

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10760
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AMOS WELLS,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:94-CR-26-Y-1

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(March 22, 1995)

Before GARWOOD, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

Amos Wells argues that the district court erred in refusing to decrease his offense level for acceptance of responsibility.

This Court reviews the application of the Sentencing Guidelines de novo and the district court's findings of fact for clear error. United States v. Wimbish, 980 F.2d 312, 313 (5th Cir. 1992), cert. denied, 113 S. Ct. 2365 (1993). U.S.S.G. § 3E1.1(a) directs the sentencing court to decrease the offense level by two levels if the defendant "clearly demonstrates acceptance of responsibility for his offense." The defendant

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

bears the burden to prove entitlement to the reduction. United States v. Lghodaro, 967 F.2d 1028, 1031 (5th Cir. 1992).

In determining whether a defendant is entitled to the reduction, consideration may be given to whether the defendant truthfully admitted the conduct comprising the offense of conviction, and truthfully admitted or did not falsely deny any additional conduct for which he is accountable. § 3E1.1, comment. (n.1(a)). "The mere entry of a guilty plea . . . does not entitle a defendant to a sentencing reduction for acceptance of responsibility as a matter of right." United States v. Wilder, 15 F.3d 1292, 1298 (5th Cir. 1994) (internal quotation and citation omitted). A defendant's attempt to minimize or deny involvement in an offense supports the refusal to grant a reduction for acceptance of responsibility. United States v. Watson, 988 F.2d 544, 551 (5th Cir. 1993), cert. denied, 114 S. Ct. 698 (1994).

Wells failed to admit his full involvement in the conspiracy during the presentence investigation despite having made admissions of such involvement in the factual resume accompanying the plea agreement. The district court's refusal to reduce Wells's offense level for acceptance of responsibility was not clearly erroneous.

Wells argues for the first time on appeal that the district court erred in failing to reduce his offense level by four levels based on his minimal participation in the offense.

Under Fed. R. Crim. P. 52(b), this court may correct forfeited errors only when the appellant shows the following

factors: (1) there is an error, (2) that is clear or obvious, and (3) that affects his substantial rights. United States v. Calverley, 37 F.3d 160, 162-64, (5th Cir. 1994) (en banc) (citing United States v. Olano, 113 S. Ct. 1770, 1776-79 (1993)), cert. denied, ___ S. Ct. ___, 1994 WL 36679 (U.S. Feb. 27, 1995) (No. 94-7792). If these factors are established, the decision to correct the forfeited error is within the sound discretion of the court, and the court will not exercise that discretion unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 113 S. Ct. at 1778.

The determination of a defendant's role in the offense is factual in nature. See United States v. Zuniga, 18 F.3d 1254, 1261 (5th Cir.), cert. denied, 115 S. Ct. 214 (1994).

"[Q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." United States v. Guerrero, 5 F.3d 868, 871 (5th Cir. 1993), cert. denied, 114 S. Ct. 1111 (1994) (citation omitted). Therefore, this issue is not subject to appellate review.

Wells argues that the district court erred in holding him accountable for the total amount of the loss involved in the conspiracy because his involvement was limited to one transaction. The district court's calculation of the amount of loss is a factual finding, reviewed by this Court for clear error. Wimbish, 980 F.2d at 313. A conspirator may be held liable for the substantive acts of a co-defendant if the acts were reasonably foreseeable acts and done in furtherance of the conspiracy. See § 1B1.3(a)(1)(B); Lghodaro, 967 F.2d at 1030.

The district court may rely on information contained in the presentence report when making a sentencing determination as long as the information bears the minimum indicia of reliability. United States v. Shipley, 963 F.2d 56, 59 (5th Cir.), cert. denied, 113 S. Ct. 348 (1992). A defendant is responsible for proving that the information on which the district court relies is materially untrue. Id. Unsworn assertions do not bear a sufficient indicia of reliability to be considered. Lghodaro, 967 F.2d at 1030.

The presentence investigation produced evidence that the conspiracy involved the filing of false tax returns seeking refunds in the amount of \$139,239. It also revealed that Wells initiated the conspiracy and received a greater portion of the proceeds from the scheme than his co-conspirators. Wells did not produce any evidence to rebut the findings in the presentence report, nor did he produce evidence demonstrating that his involvement was limited to a single transaction. The district court's determination that Wells was accountable for the full amount of the intended loss involved in the conspiracy was not clearly erroneous.

AFFIRMED.