

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40189
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL EDWARD LATHAM,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:93-CR-14-1
- - - - -
(September 20, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Michael Edward Latham pleaded guilty to one count of conspiracy to commit wire fraud in relation to his activities as a general partner in Environmental Systems (ES). He was sentenced to 39 months imprisonment, three years supervised release, \$75,127 in restitution, and a \$50 special assessment. He appeals the 39-month sentence imposed. On the same day he pleaded guilty to a one-count information charging him with

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

conspiracy to commit wire fraud in relation to his activities as a partner in Continental Distributors (CD).

Latham challenges the district court's finding that he was a leader or organizer of the criminal activity. The district court's finding that Latham had an aggravating role in the offense is reviewed for clear error. United States v. Watson, 988 F.2d 544, 550 (5th Cir.), cert. denied, 114 S. Ct. 698 (1993). A defendant's base offense level may be increased by four levels if the defendant "was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a).

The district court considered Latham's conduct in relation to his involvement in Environmental Systems (ES) and his involvement in Continental Distributors (CD) to determine Latham's offense level. The district court may use the characteristics of one count to adjust the offense level for another count if those counts are grouped together under the guidelines. See United States v. Kleinebreil, 966 F.2d 945, 955 (5th Cir. 1992). Without objection in the district court or this Court, the two counts of conviction were grouped together to determine Latham's offense level. Therefore, the district court properly considered the conduct in the CD scheme to determine Latham's offense level for the ES scheme.

Latham argues that the CD scheme did not involve five or more participants. The five participants included under § 3B1.1 do not have to be charged or convicted, but rather need only have participated knowingly in some part of the criminal enterprise.

United States v. Boutte, 13 F.3d 855, 860 (5th Cir.), petition for cert. filed, (U.S. May 31, 1994) (No. 93-1930). Latham does not dispute that Kendal Smith, Steve Allenbaugh, and Alex Wilson were involved in the scheme. Smith testified at the sentencing hearing that Ken Bridgeman was involved in the scheme between November 1, 1991, and December 14, 1991, and received payments of \$8000 during that period. An unidentified woman was also employed by CD for a short period. Latham has failed to demonstrate that the district court's finding that Latham, Smith, Allenbaugh, Wilson, and Bridgeman were participants in the CD scheme is clearly erroneous. See Boutte, 13 F.3d at 860.

AFFIRMED.