

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20156
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RICHARD CRUZ,

Defendant-Appellant.

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

(CR-H-92-184-1)

(January 31, 1995)

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

PER CURIAM:*

Appellant, Richard Cruz (Cruz) challenges his conviction and sentence for violation of 18 U.S.C. § 922(g), felon in possession

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

of a firearm. We affirm.

FACTS

Cruz was convicted, following a jury trial, of being a felon in possession of a firearm and sentenced to 235 months in prison. His sentence was enhanced under 18 U.S.C. § 924(e)(1) because he had three prior felony convictions.

Ishmael Rodarte, a special agent with the Bureau of Alcohol, Tobacco and Firearms (ATF) testified that he was contacted by Alberto Medina (Medina), a confidential informant who was cooperating in a number of ATF investigations, about making an under cover purchase from Cruz. ATF had agreed not to prosecute Medina in a firearms case and to pay his expenses if he cooperated in the investigations. Medina had been instructed that he was not to provide any weapons or to assist in any illegal acts if the subject was not predisposed to commit them. Medina was also instructed not to participate in any of the conversations or dealings after Rodarte met an individual under investigation.

Medina advised Rodarte that Cruz was interested in selling a weapon. Rodarte met Medina and they drove to Cruz's house in Medina's car. Rodarte wore a wire so that his conversation with Cruz could be taped. When the men arrived at Cruz's house a woman in front of the house told Medina that Cruz had gone to make a phone call. The men drove around the neighborhood for five to ten minutes searching for Cruz. They returned to Cruz's house and saw him approaching his house from across the street. The three men

entered the house and Medina walked into another room.

Rodarte asked Cruz to show him the item that he wanted to sell. Cruz pulled a shotgun out from under a mattress. Rodarte and Cruz began negotiating a sales price for the gun, during which Cruz told the agent that the gun was worth the asking price because "you could hide it under here [his arm] and walk in anyplace and make \$5,000 in a minute or two." The agent interpreted Cruz's statement as meaning that the gun could be easily concealed during a robbery. Rodarte testified that Cruz was laughing and joking during the sale, and did not seem reluctant or nervous. Rodarte bought the gun for \$200, cash, wrapped it in a shirt Cruz gave him and left with Medina. The tape recording of the meeting was admitted into evidence.

Cruz testified that on the day of the gun sale, Medina came to his house and asked Cruz to sell the gun because Medina's family needed the money for rent. Medina allegedly told Cruz that he could not sell the gun directly to the buyer because Medina owed the buyer money and he would take the gun from Medina.

Cruz testified that he did not want to sell the gun, but Medina told him that he better do it. Cruz contended that he feared if he refused to make the sale that Medina would send someone to harm his mother. Cruz admitted that Medina did not make any direct threats to him, but that Medina was a dangerous and violent man and a member of a prison gang. Cruz testified that he went next door so that he could avoid Medina when he returned with the buyer, and instructed his aunt to tell the men that he had gone

to the store to use the phone. He stayed gone an hour or two and returned home after observing Medina and the buyer leave his house. Cruz testified that he was on his porch when the men returned and that he had no choice but to go through with the transaction.

Cruz testified that as they entered the house, Medina instructed him to obtain the gun and to sell it to the buyer. Medina then went in to the kitchen where he could overhear everything that was said by Rodarte and Cruz. Cruz testified that he therefore had to do "a good job of salesmanship." According to Cruz, Medina returned to his home later in the day and retrieved all of the money from the sale.

SUFFICIENCY OF EVIDENCE -- ENTRAPMENT

Cruz contends that the government failed to establish beyond a reasonable doubt that he was not entrapped by Medina. The standard of review in a case where the jury rejected the entrapment defense is the same as a traditional sufficiency issue -- viewing the evidence in the light most favorable to the government, could a reasonable jury have concluded beyond a reasonable doubt that the defendant was predisposed to commit the offense. *United States v. Johnson*, 872 F.2d 612, 621 (5th Cir. 1989).

