IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10309

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILSON RENFIGO MUNOZ and
JIMMY RAY ROJO,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(3:90 CR 128 R)

March 20, 1995

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

A Texas jury found Wilson Renfigo Munoz and Jimmy Ray Rojo guilty of one count each of conspiring to distribute and to possess with intent to distribute greater than five kilograms of cocaine in violation of 21 U.S.C. § 846. In addition, the jury found Munoz guilty of one count of aiding and abetting the possession of

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

cocaine with intent to distribute, 21 U.S.C. § 841(a)(1); 18 U.S.C. § 2, and found Rojo guilty of one count of possession of cocaine with intent to distribute. 21 U.S.C. § 841(a)(1). Munoz and Rojo appealed to this court, which affirmed their convictions in an unpublished opinion but remanded the case for resentencing because there had been no factual determination as to the quantity of drugs which were reasonably foreseeable to each of the defendants. U.S.S.G. § 1B1.3. Following resentencing, both defendants appeal their revised sentences.

I. FACTUAL AND PROCEDURAL BACKGROUND

John Paul Weber, formerly a Swiss pastry chef, was arrested in April of 1989 for distribution of cocaine. He cooperated with the government[1] and has aided in the successful prosecution of numerous drug dealers associated, inter alia, with Jose "Alex" Ramos. Ramos, already sentenced to imprisonment for life, was a major drug kingpin whose Houston, Texas operation regularly distributed thousands of kilograms of cocaine he imported from Colombia. Weber, one of Ramos's customers, would obtain the cocaine from Ramos in Houston and sell it in Dallas and other cities. In this case, Weber's information led to the indictment of twenty three alleged conspirators. Weber named Rojo as a multi-ounce cocaine distributor and customer of Weber in Dallas. Munoz was identified by Weber as an assistant of Ramos who aided in the transfer of

[1] In his plea bargain with the government, Weber agreed to serve a thirty-six month term of imprisonment and was accepted into the government's Witness Protection Program.

drugs from Ramos to Weber.

The jury found both Rojo and Munoz guilty of the conspiracy count. In addition, Munoz was found guilty of one count of aiding and abetting the possession of cocaine, and Rojo was found guilty of one count of possession of cocaine. The district court imposed sentences which, inter alia, Rojo and Munoz appealed. In an unpublished opinion, United States v. Saltos, No. 91-7157 (5th Cir. Mar. 30, 1993), this court vacated the original sentences because the district court had not made a proper determination as to the quantity of drugs which was "reasonably foreseeable by [each] defendant." U.S.S.G. § 1B1.3, commentary, applic. n.1 (cross referenced by § 2D1.4). Accordingly, we remanded to the district court for resentencing of Munoz and Rojo.

Upon remand, the district court held a resentencing hearing and resentenced Munoz to 136 months of imprisonment and Rojo to 200 months of imprisonment. On appeal to this court, both defendants argue that the district court erred in calculating the amount of drugs which were reasonably foreseeable to them. In addition, Munoz argues that district court erred in refusing to grant him an additional two-level downward adjustment for as a "minimal" participant in the conspiracy. U.S.S.G. § 3B1.2(a). We affirm.

II. STANDARD OF REVIEW

A sentencing court's factual findings must be supported by a preponderance of the evidence, United States v. McCaskey, 9 F.3d 368, 372 (5th Cir. 1993), cert. denied, 114 S. Ct. 1565 (1994), and

we review such findings under the clearly erroneous standard. United States v. Palmer, 31 F.3d 259, 261 (5th Cir. 1994). In particular, a district court's determination of the amount of drugs involved in an offense will be reversed only for clear error. United States v. Mergerson, 4 F.3d 337, 345 (5th Cir. 1993), cert. denied, 114 S. Ct. 1310 (1994); United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990). A factual finding is clearly erroneous if it is not plausible in light of the record taken as a whole. See Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985). Whether the district court correctly applied the Guidelines is a question of law subject to de novo review. United States v. Diaz, 39 F.3d 568, 571 (5th Cir. 1994).

The district court's denial of a reduction under U.S.S.G. § 3B1.2 is entitled to great deference and should not be disturbed except for clear error. United States v. Devine, 934 F.2d 1325, 1340 (5th Cir. 1991), cert. denied, 502 U.S. 1065 (1992).

