UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20857
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN CARLOS TORRES,

Defendant-Appellant.

On Appeal from the United States District Court
For the Southern District of Texas
(CR-H-94-0002-01)

February 1, 1996

Before WISDOM, HIGGINBOTHAM, and PARKER, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant, Juan Carlos Torres ("Torres"), appeals both his conviction and sentencing for conspiracy to possess with intent to distribute cocaine, and aiding and abetting the possession of cocaine with the intent to distribute.[2] We find no error in the record, and AFFIRM.

I.

Torres first contends that the district court erred in denying his motion to suppress alleged involuntary oral statements he made at the time of his arrest. On appeal from a motion to suppress, this court's appellate review is limited to determining if the facts found are clearly

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[*] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

[2] Torres was also charged with, but acquitted of, unlawful use of a firearm during the commission of a drug offense pursuant to 18 U.S.C. § 924(c).

erroneous, and if the district court applied the law in error.[3]

A confession is voluntary if, "under the totality of the circumstances," the statement is the product of the accused's "free and rational choice."[4] In this case, the district court found that Torres was advised of his *Miranda* rights in both English and Spanish, that he acknowledged these rights, and that he proceeded to talk to officers without a request for counsel. These findings of fact are supported by the testimony of two of the agents conducting Torres's interrogation, and are not clearly erroneous, in spite of the contradictory testimony of the defendant and another woman present at the time of the defendants' arrest.[5] Under these facts, the district court correctly concluded that the "totality of the circumstances" indicated that Torres's made his statements freely.[6] We therefore affirm the district court's denial of the Torres's motion to suppress the oral statements.

II.

Torres next argues that the district court improperly denied his request for a sentencing reduction for being a minor participant in the offense.[7] Alternatively, Torres contends that the district court failed to state reasons for this denial, and that the case must therefore be remanded for re-sentencing.[8]

We review the district court's determination of a mitigating role under the sentencing guidelines for clear error.[9] The defendant bears the burden of demonstrating by a preponderance of

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[3] *United States v. Shabazz,* 993 F.2d 431, 434 (5th Cir. 1993).

[4] *United States v. Scurlock,* 52 F.3d 531, 536 (5th Cir. 1995).

[5] *See, Amadeo v. Zant,* 486 U.S. 214, 223 (1988) (a fact finder's choice between two permissible points of view cannot be clearly erroneous.)

[6] *Scurlock,* 52 F.3d at 536.

[7] U.S.S.G. §3B1.2(b). The district court sentenced Torres to 350 months in prison, followed by five years of supervised release, a $25,000 fine, and a $100 special assessment.

[8] *See, United States v. Brown,* 54 F.3d 234, 242 (5th Cir. 1995).

[9] *United States v. Tremelling,* 43 F.3d 148, 153 (5th Cir.), *cert. denied,* 115 S. Ct. 1990 (1995).

the evidence that he is entitled to the reduction.[10] Torres has not met his burden in this case.

Under the U.S. Sentencing Guidelines, a defendant's offense level should be reduced by two levels if was a minor participant in the offense.[11] A "minor participant" is one who is less culpable than most other participants, but whose role could not be described as minimal.[12] To receive the adjustment, a defendant must be "substantially less culpable" than the average participant.[13] His role must have been "at best peripheral to the advancement of the illicit activity."[14]

The district court determined that Torres was not a minor participant, based on a factual finding that the "defendant was a highly trusted associate or lieutenant of this drug organization who came to Houston and was in charge of the drug ledgers of one of the largest drug operations. . . ever found in this particular country."[15] The record is replete with evidence to support this factual finding, including the defendant's own admission that he had written the ledger books for the organization. Therefore, the court was not clearly erroneous in making this determination. Furthermore, at the sentencing hearing, the district court specifically adopted into the record the factual findings and sentencing recommendations of Torres's Presentencing Report.[16] Yet, Torres, who had the burden of proof on this issue, did not then offer any evidence to prove that he was entitled to the adjustment. Thus, we affirm the district court's refusal to reduce Torres's sentence.

We also reject Torres's argument that the district court failed to state reasons for denying the requested adjustment. The district court specifically adopted into the record the factual findings and guideline application set forth in Torres's Presentencing Report, including its

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[10] *Brown,* 54 F.3d at 240-41.

[11] U.S.S.G. §3B1.2(b).

[12] *Id.,* comment, n.3.

[13] *United States v. Zuniga,* 18 F.3d 1254, 1261 (5th Cir.), *cert. denied,* 115 S. Ct. 214 (1994).

[14] *Tremelling,* 43 F.3d at 153.

[15] Record, Volume 13, p27.

[16] Record, Volume 1, p407.

determination that Torres was not a "minor participant" in the offense.[17] Additionally, the court articulated reasons for its calculation of Torres's sentence as a whole.[18] The combination of these two portions of the record adequately articulate the reasons for denying Torres's request.

III.

Finally, Torres contends that the district court erred in increasing his sentence for the possession of a firearm.[19] We review this issue for clear error.[20]

To obtain the enhancement, the government must prove possession by a preponderance of the evidence.[21] It may meet this burden by showing that a temporal and spatial relationship existed between the weapon, the drug trafficking activity, and the defendant.[22] A co-conspirator may be assessed the increase based on another co-conspirator's possession where the use of the weapon was reasonably foreseeable.[23] Because firearms are "tools of the trade" in drug conspiracies," a co-conspirator's use will ordinarily be foreseeable.[24]

In this case, the government presented evidence that agents found a loaded .357 magnum revolver resting on top of the drug ledger created by Torres, and containing Torres's fingerprints, in the same closet where they found a large quantity of cocaine, in the same house where they arrested Torres. This is sufficient evidence to justify the sentencing increase. The absence of fingerprints on the gun itself, and fact that the gun was not in plain view do not overcome this finding.

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17 *Id.*

18 Record, Volume 13, p27.

19 U.S.S.G. § 2D1.1(b)(1).

20 *United States v. Mitchell*, 31 F.3d 271, 278 (5th Cir.), *cert. denied*, 115 S. Ct. 455 (1994).

21 *United States v. Aguilera-Zapata*, 901 F.2d 1209, 1215 (5th Cir. 1990).

22 *Id.*

23 *Id.* at 1215-16.

24 *Id.*

Additionally, Torres's acquittal for *use* of a firearm,[25] does not preclude consideration of a sentencing enhancement for *possession* of a firearm.[26] Therefore, we affirm the district court's enhancement of Torres's sentence.

IV.

For the reasons set forth above, we AFFIRM the conviction and sentence of Juan Carlos Torres.

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[25] See note 1, *supra.*

[26] *United States v. Carter,* 953 F.2d 1449, 1459 (5th Cir.), *cert. denied,* 504 U.S. 990 (1992).