

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10516
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TRINIDAD GONZALEZ,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
(4:93-CR-84-Y)

(February 16, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Trinidad Gonzalez entered a guilty plea to count seven of a sixteen-count indictment naming him and twelve others in narcotics violations. Gonzalez entered his plea pursuant to a plea agreement supported by a factual resume. The district court reserved acceptance of the plea agreement until preparation of a Presentence Investigation Report ("PSR").

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

The PSR calculated Gonzalez's base offense level using the amount of drugs that he had stipulated to distributing in the factual resume (in excess of 150 kilograms of cocaine). The PSR did not give Gonzalez credit for acceptance of responsibility. The PSR added four offense points to Gonzalez's base offense level because he was considered the leader of a conspiracy to distribute cocaine and heroin, and he supplied the drugs to the distributors. The PSR added two offense points to Gonzalez's base offense level because DEA agents found firearms at the residence used by Gonzalez and a co-conspirator to store the narcotics. Gonzalez objected to the PSR on all these elements. The district court overruled all objections, accepted the PSR as its factual findings, accepted the plea agreement, and sentenced Gonzalez to 480-months' imprisonment, four-years' supervised release, and deportation upon release. Gonzalez timely appealed his sentence.

I

A

Gonzalez argues that the district court erred in failing to award him credit for acceptance of responsibility because he pleaded guilty, truthfully admitted to the conduct comprising his offense, did not falsely deny any additional relevant conduct, and stood ready to perform his part of the plea agreement.

We have not "ultimately defined what standard applies in reviewing a district court's refusal to credit acceptance of responsibility." United States v. Cartwright, 6 F.3d 294, 304 (5th

Cir. 1993), cert. denied, 1994 WL 397134 (Dec. 12, 1994). We have applied a "clearly erroneous" standard, "without foundation," and "great deference," and found that there is "no practical difference between the standards." Id. (citations omitted).

A defendant who enters a guilty plea is not entitled to an adjustment "as a matter of right." § 3E1.1 comment. (n.3). The defendant bears the burden of showing that he is entitled to the downward adjustment for acceptance of responsibility. § 3E1.1(a); United States v. Lghodaro, 967 F.2d 1028, 1031 (5th Cir. 1992). In determining whether a defendant qualifies for an adjustment for acceptance of responsibility, consideration may be given to whether the defendant truthfully admitted the conduct comprising the offense of conviction and whether he falsely denied any additional relevant conduct for which he was accountable. § 3E1.1 comment. (n.1(a)). However, "[a] defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction." Id. However, a defendant who falsely denies relevant conduct, which the court determines to be true, acts in a manner inconsistent with acceptance of responsibility. Id.

Gonzalez stipulated to facts relating to his offense conduct and his involvement in the conspiracy. During his interview with the probation officer, Gonzalez, as reflected in the PSR, "denied any other sales of heroin or cocaine, or knowledge of a conspiracy [and] denied all of the information contained in the Factual

Resume," with the exception of the offense to which he pleaded guilty. Gonzalez's counsel advised him of the consequences of such action during the interview, and Gonzalez stated that he understood.

The district court accepted the PSR as its factual findings. In resolving disputed factual matters at sentencing, the district court may consider any relevant evidence with sufficient indicia of reliability. United States v. Manthei, 913 F.2d 1130, 1138 (5th Cir. 1990). A PSR generally has that type of reliability. United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990). A defendant bears the burden of demonstrating that the information contained in the PSR is materially untrue. United States v. Rodriguez, 897 F.2d 1324, 1328 (5th Cir.), cert. denied, 498 U.S. 857 (1990). If no relevant affidavits or other evidence are submitted to rebut the information contained in the PSR, the district court is free to adopt its findings without further inquiry or explanation. United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990). Furthermore, district courts may adopt disputed PSR facts when the record indicates that the district court, at least implicitly, considered the relevant arguments and decided to credit the PSR's position. See United States v. Sherbak, 950 F.2d 1095, 1099-1100 (5th Cir. 1992).

Gonzalez denied relevant conduct already determined to be true, exhibiting conduct inconsistent with acceptance of responsibility. See § 3E1.1 comment. (n.1(a)). The district court

did not err in denying an award for acceptance of responsibility based on Gonzalez's conduct.

B

Gonzalez argues that the district court erred in basing his offense level on the drug quantity attributable to the conspiracy.

We review for clear error the district court's determination of the applicable quantity of drugs for sentencing purposes. United States v. Mergerson, 4 F.3d 337, 346 (5th Cir. 1993), cert. denied, 114 S.Ct. 1310 (1994).

