

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10762

Summary Calendar

United States,

Plaintiff-Appellee,

versus

Roy Lee Simpson,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:94 CR 10 A 4)

November 3, 1995

Before HIGGINBOTHAM, DUHÉ, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

As part of a plea agreement, Roy Simpson pled guilty to one count of distributing cocaine base. In the guilty plea, Simpson stipulated that he engaged in a conspiracy with several other dealers, including codefendant Edwards, to distribute cocaine powder and cocaine base. Testimony at the sentencing hearing from Special Agent Floyd, together with the stipulated facts,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

established that Simpson and several other individuals sold crack from an establishment called Bad Boys Auto Detailing in Arlington, Texas. Edwards was the primary source of crack for the dealers operating from Bad Boys. On one occasion, Simpson himself distributed 42.8 net weight grams of 79% pure cocaine base. On a series of occasions, codefendants distributed 27.89 grams of cocaine-containing powder, 32.9 grams of 58% pure cocaine base, and 32.8 grams of 59% pure cocaine base. Throughout the time period in which Simpson dealt drugs from Bad Boys, Edwards kept firearms for protection at his home, where Edwards would prepare cocaine later sold from the Auto store. Shortly before arresting Simpson, law enforcement officials searched Edwards' apartment and found several firearms.

The district court held that all of the codefendants' drug sales were reasonably foreseeable to Simpson, and therefore used the quantity of drugs from all of these sales to calculate the offense level under the Sentencing Guidelines. The district court also held that Simpson could foresee Edwards' use of firearms in furtherance of the conspiracy, and increased Simpson's sentence accordingly.

Simpson does not appeal the calculation of his sentence based on the facts as found by the district court, nor does he dispute the court's authority to base its sentence on the quantity of drugs that were part of a common plan of distribution. See United States v. Fierro, 38 F.3d 761, 773 (5th Cir. 1994), cert. denied, 115 S. Ct. 1431 (1995). Rather,

Simpson argues that the evidence was insufficient to support the finding that he engaged in "jointly undertaken criminal activity" for the purposes of U.S.S.G. § 1B1.3(a)(1)(B). He also contests the district court's finding that Simpson could foresee his coconspirators' drug sales and Edward's use of firearms. In addition, Simpson argues that punishing crack cocaine offenses more severely than cocaine powder offenses violates constitutional due process, equal protection, and cruel and unusual punishment principles.

We review findings of fact in the context of a sentencing hearing, such as the district court's foreseeability findings, under the clearly erroneous standard. Fierro, 38 F.3d at 774. We review conclusions of law de novo.

Simpson's first contention, that the evidence was insufficient to support a finding that he engaged in jointly undertaken criminal activity, runs afoul of his stipulation. Simpson stipulated that he engaged in a conspiracy with Edwards and other codefendants. This stipulation makes irrelevant his arguments that he was a minor participant in the conspiracy or an independent contractor. The district court properly relied on Simpson's stipulation in basing its calculation of his sentence on the activities of coconspirators. See U.S.S.G. § 1B1.3(a)(1)(B) (providing that courts should calculate the level of offense, "in the case of a jointly undertaken criminal activity[, based on] all reasonably foreseeable acts and

omissions of others in furtherance of the jointly undertaken criminal activity").

Regarding the foreseeability that coconspirators would engage in drug sales, the presentence report states that Simpson bought drugs from Edwards and sold them out of Bad Boys with Edwards' blessing. It further states that law enforcement officials saw Simpson at Bad Boys on several occasions, and that several drug buys were arranged or consummated at Bad Boys with other dealers. "A presentence report generally bears sufficient indicia of reliability to be considered as evidence" by a sentencing court. United States v. Montoya-Ortiz, 7 F.3d 1171, 1180 (5th Cir. 1993) (internal quotation marks and alteration omitted). In addition, Special Agent Floyd testified that on one occasion Simpson sought to arrange a drug transaction with undercover officers involving several of the other Bad Boys dealers. Cf. U.S.S.G. § 1B1.3, illus. 6 (stating that drug dealers operating independently but sharing a common source of drugs may only be held responsible for each other's activities). From this evidence, the district court could infer that Simpson either knew or could have foreseen that codefendants sold drugs as part of a conspiracy in which, by his own stipulation, he participated.

Regarding the firearm, Special Agent Floyd told the court that codefendant Edwards "kept numerous weapons with him and on him at all times" during the period in which Simpson was engaged in the conspiracy. A search of Edwards' apartment revealed

several firearms. The presentence report stated that Edwards routinely carried firearms and that Simpson spent significant time with Edwards at Bad Boys. This evidence was sufficient to allow the district court to infer that Simpson knew or could have foreseen that Edwards used firearms as part of the drug conspiracy in which, by his own stipulation, Simpson participated.

Because Simpson did not raise his constitutional objections to his sentence in the district court, we consider them waived. Even if we were to reach the merits, circuit precedent forecloses Simpson's arguments. See United States v. Thomas, 932 F.2d 1085, 1089-90 (5th Cir.), cert. denied, 502 U.S. 1038 (1992) (rejecting due process challenge to treating crack and cocaine powder differently for sentencing purposes); see also United States v. Fisher, 22 F.3d 574, 579-80 (5th Cir. 1994) (rejecting challenge under cruel and unusual punishment principles), cert. denied, 115 S. Ct. 529 (1994); United States v. Watson, 953 F.2d 895, 897-98 (5th Cir.), cert. denied, 504 U.S. 928 (1992) (rejecting equal protection challenge)

AFFIRMED.