 44 for his

acceptance of responsibility. Finally, the court reduced this offense level to 43, pursuant to Sentencing Guidelines chapter 5, part A, application note 2.

Wood argues that the court erred because application note 2 to the Sentencing Table states that "[a]n offense level of more than 43 is to be treated as an offense level of 43." This note, he contends, demonstrates that the district court erred in computing his sentence because it computed enhancements above the level of 43. He asserts that a plain reading of this commentary does not allow any offense level to add up to more than 43. As a result, once a defendant's base offense level exceeds 43, all downward adjustments must proceed from level 43. Therefore, the court should have computed his offense level to be 43, then given him the two-point reduction for acceptance of responsibility for a total of 41. Thus, he would have been accorded a meaningful benefit for his acceptance of responsibility.

Despite his insistence, Wood, nevertheless, misreads the Sentencing Guidelines. We have previously discussed the order in which a sentence must be calculated, finding that under the Application Instructions of section 1B1.1 the district court must first determine the base offense level, then make any upward adjustments, and finally make any adjustments for acceptance of responsibility. United States v. Reyes, 881 F.2d 155, 156 (5th Cir. 1989). Moreover, the Second Circuit has recently faced an identical argument in United States v. Caceda, 990 F.2d 707, 710

(2d Cir.), cert. denied, 114 S.Ct. 312, 126 L.Ed.2d 259 (1993). The Caceda court characterized an argument identical to Wood's as proposing a "perverse" result. We agree. As the Caceda court stated,

> [w]e believe it evident that downward adjustments must be made from the total of the base offense level plus upward adjustments even if that total exceeds 43. Otherwise, a more culpable offender, say, a defendant whose conduct would yield a level of 50 who was entitled to a downward adjustment of 2, would receive a total offense level of 41, while a less culpable defendant with a level of 43 and no applicable upward or downward adjustments would get a higher sentence.

Id. We therefore hold that the district court did not err when it reduced Wood's offense level for his acceptance of responsibility from his total offense level of 46, rather than from his final adjusted offense level of 43. Although the Sentencing Guidelines cannot be championed as a model of clarity and simplicity in statutory language, we are firmly convinced that a reading of the Guidelines as a whole does not allow for such a twisted result as Wood proposes. Accordingly, we affirm the district court's determination of his sentence.

E

(1)

We now turn to Wood's several constitutional challenges to his sentence under the Guidelines. He first contends that because facts established at the sentencing hearing directly affect the determination of a defendant's sentence, the full requirements of the Confrontation Clause of the Sixth Amendment should be employed

at the sentencing hearing to ensure the protection of the defendant's constitutional rights. Although acknowledging that the Sentencing Guidelines explicitly permit a sentencing court's consideration of hearsay testimony, Wood, nevertheless, challenges the constitutionality of the district court's application of the Guidelines in this case.

We are reminded that 18 U.S.C. § 3661 provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." The Sentencing Guidelines also state that "[i]n resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a) (1993). Moreover, a "defendant's confrontation rights at a sentencing hearing are severely restricted." United States v. Rodriguez, 897 F.2d 1324, 1328 (5th Cir.), cert. denied, 498 U.S. 857, 111 S.Ct. 158, 112 L.Ed.2d 124 (1990)

Wood specifically challenges the information provided to the detective by his co-conspirator, which showed that Wood used a gun during a drug deal. Wood bore the burden of demonstrating that this information could not be relied upon because it was materially

untrue, inaccurate, or unreliable. United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). He was given an opportunity to respond, and he did not present any evidence to show that this information was unreliable, other than attacking the co-conspirator's credibility. Because the court did not foreclose his opportunity to confront and cross-examine the detective about the basis for his information, Wood's Sixth Amendment rights were not denied at this sentencing hearing. United States v. Byrd, 898 F.2d 450, 453 (5th Cir. 1990). We therefore affirm the district court's determination of his sentence and hold that his confrontation rights were not violated. See Rodriguez, 897 F.2d at 1328.

(2)

Wood next challenges his sentence as determined by the Sentencing Guidelines, arguing that the mandatory imposition of life imprisonment at level 43 violates the Eighth Amendment's proscription against cruel and unusual punishment. He contends that the automatic life sentence at level 43 is unconstitutional because the Guidelines impose incremental increases in the length of imprisonment from level 1 to 42, then the sentence range inexplicably leaps to life at 43. Wood also argues that his life sentence violates the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment because his life sentence is disproportionate to his crime.

The Supreme Court has upheld the constitutionality of the Sentencing Guidelines. Mistretta v. United States, 488 U.S. 361, 109 S.Ct. 647 (1989). In evaluating a sentence under the Eighth Amendment, we determine only whether the sentence with within constitutional limits. United States v. Sullivan, 895 F.2d 1030, 1032 (5th Cir.), cert. denied, 498 U.S. 877, 111 S.Ct. 207, 112 L.Ed.2d 168 (1990). Because the district court complied with the Sentencing Guidelines in imposing Wood's sentence and his sentence is within the applicable guideline range, we find no Eighth Amendment violation. Id.

V

We will close by summarizing our holding. We affirm the district court's determination that 15 or more kilograms of cocaine were attributable to Wood as relevant conduct, that Wood possessed a dangerous weapon during the course and scope of this conspiracy, and that Wood was a manager within the conspiracy. Moreover, we hold that the district court correctly computed Wood's offense level by deducting the two points for his acceptance of responsibility from his final offense total of 46. Finally, we hold that his sentence does not violate either the Confrontation Clause of the Sixth Amendment nor Eighth Amendment's proscription against cruel and unusual punishments. For the foregoing reasons, Wood's life sentence imposed by the district court is

A F F I R M E D.