

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20118
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROGELIO HERRERA-ISAIS,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CR-H-92-298-5
- - - - -

(March 22, 1995)

Before GARWOOD, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

Rogelio Herrera-Isais appeals his sentence in a guilty-plea conviction for drug-trafficking. Herrera asserts that the district court erred in increasing his offense level by three under U.S.S.G. § 3B1.1(b) because he was a manager or supervisor. He contends that, if the entire scope of the criminal activity is considered, his role was relatively minor and insignificant. Moreover, Herrera contends that the increase was improper because the criminal activity did not include five or more participants.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

We will not disturb a district court's findings with regard to a defendant's role in a criminal activity unless those findings are clearly erroneous. United States v. Barreto, 871 F.2d 511, 512 (5th Cir. 1989). A factual finding is not clearly erroneous so long as it is plausible in light of the record read as a whole. See United States v. Fields, 906 F.2d 139, 142 (5th Cir.), cert. denied, 498 U.S. 874 (1990).

There is an evidential basis for the district court's factfindings at sentencing. Herrera had the authority to recruit the confidential informant to transport the marijuana and cocaine, and he exercised control and authority over others. See United States v. Narvaez, 38 F.3d 162, 166 (5th Cir. 1994) (citing U.S.S.G. § 3B1.1 comment. (n. 4)). Although Herrera's counsel denied at sentencing that Herrera told the confidential informant to keep a kilo of cocaine in payment, the district court chose to credit the confidential informant's version of the facts. The findings of the district court are not clearly erroneous.

We do not address the question whether the criminal activity included five or more participants. At sentencing, Herrera conceded that there was "no question that there were five or more participants in the conspiracy" Having made this concession, he is estopped from changing his position on appeal. Cf. United States v. McCaskey, 9 F.3d 368, 378-79 (5th Cir. 1993), cert. denied, 114 S. Ct. 1565 (1994).

Herrera contends that the district court erred in refusing to decrease his offense level by two levels for acceptance of

responsibility under § 3E1.1(a). We review "the sentencing court's acceptance of responsibility determination with even more deference than under the pure clearly erroneous standard."

United States v. Bermea, 30 F.3d 1539, 1577 (5th Cir. 1994).

Herrera asserts that he accepted responsibility because his statement to the probation officer during the presentence interview is consistent with the Government's version of the facts. Herrera emphasizes that he made no attempt to flee, he admitted his culpability, the Government did not have to prove its case at trial because of his guilty plea, and he consented to an interview with the probation officer. He contends that the marijuana and cocaine were not his and that the Government's proof does not indicate whether he was the source of the drugs.

Information contained in the presentence report and adopted by the district court indicates that Herrera was the person with the cocaine. "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. Kim, 963 F.2d 65, 69 (5th Cir. 1992) (internal quotation and citation omitted).

Because Herrera tried to minimize the full extent of his participation in the conspiracy, see United States v. Wilder, 15 F.3d 1292, 1299 (5th Cir. 1994), the district court's finding that Herrera did not accept responsibility is not erroneous.

AFFIRMED.