Gonzalez specifically stipulated to the facts serving as the basis for the drug quantity used in his sentencing, admitting that he "distributed or caused to be distributed . . . in excess of 150 kilograms of cocaine." In his plea agreement, Gonzalez agreed that the Factual Resume was a "true and correct statement of his offense conduct and that such facts may be taken into consideration by the court in determining what sentence to impose." Gonzalez offered no evidence at sentencing to rebut the drug-quantity basis. The district court did not clearly err in basing Gonzalez's sentence on the quantity of drugs he admitted to distributing.

C

Gonzalez contends that the district court erred in finding that he was the leader/organizer of the conspiracy, which involved five or more participants. Gonzalez maintains that he was a "casual seller" of only one kilogram of cocaine.

A defendant's offense level may be enhanced four points if the district court finds him to be a leader or organizer of a criminal activity involving five or more participants. § 3B1.1(a). We will disturb a district court's determination regarding a defendant's role in a criminal activity only if it is clearly erroneous. United States v. Barreto, 871 F.2d 511, 512 (5th Cir. 1989).

The district court may rely on the PSR in resolving factual disputes. Alfaro, 919 F.2d at 966. As we have noted, a defendant bears the burden of demonstrating that the information contained in the PSR is materially untrue. United States v. Rodriguez, 897 F.2d 1324, 1328 (5th Cir.), cert. denied, 498 U.S. 857 (1990). The PSR stated that Gonzalez was the leader/organizer of the conspiracy and that he supplied the cocaine to distributors and directed their activities in furtherance of the jointly undertaken criminal activity. Beyond his allegations of falsehood, Gonzalez did not present evidence that the information in the PSR was materially untrue. Consequently, the district court was able to rely upon the PSR in making its sentencing decisions without clear error.

D

Gonzalez complains that the district court erred in increasing his offense level by two points for possession of a dangerous weapon. Gonzalez contends that the weapons found in his residence shared with co-conspirator Marta Mosqueda cannot be connected to him because Mosqueda owned them.

We once again start with the premise that the district court's application of the sentencing guidelines is reviewed for clear error. United States v. Aguilera-Zapata, 901 F.2d 1209, 1216 (5th Cir. 1990). The district court may assess an offense-level increase for possession of a dangerous weapon during commission of narcotics trafficking. § 2D1.1 (b). Enhancement is proper for a co-defendant's reasonably foreseeable possession of a firearm, even when the defendant had no knowledge of the possession. Aguilera-Zapata, 901 F.2d at 1215. Because firearms are "tools of the trade" of those engaged in illegal drug activities, sentencing courts may infer that a defendant should have foreseen a co-defendant's possession of a dangerous weapon if the government demonstrates that a co-conspirator knowingly possessed a weapon while engaged in the illegal activity. Id.

Gonzalez stipulated that Mosqueda acted under his direction in the drug-distribution scheme. The firearms were seized in a residence that was shared by Gonzalez and Mosqueda and that was used to store the narcotics. Other than his unsworn assertions, Gonzalez offered no rebuttal evidence. Thus, the district court did not commit clear error in finding that Gonzalez could reasonably foresee that Mosqueda possessed firearms. See Aguilera-Zapata, 901 F.2d at 1211-15.

II

Gonzalez contends that the district court violated his due process rights by considering his involvement in a "wide-scale drug

distribution conspiracy" and relied on incorrect information contained in the PSR to determine his sentence. Gonzalez failed to raise this constitutional argument in the district court.

When a defendant in a criminal case forfeits an error by failing to object, this court may remedy the error only when the appellant shows: (1) there is an error, (2) that is plain, and (3) that affects his substantial rights. United States v. Rodriguez, 15 F.3d 408, 414-15 (5th Cir. 1994)(citing United States v. Olano, 113 S.Ct. 1770, 1777-79 (1993)); Fed. R. Crim. P. 52(b). This court lacks the authority to relieve an appellant of this burden. Olano, 113 S.Ct. at 1781. "If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Id. at 1778 (quoting Fed. R. Crim. P. 52(b)). "Plain is synonymous with 'clear' or 'obvious,' and '[a]t a minimum,' contemplates an error which was 'clear under current law' at the time of trial." United States v. Calverly, 37 F.3d 160, 162-63 (5th Cir. 1994)(en banc).

Gonzalez's argument fails at the first step of the Olano analysis because he does not present a clear or obvious error. The Guidelines allow consideration of relevant conduct of which the defendant has not been convicted, including dismissed counts. See United States v. Byrd, 898 F.2d 450, 451-52 (5th Cir. 1990). Gonzalez bears the burden of demonstrating that the information relied upon in sentencing is "materially untrue." United States v. Vela, 927 F.2d 197, 201 (5th Cir.), cert. denied, 112 S.Ct. 214

(1991). Gonzalez provided only his unsworn assertions in objection to the PSR. The district court thus did not commit plain error.

III

For the reasons set out in this opinion, the judgment of the district court is

A F F I R M E D.