IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40397

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANKLIN B. ROBINSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(1:93-CR-10011)

(December 14, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

A jury found Franklin Robinson guilty of one count of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846, as well as one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). The district court sentenced Robinson to 170 months imprisonment, 4 years of supervised release, a $25,000 fine, and a $100 payment to the

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

crime victim fund. Robinson filed a timely appeal to this court, asserting essentially three points of error: (1) the evidence adduced at trial was insufficient to establish guilt beyond a reasonable doubt; (2) the district court erred in permitting the introduction of certain hearsay testimony; and (3) the sentence imposed was incorrectly calculated in light of the evidence and Robinson's minimal participation in the conspiracy. Finding no merit in these arguments, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 6, 1992, an undercover FBI agent sold two kilograms of cocaine to Julius Cohea. Following his arrest, Cohea agreed to cooperate with the authorities. Pursuant to that agreement, Cohea phoned his financial source, Allen Fields, and informed Fields that the cocaine had been successfully purchased. Cohea told Fields that he had the cocaine but stated that his car had broken down and that he needed to be picked up. Fields agreed to pick up Cohea, arriving shortly thereafter in a van driven by Robinson. Once inside the van, Fields removed and tested the cocaine, which was wrapped in a brown paper bag and hidden inside a Reebok shoe box.

As the trio began to leave the area, a Louisiana state trooper noticed that Robinson was driving erratically and pulled the van over for investigation. Robinson exited the van upon the officer's request and appeared to be extremely nervous. The officer asked Robinson if there were any weapons inside the van,

to which Robinson hesitatingly replied in the negative. Due to Robinson's nervous demeanor and his hesitant response, the officer approached the van and asked Fields (the passenger in the front seat) and Cohea (the passenger in the rear seat) if there were any weapons in the van. Fields informed the officer that he had a .9mm Beretta inside. When Fields began reaching toward the floorboard, the officer ordered Fields and Cohea to exit the van. The officer then obtained Robinson's consent to search the van.

The search revealed the .9mm weapon, which was located on the floorboard between the driver and passenger seat, as well as the shoe box containing two kilograms of cocaine, which was located underneath the front passenger seat.

At Robinson's trial, Cohea testified that Fields had instructed Cohea to deliver cocaine to Robinson (who lived across the street from Fields) in the event that Fields was not at home. Cohea estimated that he had delivered cocaine to Robinson's house on six to eight occasions, in quantities varying from two to eight kilograms per visit. Fields also acknowledged that Robinson, who had served as both a drop-off source and a driver, knew about the cocaine in the van as well as cocaine obtained from Cohea on several other occasions.

The testimony of Robinson's wife confirmed that Cohea had visited the Robinson home on numerous occasions; however, Mrs. Robinson stated that she had never seen any cocaine in her home. Robinson asserted that he was ignorant of the presence of the

cocaine and the weapon found in his van, as well as the other cocaine allegedly delivered to his home by Cohea.

The presentencing report ("PSR") prepared for Robinson established a base offense level of 32. This base level reflected a factual finding that Robinson had knowingly participated in a conspiracy to distribute a total of fourteen grams of cocaine: two kilograms which were found in his van on the day of arrest, plus twelve kilograms that were delivered to Robinson's home by Cohea.[1] In addition, the PSR recommended an upward base-level adjustment of two levels due to the presence of the .9mm weapon found on the floorboard of Robinson's van. Robinson's total offense level was calculated at 34, which combined with a criminal history category of I, yielded a guideline imprisonment range of 151 to 188 months.

The district judge, relying on the PSR, sentenced Cohea to 170 months in prison, a figure within the guideline range. Cohea, who had cooperated with the police, received a three-year sentence of imprisonment. Another co-conspirator, Darryl

[1] Specifically, the twelve kilograms represented a total of six deliveries from Cohea to Robinson of at least two kilograms per delivery. The probation officer arrived at the twelve kilogram figure by accepting as true the lowest common denominator of deliveries and quantities of cocaine delivered to Robinson that were asserted by Franklin and Cohea. Cohea testified at trial that he had delivered from three to eight kilograms of cocaine to Robinson on six to eight occasions (i.e., a total of 18 to 64 kilograms). Cohea and Fields provided statements to law enforcement officials following their arrest that Cohea had made six deliveries to Robinson of two kilograms each (i.e., a total of twelve kilograms).