To make out an entrapment defense, a defendant must "make a prima facie showing that government conduct created a substantial risk that an offense would be committed by a person other than one ready to commit it." *United States v. Hudson*, 982 F.2d 160, 162 (5th Cir.), *cert. denied*, 114 S.Ct. 100 (1993) (internal quotations and citations omitted). If the defendant makes a prima facie

showing, "the burden shifts to the government to prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents." *Id.* (citation and internal quotations omitted).

Cruz contends that his testimony concerning Medina's role in the offense met his prima facie burden of establishing that he was entrapped. He further contends that the government, in failing to call Medina or otherwise affirmatively contradict Cruz's version of the facts, did not meet their burden to establish Cruz's predisposition. We disagree. First, the evidence reflected that Cruz was a willing and enthusiastic participant in the sales transaction. *United States v. Mora*, 994 F.2d 1129, 1137 (5th Cir. 1993) (based on defendant's willing participation in a drug transaction, jury could reject his testimony that he was entrapped and find beyond a reasonable doubt a predisposition to commit the crime). Further, the jury was entitled to disbelieve Cruz's testimony concerning Medina's behavior even though Medina was not called as a witness by the government. *See Mora*, 994 F.2d at 1137 (jury was entitled to disbelieve the defendants' description of the informant's behavior although the government did not introduce any evidence directly contradicting their story about the informant's threats.)

We find no merit in Cruz's argument that the evidence was insufficient to allow the jury to reject his entrapment defense.

DOUBLE JEOPARDY

Cruz's three prior felony convictions were used to support the

predicate § 922(g) offense (felon in possession of a firearm), to support the imposition of the mandatory minimum penalty under § 924(e), and to increase his offense level under the guidelines pursuant to U.S.S.G. § 4B1.4, which he argues results in a double jeopardy violation.

Cruz's double jeopardy argument is without merit. "Consideration of the same felony to convict under section 922(g) and to enhance punishment under section 924(e)(1) is neither a double prosecution nor a double punishment" and does not implicate the Double Jeopardy Clause. *United States v. Wallace*, 889 F.2d 580, 584 (5th Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990). Further, Cruz cannot complain because his offense level was increased based on his prior criminal history. *See United States v. Doucette*, 979 F.2d 1042, 1046-47 (5th Cir. 1992)(rejecting the defendant's contention that an upward departure from the fifteen-year minimum sentence under § 924(e) based on the defendant's prior criminal history is a violation of double jeopardy). Cruz's argument concerning a double enhancement under § 924(e) and the guidelines provision is based on a mistaken premise. Section 924(e) sets forth the statutory minimum if its conditions are met. Section 4B1.4 is the guideline that implements that provision. Cruz's sentence was not "enhanced" pursuant to both provisions. The district court sentenced Cruz to the minimum allowed under the properly calculated guideline range.

CRUEL AND UNUSUAL PUNISHMENT

Cruz argues that the imposition of the 235-month penalty for

the isolated sale of a legal weapon was cruel and unusual punishment. Curz argues that the sentence should be reviewed in light of the evolving standards of decency in this society.

The scope of review of an Eighth Amendment challenge to the severity of a sentence is narrow. *See United States v. Sullivan*, 895 F.2d 1030, 1031 (5th Cir.), *cert. denied*, 498 U.S. 877 (1990). "Reviewing courts...should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." *Id.* at 1031-32. "[I]n applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits." *Id.* at 1032. An enhanced sentence based on a defendant's prior convictions is not disproportionately severe if the "sentence was directly related to the gravity of [the defendant's] criminal history." *United States v. Prudhome*, 13 F.3d 147, 150 (5th Cir.), *cert. denied*, 114 S.Ct. 1866 (1994). A sentence imposed within the guideline range, is a "a persuasive indication that it is not grossly disproportionate." *Id.* (footnote and citation omitted).

The district court imposed the minimum guideline sentence of 235 months although it could have imposed a sentence of 293 months under the guidelines. *See*, U.S.S.G. Sentencing Table. The imposition of the 235-month sentence was within the guideline range and did not constitute the imposition of cruel and unusual punishment in violation of the Eighth Amendment. *See Prudhome*, 13

F.3d at 150 (upholding 288 month sentence imposed pursuant to § 924(e) and § 4B1.4).

CONCLUSION

For the foregoing reasons, we AFFIRM Cruz's conviction and sentence.