

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11053
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RITA GRAY,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas

(5:93 CR 032 C (04))

(June 21, 1995)

Before SMITH, Emilio M. GARZA, and PARKER, Circuit Judges.

Per Curiam:*

Rita Gray ("Gray") presents two issues on appeal, both challenging the sentence imposed by the district court. We affirm.

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

Gray pleaded guilty to interstate travel in aid of a racketeering enterprise. During the presentence investigation, she acknowledged that she was aware that co-defendant Donnell Gibson was involved with James Bass in a conspiracy to possess with intent to distribute "crack" cocaine. Gray also acknowledged that she was aware that Gibson and Bass planned to procure cocaine in California and to transport it to Texas for distribution to cocaine traffickers.

On or about March 14, 1993, Rita Gray received \$3500 in currency from a co-conspirator in Texas. Gray was instructed to take the money to Gibson in California so that he could procure additional cocaine base for distribution in Texas. Gray purchased an airplane ticket for a flight to Los Angeles, California and flew to Los Angeles with the currency. After arriving in Los Angeles, Gray delivered the \$3500 in currency to Gibson and relayed the message to immediately call the individual who supplied the money because the individual wished to "re-up" his supply of cocaine base. Gray knew that Gibson would use the funds to purchase approximately 170.10 grams or six ounces of cocaine base to be distributed in Texas. Raymond Norris, pursuant to Gibson's instructions, flew from California to Texas with the cocaine base and distributed it to the conspirator who had supplied the \$3500 for the purchase of the drugs.

The probation officer, in determining Gray's offense level for the presentence report ("PSR"), did not recommend that she receive an adjustment for her role in the offense. The officer also determined that there were no factors warranting a departure at

sentencing. Gibson filed objections, arguing for a downward departure and a reduction in her offense level under U.S.S.G. § 3B1.2 based on her minor or minimal participation in the offense. Gray argued that she merely acted as a courier for Gibson because of their romantic involvement and that she did not receive any compensation for the trip.

The probation officer responded in an Addendum to the PSR that Gray acted as a money courier for an interstate-drug-trafficking network and knowingly participated in the scheme which resulted in the procurement of a large amount of cocaine base for distribution in Texas. The probation officer also stated that even if the offense level was reduced by four levels for minimal participation in the offense, the guideline sentencing range would still exceed the 60-month maximum statutory sentence imposed.

In response to the Addendum, Gray argued that the district court could have imposed a sentence less than the maximum statutory penalty of 60 months by departing downward and that the reference to § 3B1.2 was made to provide the district court with guidance in imposing sentence based on her role and participation in the offense.

At the sentencing hearing, the district court overruled Gray's objections and adopted the findings made in the PSR. The district court stated that the guideline sentencing range for Gray's offense of conviction was 108 to 135 months, but that the statutory maximum that could be imposed was 60 months. The district court stated that it had found no aggravating or mitigating factors which

warranted a departure from the guidelines and imposed a term of imprisonment of 60 months to be followed by a two-year term of supervised release.

DISCUSSION

A. Did the district court err in failing to depart downward?

Gray argues that the findings in the PSR lacked sufficient evidence of reliability concerning the extent of her involvement in the conspiracy, citing the factual resumes of the other defendants which detail their participation and interaction in a number of drug transactions. She notes that she was mentioned on only one occasion when she rode in a car with co-defendant Gibson to the airport.

Next Gray argues that the district court failed to consider her history, the circumstances surrounding the offense, and the guideline policy statements as it was required to do under 18 U.S.C. § 3553. Gray contends that she participated in the offense as a money courier because of her romantic involvement with co-defendant Gibson, that she did not participate in drug transactions on other occasions, and that she did not receive any financial benefits from the drug trafficking scheme.

Gray asserts that her history as reflected in the PSR shows that she has no past drug involvement, that she was gainfully employed almost continuously between 1978 and April 1994, and that her only prior offense was a misdemeanor conviction for driving with a suspended license. Gray argues that she was a minor participant and that the imposition of a disproportionately harsh

sentence will not serve the purposes of reformation or rehabilitation.

Gray contends that the district court failed to consider the guideline policy statements regarding culpability that contemplate that a defendant's sentence should be adjusted based on his degree of participation and culpability. Gray argues that her participation was minimal and that there is no reliable evidence that she participated beyond the one courier incident. Gray asserts that her relevant conduct should have been limited to that one incident, relying on commentary following U.S.S.G. § 1B1.3.