Franklin, also cooperated with the authorities and received a sentence of sixty months imprisonment.[2]

II. STANDARD OF REVIEW

Our scope of review on a sufficiency of the evidence challenge is narrow. We must affirm if a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. United States v. McCord, 33 F.3d 1434, 1439 (5th Cir. 1994); United States v. Townsend, 31 F.3d 262, 266 (5th Cir. 1994). We must construe the evidence, including all reasonable inferences that can be drawn from the evidence, in the light most favorable to the verdict. McCord, 33 F.3d at 1439; Townsend, 31 F.3d at 266.

The application of the sentencing guidelines is a question of law which is reviewable *de novo* on appeal. United States v. Cabral-Castillo, 35 F.3d 182, 186 (5th Cir. 1994); United States v. Howard, 991 F.2d 195, 199 (5th Cir.), cert. denied, 114 S. Ct. 395 (1993). We will uphold a sentence imposed under the Guidelines unless it: (1) was imposed in violation of the law; (2) resulted from an incorrect application of the guidelines; (3) is outside the range of the applicable sentencing guideline and is unreasonable; or (4) was imposed for an offense for which there is no applicable guideline and is plainly unreasonable.

---

[2] With regard to co-conspirator Fields, the record reveals that on March 31, 1994, the district court granted a continuance on his sentencing due to a deterioration of his physical condition.

Cabral-Castillo, 35 F.3d at 186; United States v. Howard, 991 F.2d 195, 199 (5th Cir.), cert. denied, 114 S. Ct. 395 (1993). A sentencing court's factual findings must be supported by a preponderance of the evidence, and we will reverse such findings only for clear error. United States v. McCaskey, 9 F.3d 368, 372 (5th Cir. 1993), cert. denied, 114 S. Ct. 1565 (1994); United States v. Buckhalter, 986 F.2d 875, 879 (5th Cir.), cert. denied, 114 S. Ct. 210 (1993).

III. ANALYSIS

A. Sufficiency of the Evidence.

Robinson argues that the evidence adduced at trial was insufficient as a matter of law to permit a reasonable jury to find him guilty of participation in a conspiracy with intent to distribute or possession of cocaine. Specifically, Robinson contends that his mere presence in the van which was found to contain cocaine cannot permit a reasonable inference that he knew about the cocaine and intended to further the goals of the conspiracy. Robinson argues that he "was caught in the wrong place at the wrong time," and that the testimony of Cohea and Fields regarding his participation in the conspiracy is too unreliable to permit a reasonable inference of his participation in a conspiracy. Robinson also points out that the cocaine was found underneath the front passenger seat, outside the view of the driver's seat, and that he consented to the search, an action that he contends reveals his ignorance of the contraband. These

facts, Robinson contends, create a reasonable doubt with regard to his possession of the cocaine and his participation in the conspiracy. We disagree.

(1) Conspiracy.

In order to prove that a defendant is guilty of conspiracy, the government must prove beyond a reasonable doubt that (1) a conspiracy existed, and (2) that the defendant knowingly and voluntarily participated in it. United States v. Mergerson, 4 F.3d 337, 341 (5th Cir. 1993), cert. denied, 114 S. Ct. 1310 (1994); United States v. Greenwood, 974 F.2d 1449, 1456-57 (5th Cir. 1992), cert. denied, 113 S. Ct. 2354 (1993). The agreement among conspirators need not be express; a tacit agreement will suffice. Greenwood, 974 F.2d at 1457. The uncorroborated testimony of a co-conspirator may be enough to prove, beyond a reasonable doubt, that the defendant knowingly participated in the conspiracy. Greenwood, 974 F.2d at 1457; United States v. Hernandez, 962 F.2d 1152, 1157 (5th Cir. 1992).

In this case, the evidence clearly permits a reasonable inference of the existence of a conspiracy to distribute cocaine. Robinson's knowing and voluntary participation in this conspiracy was proven by the testimony of Cohea and Fields, who testified that Robinson knew about the cocaine and occasionally stored cocaine in his own home. A conspiracy conviction may be based upon uncorroborated testimony of a coconspirator even when such testimony is from one who made a plea bargain with the government, provided that the testimony is not incredible or

otherwise insubstantial on its face. United States v. Gadison, 8 F.3d 186, 190 (5th Cir. 1993). The jury in this case found the testimony of Cohea and Fields to be credible; in the absence of clear error, we will not disturb this credibility assessment. United States v. Restrepo, 994 F.2d 173, 182 (5th Cir. 1993); United States v. Hoskins, 628 F.2d 295, 297 (5th Cir.), cert. denied, 449 U.S. 987 (1980). The testimony adduced at trial was sufficient to permit a reasonable jury to find Robinson guilty of conspiracy beyond a reasonable doubt.