III. ANALYSIS

A. Munoz's Claims.

Munoz's primary argument on appeal is that the district court erred in failing to grant him a four level downward adjustment as a "minimal" participant pursuant to U.S.S.G. § 3B1.2(a).[2] The

[2] Section 3B1.2 states:

Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

district court did, however, grant Munoz a two level downward adjustment as a "minor" participant. U.S.S.G. § 3B1.2(b). Specifically, Munoz claims two points of error with regard to this issue: (1) the district court erred in determining that it had no authority to grant Munoz an additional downward adjustment on remand for being a minimal, as opposed to a minor, participant; and (2) the district court committed clear error in failing to classify Munoz as a minimal participant.

With regard to his first contention, Munoz bases his argument on the following statement of the district court:

> I do not think it's appropriate for me to make additional-- do additional tinkering with the guideline calculation even if I were tempted to do so. I think I made correct determinations on the role that people played. We went through some of those arguments before. And the Fifth Circuit did a very limited remand and that was the-- the determination of the amount of drugs that were reasonably foreseeable as to each Defendant. . . . .

According to Munoz, this statement belies the district court's belief that, pursuant to our earlier decision vacating the original sentences and remanding for a determination of foreseeability, it lacked the power to consider Munoz's plea for an additional downward adjustment. The district court appears to have concluded that: (1) in view of this court's limited remand on the first

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> (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
>
> (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.
>
> In cases falling between (a) and (b), decrease by 3 levels.

U.S.S.G. § 3B1.2.

appeal, it lacked the power to consider Munoz's request for an additional downward departure; and (2) even if it had such power, it would find that Munoz was not entitled to the requested adjustment. The district court may well have been correct in its view of its power on remand. See United States v. Fiallo-Jacome, 874 F.2d 1479 (llth Cir. 1989). We need not decide that issue, however, because it is clear that the district court would not have given the minimal-participant reduction even if he had the power to do so. We must give great deference to this decision and may reverse only for clear error. Devine, 934 F.2d at 1340.

The commentary on U.S.S.G. § 3B1.2 states that "[i]t is intended that the downward adjustment for a minimal participant will be used infrequently." U.S.S.G. § 3B1.2, applic. n.2. However, minimal participant classification is warranted where "the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as a minimal participant." U.S.S.G. § 3B1.2, applic. n.1. The commentary tells us that minimal participant status

> would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marijuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.

U.S.S.G. § 3B1.2, applic. n.2.

Munoz argues that he was a cocaine courier for Ramos on only a single occasion; therefore, according to the commentary to § 3B1.2, he should be classified as a minimal participant. The

government counters by contending that "Munoz understates his involvement." After carefully scrutinizing the testimony elicited at the resentencing hearing, we find no clear error in the district court's conclusion that Munoz was a minor, but not minimal, participant. Weber's testimony revealed that Weber had met with Munoz on three different occasions and had specifically discussed the cocaine business with Munoz. Weber testified that Munoz had informed Weber that Munoz managed Ramos' ranch in Texas, including guarding large amounts of money stored there. Weber also testified that on one occasion, Weber delivered a car to Munoz and informed Munoz that a specific amount of money was inside a briefcase in the car. Munoz then drove the car away for a while; upon his return, Munoz told Weber that "you're ready to go." Weber testified that the money was intended as a prepayment for twenty kilograms of cocaine and that, after Munoz returned the car to Weber, the money was missing and there were twenty kilograms of cocaine inside.

The district court specifically found Weber to be a credible witness. Testimony is incredible as a matter of law only if it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature. United States v. Bermea, 30 F.3d 1539, 1552 (5th Cir. 1994), cert. denied, 1995 U.S. LEXIS 1124, 63 U.S.L.W. 3625 (1995); United States v. Hoskins, 628 F.2d 295, 297 (5th Cir.), cert. denied, 449 U.S. 987 (1980). Munoz has not proffered any evidence that Weber's version of events could not possibly have occurred; thus, we will not disturb the district court's credibility

determination. Given the frequency with which Weber encountered Munoz, the nature of their conversations, and Munoz's self-professed knowledge of Ramos' smuggling activities, it is reasonable to conclude that Munoz understood the scope and structure of the conspiracy and voluntarily participated in it. Under the circumstances, his delivery to Weber of twenty kilograms of cocaine cannot reasonably be classified as an isolated delivery of a "small amount of drugs." U.S.S.G. § 3B1.2, applic. n.2. Based upon Weber's credible testimony, it was not clear error to refuse to grant Munoz an additional downward departure as a "minimal" participant.