Gray has acknowledged that, even if the district court had reduced her offense level based on her minimal or minor participation, the guideline sentencing range would have exceeded the statutory maximum sentence.¹ However, Gray contends that her status as a minimal participant should have been considered by the court in determining if she was eligible for a downward departure.

It is arguable that the district court was not authorized to consider Gray's minimal or minor role in the offense in determining whether a downward departure was warranted because such role is not "an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission in

¹ Gray's statement that the guideline range would have exceeded the statutory maximum is incorrect because the statutory maximum would have become the guideline sentence. See U.S.S.G. § 5G1.1 (if the statutory maximum sentence is less than the minimum guideline range sentence, the statutory maximum sentence shall be the guideline sentence).

formulating the guidelines" 18 U.S.C. § 3553(b). However, even if this court would approve such use of an adjustment for her role in the offense, Gray has not shown that her sentence should be disturbed. This court's review of sentences made under the guidelines is confined to determining whether a sentence was imposed in violation of law or as a result of an incorrect application of the sentencing guidelines. *United States v. Nevarez-Arreola*, 885 F.2d 243, 245 (5th Cir. 1989). This court reviews the sentencing court's determination that a defendant did not play a minor or minimal role in the offense for clear error. *United States v. Devine*, 934 F.2d 1325, 1340 (5th Cir. 1991), *cert. denied*, 502 U.S. 1104 (1992). The defendant bears the burden of proving his mitigating role by a preponderance of the evidence. *United States v. Zuniga*, 18 F.3d 1254, 1261 (5th Cir.), *cert. denied*, 115 S. Ct. 214 (1994). The district court's refusal to grant a reduction for minimal or minor participant status is entitled to great deference. *Devine*, 934 F.2d at 1340.

Section 3B1.2 provides for a four-level reduction for a minimal participant and a two-level reduction for a minor participant. A minimal participant is one who is "plainly among the least culpable of those involved in the conduct of the group" and who demonstrates a "lack of knowledge or understanding of the scope and structure of the enterprise." § 3B1.2, comment. (n.1); *United States v. Mitchell*, 31 F.3d 271, 278 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 953 (1995). A minor participant is defined as "any participant who is less culpable than most other participants,

but whose role could not be described as minimal." § 3B1.2, comment. (n.3); *Zuniga*, 18 F.3d at 1260 n.10. The adjustment under § 3B1.2 is intended for those participants who are "substantially less culpable than the average participant." § 3B1.2, comment., (backg'd). Because most offenses are committed by participants of roughly equal culpability, this adjustment was intended to be used infrequently. *United States v. Maseratti*, 1 F.3d 330, 341 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 282 (1994).

A district court may consider in its sentencing decisions any relevant evidence that "has sufficient indicia of reliability to support its probable accuracy." § 6A1.3(a). "[A] presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the sentencing guidelines." *United States v. Alfaro*, 919 F.2d 962, 966 (5th Cir. 1990) (footnote omitted). "If information is presented to the sentencing judge with which the defendant would take issue, the defendant bears the burden of demonstrating that the information cannot be relied upon because it is materially untrue, inaccurate or unreliable." *United States v. Angulo*, 927 F.2d 202, 205 (5th Cir. 1991). Objections in the form of unsworn assertions do not bear sufficient indicia of reliability to be considered. *United States v. Lghodaro*, 967 F.2d 1028, 1030 (5th Cir. 1992). A sentencing court may "adopt facts contained in a PSR without inquiry, if those facts had an adequate evidentiary basis and the defendant does not present rebuttal evidence." *United States v. Puig-Infante*, 19 F.3d 929, 943 (5th

Cir.), *cert. denied*, 115 S. Ct. 180 (1994) (internal citation omitted).

Gray's argument that she was a minor or minimal participant in the offense is without merit. The mere fact that Gray acted as a courier in the conspiracy does not automatically categorize her as a minor or minimal participant in the offense. Section 3B1.2, application note 2, provides that the downward adjustment for a minimal participant would be appropriate "in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs." This court has held, however, that a one-time courier of a large amount of heroin who performed the task after meeting previously unknown individuals in a bar was not entitled to a § 3B1.2 reduction. *United States v. Buenrostro*, 868 F.2d 135, 137-38 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990). Moreover, "a defendant may be a courier without being substantially less culpable than the average participant," and without being a minimal or even a minor participant. *United States v. Franco-Torres*, 869 F.2d 797, 801 (5th Cir. 1989).