(2) Possession With Intent to Distribute.

The elements of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) are (1) knowing, (2) possession, (3) with intent to distribute. United States v. Munoz, 957 F.2d 171, 174 (5th Cir.), cert. denied, 113 S. Ct. 332 (1992); United States v. Anchondo-Sandoval, 910 F.2d 1234, 1236 (5th Cir. 1990). Possession may be either actual or constructive. United States v. Pigrum, 922 F.2d 249, 255 (5th Cir.), cert. denied, 500 U.S. 936 (1991). Constructive possession exists when the defendant exercises or has power to exercise dominion and control over the contraband itself or the premises where the contraband is found. United States v. Lopez, 979 F.2d 1024, 1031 (5th Cir. 1992), cert. denied, 113 S. Ct. 2349 (1993); Pigrum, 922 F.2d at 255; United States v. Wilson, 657 F.2d 755, 760 (5th Cir. 1981), cert. denied, 455 U.S. 951 (1982). The requisite intent to distribute illegal drugs may be inferred from the amount, quality, and value of the drug. United

States v. Munoz, 957 F.2d 171, 174 (5th Cir.), cert. denied, 113 S. Ct. 332 (1992); Pigrum, 922 F.2d at 254.

In this case, the evidence indicates that two kilograms of cocaine were found inside a van owned and operated by Robinson. The evidence also indicates that the shoebox containing the cocaine was ripped open by someone while it was being transported in Robinson's van. Both Cohea and Fields testified that Robinson knew about the cocaine and occasionally stored cocaine in his own home for Fields. These facts are sufficient to permit a reasonable juror to infer that Robinson knew about the cocaine and exercised constructive or actual dominion over it. Furthermore, the value of the cocaine stored in Robinson's house and the cocaine found in Robinson's van (approximately $38,000 per two kilograms), combined with Robinson's testimony that he did not use cocaine, was sufficient to permit a reasonable juror to infer that Robinson intended to distribute the cocaine.

B. Hearsay Testimony.

Robinson contends that the district court committed reversible error by admitting into evidence testimony by Franklin regarding an out-of-court statement made by Fields to Franklin. Specifically, Franklin testified that Fields told him that Robinson had accompanied Fields on numerous cocaine acquisition trips to Baton Rouge. We review the district court's admission of evidence for an abuse of discretion. United States v. McAfee, 8 F.3d 1010, 1017 (5th Cir. 1993); United States v. Sparks, 2

F.3d 574, 582 (5th Cir. 1993), cert. denied, 114 S. Ct. 720 (1994).

Robinson recognizes that Rule 801(d)(2)(E) of the Federal Rules of Evidence classifies as non-hearsay any out-of-court statement made by a co-conspirator during the course of and in furtherance of the conspiracy. However, Robinson argues that 801(d)(2)(E) is inapplicable because the statement was not made in furtherance of the conspiracy alleged in the indictment. The conspiracy alleged in the indictment is between Robinson, Fields, Cohea, and Franklin. In contrast, the hearsay statement concerned actions taken only by Robinson, Fields, and Franklin--but not Cohea. Robinson asserts that the hearsay statement concerned a "second" conspiracy which was distinct from the conspiracy alleged in the indictment; therefore, the hearsay statement cannot be characterized as being made "in furtherance" of the conspiracy for which Robinson was indicted.

We are not persuaded by this argument. First, the mere absence of Cohea's involvement in the Baton Rouge cocaine acquisition trips does not create a second, distinct conspiracy. To be guilty of conspiracy, an individual does not have to participate in all aspects of a conspiracy. See, e.g., United States v. Raborn, 872 F.2d 589, 596 (5th Cir. 1989); United States v. Patterson, 739 F.2d 191, 196 (5th Cir. 1984). *A fortiori*, a conspirator's absence from one or more activities of the conspiracy does not sever those activities and create new conspiracies. The indictment alleged a conspiracy to distribute

cocaine among four men: Robinson, Fields, Franklin, and Cohea. Field's out-of-court statement to Franklin describing Robinson's involvement in the conspiracy was made during the course of the larger conspiracy among these four men to distribute cocaine. The fact that Cohea may not have been directly involved in the particular trips to Baton Rouge is irrelevant. Because Franklin's testimony concerned a statement made by co-conspirator Fields during and in furtherance of the conspiracy, it was not an abuse of discretion for the district court to admit the testimony as non-hearsay pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence.[3]

