IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11100
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS J. PEREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-084-Y)

June 5, 1996

Before WISDOM, DAVIS, and STEWART, Circuit Judges.

PER CURIAM:[*]

The defendant-appellant, Jesus J. Perez, appeals his sentence for the distribution of cocaine.[1] He first contends that the district court improperly attributed to him as relevant conduct 14.3 kilograms of cocaine, or the approximate amount of cocaine purchased with $251,519.00 in cash seized from a car driven by one of Perez's associates. Second, Perez maintains that the district court erred by assessing a two level sentence enhancement for the possession of a firearm in connection with the drug offense. Finally, Perez asserts that the district court improperly rejected his request for

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[*] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

[1] The district court sentenced Perez to 188 months imprisonment, followed by a three year term of supervised release. The district court also imposed a mandatory special assessment of $50.00.

a downward departure in sentencing due to an alleged over-representation of the seriousness of Perez's criminal history. We have reviewed the record and find no reversible error.

First, in a controlled substance conviction, the sentence should be based not only on the amount involved in the offense, but also on the contraband involved in "acts. . . that were part of the same course of conduct or common scheme and plan as the offense of conviction."[2] Conspirators may be sentenced on the basis of the conduct of co-conspirators taken in furtherance of the conspiracy if that conduct was known or reasonably foreseeable.[3] The sentencing court is to make an approximation of the controlled substance reasonably foreseeable by the defendant.[4] This court reviews that determination for clear error, taking into account the district court's wide discretion in the kind and source of information [it] considers in imposing sentence".[5] It is the defendant that bears the burden of showing that the information relied upon by the district court is "materially untrue".[6]

In this case, the district court relied on the conclusions of the Presentencing Investigation Report (PSR) indicating that Perez was present at the time the conspirators discovered that the police

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U.S.S.G. §1B1.3(a)(2).

U.S.S.G. §1B1.3 *comment (n.1)*.

U.S.S.G. §2D1.4 *comment (n.2)*; *United States v. Puma*, 937 F.2d 151 (5th Cir. 1991), *cert. denied*, 502 U.S. 1092; 112 S. Ct. 1165, 117 L. Ed. 2d 412 (1992).

United States v. Garcia, 693 F.2d 412, 416 (5th Cir. 1982).

United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991); *United States v. Vela*, 927 F.2d 197, 201 (5th Cir.) *cert. denied*, 502 U.S. 875, 112 S. Ct. 214 (1991).

had seized the $251,519.00 from his associate's car, and that Perez expressed concern over the loss of the money because he needed the money to pay Columbian cocaine suppliers. The PSR also concluded that Perez's conduct from late 1992 to early 1993 was part of a single drug conspiracy. Additionally, the PSR indicated that the market value of cocaine at time of the cash seizure was $17,500 per kilogram, which converts to 14.3 kilograms of cocaine from the cash seized.

Although Perez objected to the findings of the PSR, he did not offer any evidence to refute its facts. Therefore, the district court was free to adopt the facts within the PSR without further inquiry.[7] Given the contents of the PSR, the district court did not err in attributing to Perez an amount of cocaine based on the cash seized from the car, and also did not err in its calculation of that amount as 14.3 kilograms.

Perez's challenge to the district court's upward departure for possession of a firearm is also without merit. In crimes involving the trafficking of drugs, the U.S. Sentencing Guidelines instruct sentencing courts to increase a defendant's offense level by two whenever a dangerous weapon is possessed.[8] If only a co-conspirator possessed a dangerous weapon, the district court should still apply the enhancement if the possession was "reasonably foreseeable to the defendant".[9] In this case,

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United States v. Mueller, 902 F.2d 336, 346 (5th Cir. 1990).

U.S.S.G. §2D1.1.

United States v. Gaytan, 74 F.3d 545, 559 (5th Cir. 1996). Note that this court has recently determined that *Bailey v. United States*, 116 S. Ct. 501 (1995), in which the Supreme Court limited the scope of the provision of 18 U.S.C. §924(c)(1) that prohibits use of a firearm during a drug

the district court had two independent bases for applying the enhancement. First, there was evidence in the PSR that three firearms were seized from the home of Perez's co-conspirator, and that Perez had gone to that residence in connection with a cocaine delivery in November 1993. Second, there was evidence that Perez was himself armed on several occasions when he went to Fort Worth in connection with his cocaine distribution activities. The district court did not err in applying this sentence enhancement.

Finally, this court lacks jurisdiction to review the district court's decision not to apply a downward departure for Perez's criminal history. Perez does not challenge the calculation of the criminal history score, nor does he argue that the district court erroneously believed that it could not award a downward departure. Instead, Perez argues only that the district court improperly refused to apply the potential adjustment. This decision is entirely discretionary.[10] This court has previously determined that "claims challenging the discretionary denial of downward departures . . . are not subject to appellate review and should be dismissed for lack of jurisdiction."[11] Therefore, we dismiss Perez's final claim.

For the reasons set forth above, we AFFIRM the sentence imposed by the district court.

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trafficking offense, does not apply to the sentencing guideline regarding possession of a dangerous weapon. *See United States v. Castillo,* -- F.3d-- (5th Cir. Mar. 11, 1996), 1996 WL 107233 at *15, n.34.

United States v. Madison, 990 F.2d 178, 184 (5th Cir. 1993).

United States v. Dimarco, 46 F.3d 476, 478 (5th Cir. 1995).