UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30401
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FELIX RUBEN POTES,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CR-94-22-H)

(May 18, 1995)

Before POLITZ, Chief Judge, KING and STEWART, Circuit Judges.

POLITZ, Chief Judge:[*]

Felix Ruben Potes appeals his sentence for conspiracy to possess cocaine with intent to distribute.[1] Finding no error we affirm.

In January 1994 an informant working for United States

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

[1]21 U.S.C. §§ 841(a)(1), 846.

authorities was approached in Colombia and importuned to transport cocaine into the United States for which he would be paid $4000 per kilo. The informant agreed and four kilos of cocaine were brought onto the ship on which the informant served by two men who gave him written instructions for delivery, specifically a paper containing two telephone numbers and the name "Tocaya." The informant hid the four packages in a secluded place on the ship. Three kilos disappeared during transit. Upon arrival at the Port of New Orleans the informant delivered the remaining kilo and the instruction sheet to agents who boarded the vessel.

Federal agents structured a controlled delivery of four kilos of fake drugs. After calling one of the supplied telephone numbers, which triggered a pager, a Spanish-speaking female named Tocaya returned the call and instructed the agent to contact two men at a New Orleans telephone number. The agent complied and arrangments were made to meet the two men at a New Orleans hotel for delivery of the contraband.

At the appointed time the agent arrived at the hotel and met Potes and an accomplice, Sheldon Stewart. Potes examined the packets, discussed the transaction, and agreed to accept the drugs. Potes advised that he would take the drugs and would return in an hour with the $16,000 payment due. When the agent demurred, Potes motioned for Stewart to lock the door. At this point the agent gave the signal and colleagues entered the room and arrested Potes and Stewart.

Indicted for conspiracy, Stewart pleaded guilty and was

sentenced to 60 months imprisonment and a term of supervised release. Potes was convicted by a jury and sentenced in accordance with the PSR computation to 97 months, the low end of the sentencing range, and a term of supervised release. Potes timely appealed, complaining that the district court erred in declining a downward adjustment for his minimal or minor role in the transaction.

The district court found that Potes "was aware of the amount of cocaine . . . four kilograms," that there were "ample facts to support his knowledge of the intent of the conspiracy," and that he "was entrusted with a considerable amount of money by whoever the major players were in the operation," all culminating in the conclusion that Potes' "role in the offense was neither minimal nor minor."

When a defendant is sentenced within the guideline range our review is limited to determining whether the guidelines were correctly applied, examining legal issues *de novo*[2] and factual findings under the clearly erroneous standard.[3] Potes claims to be nothing more than a mere courier, entitled to an offense level reduction because he was a minimal or minor participant in the crime, citing U.S.S.G. § 3B1.2.

Minimal participants are defined as those having a "lack of knowledge or understanding of the scope and structure of the

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[2]**United States v. Arellano-Rocha**, 946 F.2d 1105 (5th Cir. 1991).

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

enterprise";[4] minor participants are defined as those parties "less culpable than most other participants, but whose role could not be described as minimal."[5] As "most offenses are committed by participants of roughly equal culpability[,] it is intended that the adjustment will be used infrequently."[6] A district court's determination of a defendant's entitlement to this adjustment is "factual in nature,"[7] "entitled to a great deference[,] and should not be disturbed except for clear error."[8]

The record amply supports the court's refusal to classify Potes as a minimal or minor participant in the drug conspiracy. It reflects Potes' familiarity with Tocaya and knowledge of the details of the conspiracy beyond that which a limited participant would have, including the quantity of cocaine smuggled into the country and the sum the informant/courier was to be paid for his efforts. The record indicates that Potes had access to $16,000, a significant sum of money. The fact that such a large sum ostensibly was committed to Potes' care suggests a position of trust in the conspiracy beyond that of a mere courier. Accordingly, there was no error in the district court's ruling that

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[4]U.S.S.G. § 3B1.2, comment. (n.1).

[5]**Id.** (n.3).

[6]**United States v. Mitchell**, 31 F.3d 271, 279 (5th Cir.), cert. denied, _____ U.S. _____, 115 S.Ct. 455 (1994) (citations omitted).

[7]**Zuniga**, 18 F.3d at 1261.

[8]**United States v. Devine**, 934 F.2d 1325, 1340 (5th Cir. 1991), cert. denied, 502 U.S. 1065 (1992).

Potes was neither a minimal nor minor participant.[9]

The sentence appealed from is AFFIRMED.

[9]Even if Potes were a mere courier, his status as such does not necessarily entitle him to a downward adjustment pursuant to section 3B1.1. See **United States v. Franco-Torres**, 869 F.2d 797 (5th Cir. 1989); **United States v. Velasquez**, 868 F.2d 714 (5th Cir. 1989); **United States v. Buenrostro**, 868 F.2d 135 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990).