Munoz's second argument on appeal is that there was insufficient evidence regarding the quantity of drugs which the district court found to be reasonably foreseeable to him. The district court determined that, based upon his delivery of twenty kilograms of cocaine to Weber, Munoz could reasonably foresee that at least twenty kilograms of cocaine were involved in the conspiracy. Under the applicable Sentencing Guidelines, a quantity of cocaine of at least fifteen kilograms but less than fifty kilograms yields a base offense level of 34. Subtracting two levels for his status as a minor participant yields a base offense level of 32 which, combined with a criminal history category of I, yields an applicable range of imprisonment of 121 to 151 months. Munoz was sentenced in the middle of this range, at 136 months. We can discern no error in the district court's factual determination that Munoz could reasonably foresee the twenty kilograms which he

delivered to Weber, and there has been no error in the district court's application of the Guidelines. Accordingly, we find this argument to be without merit.

B. Rojo's Claims.

The government has filed a motion to dismiss Rojo's appeal on grounds that it is untimely filed. The district court's judgment was entered on March 21, 1994. Rojo filed his notice of appeal to this court on April 5, 1994. The requisite deadline for filing his appeal, however, fell on April 4, 1994. See Fed. R. App. P. 4(b) ("In a criminal case, a defendant shall file notice of appeal in the district court within 10 days after the entry either of the judgement or order appealed from, or of a notice of appeal by the Government. . . . A judgment or order is entered within the meaning of this subdivision when it is entered on the criminal docket."). Because Rojo's appeal was filed eleven days after the entry of the district court's judgment, it is untimely, and absent a determination by the district court of excusable neglect, this court is without jurisdiction to entertain the appeal. See id.

In this case, however, the district court granted Rojo leave to appeal in forma pauperis. This order is tantamount to a finding of excusable neglect, conferring jurisdiction of Rojo's appeal upon this court. United States v. Quimby, 636 F.2d 86, 89 (5th Cir. 1981); Fed. R. App. P. 4(b). We thus proceed to analyze Rojo's claim on the merits.

Rojo contends that the district court clearly erred in its

determination that at least fifteen kilograms of cocaine were reasonably foreseeable to him. His sole basis for this contention appears to be that Weber was an unreliable witness who was "able to confuse" the district court. Rojo asserts that Weber is unreliable because he is a cocaine trafficker and because his testimony at the two sentencing hearings was inconsistent. Thus, because Weber's testimony is unreliable, Rojo contends that there was insufficient evidence to support the quantity of drugs for which he was held responsible. We disagree.

The district courts are in the best position to judge the credibility of witnesses and their credibility determinations are therefore afforded great deference by an appellate court. United States v. Mourning, 914 F.2d 699, 704 (5th Cir. 1990); United States v. McClure, 786 F.2d 1286, 1289 (5th Cir. 1986). Thus, we will accept the district court's credibility choice unless it is clearly erroneous. United States v. Bass, 10 F.3d 256, 258 (5th Cir. 1993); United States v. Maseratti, 1 F.3d 330, 340 (5th Cir. 1993), cert. denied, 114 S. Ct. 1096 (1994).

At resentencing, Rojo's counsel specifically argued that Weber's testimony should be discounted because it was inconsistent with his testimony at the original sentencing hearing. Specifically, Rojo's counsel noted that, during the original sentencing hearing, Weber testified that he had delivered *one* half-kilo of cocaine to Rojo, whereas during the resentencing hearing, Weber testified that he had delivered *three* half-kilos to Rojo. The district court rejected Rojo's plea to disregard the additional

amounts, stating:

> I still find Mr. Weber to be a credible witness. . . . I simply don't find his testimony to be inconsistent. He sometimes speaks in generalities and then when asked a specific question gives a specific answer. And I do credit his explanation that on the one thing [the one-half kilo versus three one-half kilo deliveries] he was inconsistent with today in terms of the trial testimony, I think if there had been a followup question either by a Defense attorney or by the Government, he would have said that there were three meetings instead of only one meeting involved. So I do find him credible.

The district court clearly considered Rojo's argument regarding Weber's credibility and rejected it. We are not left with a definite and firm conviction that this credibility choice is mistaken; thus, Rojo has not proven clear error. See United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Henderson v. Belknap (In re Henderson), 18 F.3d 1305, 1307 (5th Cir. 1994), cert. denied, 115 S. Ct. 573 (1994). In addition, Rojo offers no other theory as to why we should reject the district court's finding with regard to the quantity of drugs foreseeable to him. "The amount of drugs for which an individual shall be held accountable at sentencing represents a factual finding, and will be upheld unless clearly erroneous." Maseratti, 1 F.3d at 340. The district court's determination that Rojo could foresee at least fifteen kilograms of cocaine is plausible in light of the record as a whole; thus, we Rojo has failed to establish clear error. See Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985).

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court

as to both Munoz and Rojo is AFFIRMED. The government's motion to dismiss Rojo's appeal as untimely filed is DENIED.