The PSR reflects that Gray admitted that she was aware of the existence of the drug-trafficking conspiracy prior to acting as a courier and that she was aware that the purpose of her mission was to facilitate the distribution of a substantial quantity of cocaine base in Texas. Gray has not denied the validity of those statements in the PSR. Thus, the PSR contained reliable evidence that Gray was more than a minor or minimal participant in the offense.

Further, Gray was a central figure in the interstate travel offense to which she pleaded guilty and her offense level was determined based on that lesser offense. Thus, even assuming that Gray was a minor participant in the overall conspiracy, she is not entitled a § 3B1.2 reduction because her offense level was not determined based on her participation in the larger conspiracy. See § 3B1.2, comment. (n.4); *United States v. Olibrices*, 979 F.2d 1557, 1560 (D.C. Cir. 1992) (a defendant who pleads guilty to a lesser offense is not entitled to a § 3B1.2 reduction based on his minor role in a more serious offense if the greater offense has not been taken into account in determining the defendant's base offense level). The district court's finding that Gray was not entitled to a reduction of her offense level for her minimal or minor status was not clearly erroneous.

Nor has Gray shown that the district court erred in refusing to depart downward on any other basis. This court will not review a district court's refusal to depart from the guidelines unless the refusal was in violation of the law or the sentencing judge erroneously believed that he lacked authority to depart. *United States v. Miro*, 29 F.3d 194, 199 & n.3 (5th Cir. 1994). The district court's refusal to depart downward was not unlawful inasmuch as the district court imposed the maximum statutory sentence of 60 months, which became the guideline sentence. See § 5G1.1(a) (if the statutorily authorized maximum sentence is less than the minimum applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence). Gray

does not argue that the district court believed that it lacked the authority to depart.

B. Is Gray's sentence excessive?

Gray argues that her sentence was excessive and unreasonable because she received the same sentence as co-defendant Gibson although he personally purchased the 254.7 grams of cocaine base and made arrangements for the transportation of the drugs to Texas.

The Eighth Amendment precludes a sentence "that is greatly disproportionate to the offense, because such sentences are `cruel and unusual.'" *McGruder v. Puckett*, 954 F.2d 313, 315 (5th Cir.), *cert. denied*, 113 S. Ct. 146 (1992). In 1983, the U.S. Supreme Court held that a disproportionality claim must be analyzed by considering "(1) the gravity of the offense relative to the harshness of the penalty, (2) the sentences imposed for other crimes in the jurisdiction, and (3) the sentences imposed for the same crime in other jurisdictions." *Id.* (citing *Solem v. Helm*, 463 U.S. 277, 292 (1983)). The Supreme Court modified that approach in *Harmelin v. Michigan*, 501 U.S. 957, 1001-1005 (1991). *McGruder*, 954 F.2d at 315-16. The modification provides that parts (2) and (3) of the *Solem* test should be used only when the harshness of the penalty is grossly disproportionate to the gravity of the offense. *Id.* at 316.

The penalty imposed on Gray is not grossly disproportionate to the gravity of her offense. Gray willingly facilitated the acquisition of cocaine base for distribution by drug traffickers in

Texas. Gray's offense aided and abetted an interstate drug-trafficking network that had a deleterious effect on the overall public. Further, the sentence imposed was the sentence dictated by the guidelines which are a "convincing objective indicator of proportionality." *United States v. Sullivan*, 895 F.2d 1030, 1032 (5th Cir.), *cert. denied*, 498 U.S. 877 (1990).

Gray cannot rely on the fact that her co-defendant received the same sentence that she received to support her position that she received a disproportionately severe sentence. A co-defendant's sentence is not a "yardstick" by which to measure the sentence of another co-defendant. *United States v. Sparks*, 2 F.3d 574, 587 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 899 (1994).

Because Gray has not shown that her sentence was grossly disproportionate to the gravity of the offense, the court need not analyze the remaining *Solem* factors. Gray has not shown that her sentence was so excessive as to violate the Eighth Amendment.

CONCLUSION

For the foregoing reasons, we AFFIRM Gray's sentence.