

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20098

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SANTOS BARRERA GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 92 298 3)

(March 29, 1995)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Santos Barrera Garcia pled guilty to conspiring to possess with intent to distribute marijuana and cocaine, and other drug-related charges. He appeals two aspects of his sentence. We affirm.

The district court increased Garcia's sentence by two levels for possession of a weapon under U.S.S.G. § 2D1.1(b)(1). Garcia

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

objects that he did not own the gun, which was found in the closet of his co-defendant Raul Elizondo Alvarez¹ next to seven pounds of marijuana and two scales. Alvarez admitted that he owned the gun, and Garcia argues that there is no evidence showing that he had access to the gun since he was only a guest in Alvarez's apartment. Nor, he argues, was there any evidence showing that the gun was to be used in drug trade, since the government did not prove that the nearby marijuana, which was "stale," was part of the contraband for which Garcia pled guilty.

However, "sentencing courts may hold a defendant accountable for a co-defendant's reasonably foreseeable possession of a firearm during the commission of a narcotics trafficking offense, pursuant to Section 2D1.1(b)(1). . . . [and] may ordinarily infer that a defendant should have foreseen a co-defendant's possession of a dangerous weapon, such as a firearm, if the government demonstrates that another participant knowingly possessed the weapon while he and the defendant committed the offense by jointly engaging in concerted criminal activity involving a quantity of narcotics sufficient to support an inference of intent to distribute." U.S. v. Aquilera-Zapata, 901 F.2d 1209, 1215 (5th Cir. 1990). Garcia does not deny his participation in a drug distribution conspiracy with Alvarez, and we think the district court drew a reasonable inference that Alvarez's firearm -- a "'tool[] of the trade' of those engaged in illegal drug activities," Aquilera-Zapata, 501

¹ Alvarez's motion to dismiss the indictment was granted on February 11, 1994, after Garcia was sentenced.

F.2d at 1215 -- found near seven pounds of marijuana, stale or not, was possessed during the commission of a drug trafficking offense, and that Garcia knew about it.

The district court also increased Garcia's offense level by three points under U.S.S.G. § 3B1.1(b) for his role as a manager or supervisor of the criminal activity. Garcia protests that he did not hold a managerial or supervisory role in the conspiracy. The district court found otherwise, and we see no clear error. The district court stated that in this conspiracy to transport drugs, Garcia held the role of "one of the people on the Board of Directors" of a drug-running parcel delivery service. The presentence report showed that although the hierarchy of supervisors within the conspiracy was not clearly delineated and that power was shared among four chiefs, Garcia had the authority to arrange for the shipment of hundreds of pounds of marijuana and to hide thousands of pounds of marijuana on his property.

Garcia also argues that fewer than five individuals were involved in the conspiracy, making the court's increase under § 3B1.1(b) improper. Yet Count One of the superseding indictment to which he pled guilty states that he and six others conspired to distribute marijuana and cocaine. Counts Two, Four, and Five each state that Garcia abetted and assisted four others, and the presentence report names others involved in the conspiracy who were not indicted. Only Count Three lists fewer than five actors.

Because we find no error in the district court's sentencing, we hereby AFFIRM.