C. Sentencing Guidelines.

Robinson's final contention is that the district court incorrectly calculated the appropriate sentencing guidelines' offense level. He bases this contention on three perceived errors: (1) the PSR, which was accepted by the district court, charged Robinson with an amount of cocaine which was beyond that which was proven by a preponderance of the evidence; (2) Robinson should have been granted a reduction in his offense level due to his minimal participation in the conspiracy; and (3) the sentence

[3] Even assuming arguendo that Franklin's testimony was not admissible under Rule 801(d)(2)(E), its admission was nonetheless harmless error due to the substantial evidence from other sources regarding Robinson's knowledge of and participation in the conspiracy. See FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); 28 U.S.C. § 2111 ("On the hearing of any appeal . . . the court shall give judgment . . . without regard to errors or defects which do not affect the substantial rights of the parties.").

was excessive when compared to the sentences given to co-conspirators Cohea and Franklin.

The district court adopted the findings of the PSR. A PSR generally bears sufficient indicia of reliability to be considered by the trial court in making the factual determinations required by the sentencing guidelines. United States v. Gracia, 983 F.2d 625, 629 (5th Cir. 1993); United States v. Robins, 978 F.2d 881, 889 (5th Cir. 1992). A district court may rely on the PSR's construction of the evidence to resolve a factual dispute, rather than relying on the defendant's version of the facts. Robins, 978 F.2d at 889. A defendant challenging the accuracy of the PSR therefore bears the burden of proving that the information relied upon by the district court in sentencing is materially untrue. United States v. Young, 981 F.2d 180, 185 (5th Cir. 1992), cert. denied, 113 S. Ct. 2454 (1993).

The PSR for Robinson concluded that Robinson was responsible for fourteen kilograms of cocaine, rather than the two kilograms contended by Robinson and the eighteen kilograms contended by the government. The district court and the probation officer responsible for the PSR agreed that fourteen kilograms was an accurate figure because the post-arrest statements of Cohea and Fields, as well as the trial testimony of Cohea, indicated that the minimum quantity of cocaine delivered to Robinson's home by Cohea was twelve kilograms.

In adopting the recommendations of the PSR, the district court implicitly found the statements of Cohea and Fields to be credible. United States v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992). Robinson offers no evidence to refute this evidence other than a diaphanous assertion that Cohea is not credible. Thus, Robinson has not borne his burden of proving that the information contained in the PSR was erroneous; accordingly, we will not disturb the factual finding of the district court.

Robinson also contends that he was entitled to a downward adjustment of two to four levels pursuant to U.S.S.G. § 3B1.2 due to his minor or minimal participation in the conspiracy. Specifically, he characterizes himself as a "one time driver" who was convicted by "creative fiction and . . . inadmissible hearsay . . . ." We disagree.

The district court's denial of a reduction under U.S.S.G. § 3B1.2 is entitled to great deference and should not be disturbed except for clear error. United States v. Devine, 934 F.2d 1325, 1340 (5th Cir. 1991), cert. denied, 112 S. Ct. 954 (1992). A defendant's participation in an offense is not minor unless he is "substantially less culpable than the average participant." U.S.S.G. § 3.B1.2, background. As discussed above, the evidence was sufficient to find that Robinson was a knowing and voluntary participant in a conspiracy to possess and distribute cocaine. The testimony established that Robinson was a driver for Fields on numerous occasions, as well as a repository for the storage of cocaine when Fields was not at home. Robinson has offered no

evidence to support his claim that he is entitled to a downward adjustment based upon a minor or mitigating role in the conspiracy. Thus, in light of the evidence adduced at trial, it was not clear error for the district court to decline Robinson's request for a downward adjustment.

Robinson's final argument concerning his sentence is one he characterizes as "a matter of pure equity"; namely, he contends that the district court erred by imposing a sentence (170 months) which was comparatively greater than the sentence imposed upon either Franklin (60 months) or Cohea (36 months). What Robinson fails to recognize, however, is that Franklin and Cohea both pled guilty and agreed to cooperate with the government. In return for this cooperation, the government filed a motion pursuant to U.S.S.G. § 5K1.1 asking the district court to grant a downward departure based upon their substantial assistance. By comparison, Robinson neither cooperated with the government nor pled guilty.

The applicable guideline range for Robinson's offense was 151 to 188 months. Robinson's sentence of 170 months was well within this range. The district court did not have authority to depart downward to achieve "equity" with Robinson's cooperative codefendants. United States v. Davidson, 984 F.2d 651, 656 (5th Cir. 1993). Thus, the district court committed no error by sentencing Robinson within the appropriate guideline range.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.