

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-40473

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BARBARA JENKINS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(92 60032-09)

(May 3, 1995)

Before LAY,¹ DUHÉ and DeMOSS, Circuit Judges.

PER CURIAM:²

Appellant Barbara Jenkins appeals from the sentence imposed by the district court upon her plea of guilty to possession with intent to distribute over 50 grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). We affirm.

I. DISCUSSION

Appellant raises two arguments on appeal. First, Appellant contends that the district court improperly computed the amount of drugs constituting "relevant conduct." Second, Appellant contends

¹ Circuit Judge of the the Eighth Circuit, sitting by designation.

² 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

that the district court erred in its determination that she was a leader or organizer of the drug conspiracy. We address these issues seriatim.

A. Standard of Review

We review the district court's determination of the quantity of drugs attributable to the Appellant and the Appellant's role in the offense for clear error. See United States v. Mergerson, 4 F.3d 337, 345 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1310 (1994); United States v. Mir, 919 F.2d 940, ___ (5th Cir. 1990).

B. Quantity of Drugs

The probation officer determined that, based on "the indictment and supported by the investigative reports," 1,207.02 grams of cocaine base were attributable to Appellant. Pursuant to U.S.S.G. § 2D1.1(c)(4), the probation officer determined that Appellant's base offense level was 36. Appellant objected to "[t]he allegation of September 17, 1990 for 112 grams....[t]he allegation of September 21, 1990 relative to 196 grams, and the allegation relative to 432 grams."³ Appellant asserts that the government failed to prove that the PSR was based on reliable information, and that the PSR utilized information divulged after

³ The Presentence Investigation Report (PSR) does not mention a 432 gram amount in its calculations. Although the probation officer raised this fact in his addendum to the PSR, and the district court reiterated this fact at sentencing, Appellant made no attempt to clarify her objection. Appellant does not address her objection to the 432 gram amount on appeal, and we are left with no basis to consider her objection to the 432 grams. We find that Appellant has waived her objection to that amount.

execution of the plea agreement and immunized by the Kastigar⁴ letter incorporated into the agreement. While the affect of a promise of "use immunity" on a defendant's relevant conduct determination for purposes of sentencing is a novel issue in this Circuit, we do not reach this issue.

If we assume, ad arguendo, that Appellant's objections should have been granted, any error with regards to the two amounts was harmless. The PSR found that the amount of drugs attributable to Appellant was 1207.02 grams of cocaine base. Assuming for argument that the district judge should have granted the objections as to the two amounts, Appellant would have remained responsible for 899.02 grams of cocaine base. U.S.S.G. § 2D1.1(c)(4) provides a base offense level of 36 for "[a]t least 500 G but less than 1.5 KG of Cocaine Base." Because 899.02 grams falls within this range, Appellant's base offense level is 36 regardless of whether the challenged amounts are included in the calculation.

Notwithstanding the foregoing conclusion, Appellant's assertions on appeal appear to go beyond the two specified amounts, and therefore our inquiry must continue. However, because Appellant's objections to the remaining amounts are raised for the first time on appeal, we review only for plain error. See United States v. Calverley, 37 F.3d 160 (5th Cir. 1994)(en banc).

A defendant's base offense level for drug-trafficking offenses may be based on both "drugs with which the defendant was directly

⁴ Kastigar immunity is based on Kastigar v. United States, 406 U.S. 441 (1972), and provides "use immunity" for all statements made to law enforcement agents and testimony.

involved [under U.S.S.G. § 1B1.3(a)(1)(A)], and drugs that can be attributed to the defendant in a conspiracy as part of his 'relevant conduct' under [U.S.S.G.] § 1B1.3(a)(1)(B)." United States v. Carreon, 11 F.3d 1225, 1230 (5th Cir. 1994); see also U.S.S.G. § 2D1.1(a)(3). "Relevant conduct" includes "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." Carreon, 11 F.3d at 1230 (emphasis in original). Conduct may be relevant regardless of whether it occurred during the commission of the offense of conviction, in preparation for the offense or during an attempt to avoid detection or responsibility for the offense. U.S.S.G. § 1B1.3(a)(1)(B).

In making its sentencing decisions, a district court may consider any relevant evidence that "has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a). "[A] presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making factual determinations required by the sentencing guidelines." United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990). A sentencing court may "adopt facts contained in a PSR without inquiry, if those facts had an adequate evidentiary basis and the defendant does not present rebuttal evidence." United States v. Puig-Infante, 19 F.3d 929, 943 (5th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 180 (1994).

"If information is presented to the sentencing judge with which the defendant would take issue, the defendant bears the

burden of demonstrating that the information cannot be relied upon because it is materially untrue, inaccurate or unreliable." United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). Objections in the form of unsworn assertions do not bear sufficient indicia of reliability to be considered. United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992).

Appellant has failed to carry her burden of showing that the drug quantities contained in the PSR were untrue or based on unreliable information, and further failed to show that the information was obtained through immunized testimony. The quantities contained in the PSR were based on the indictment and investigative reports. While we have called into question the court's ability to rely on the indictment alone to support a PSR,⁵ this PSR, by its plain terms, was not based exclusively on the indictment. Furthermore, regardless of the evidentiary value of the indictment for other purposes, it does demonstrate that the government had knowledge of the specified quantities before Appellant ever entered into her plea. Appellant has fallen well short of her burden, and we cannot say that the district court committed plain error by relying on the unchallenged quantities contained in the PSR.

C. Leader or Organizer Adjustment

Appellant's second argument requires little discussion. Essentially Appellant objects to the district court's finding that

⁵ See United States v. Williams, 22 F.3d 580, 582 (5th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 367 (1994).

she was a leader or organizer of the drug conspiracy for the same grounds upon which she objects to the drug quantities contained in the PSR. Adequate evidence in the PSR demonstrated that Jenkins fell squarely within U.S.S.G. § 3B1.1(a) as a leader or organizer of the drug conspiracy.

The PSR states that "[a]ccording to the offense reports, [Jenkins] and Don Paul Jackson⁶ arranged for the purchase, transportation, and distribution of cocaine base by directing the actions of Matthew Jackson, III, Anthony Garrick, and Felix Barnes." In response to Appellant's objections to the adjustment, the probation officer noted that the

offense conduct indicates the defendant worked in conjunction with her husband, Don Paul Jackson, in the organization by arranging the purchase of cocaine base in Houston and either transporting it themselves or arranging for others to transport the illegal substance to the Western District of Louisiana for further distribution.

As support for his findings, the probation officer quoted a Drug Enforcement Administration Report wherein codefendant Don Paul Jackson stated that Appellant "shared in the management, control and financing of the crack cocaine organization."

Appellant's unsubstantiated assertion that she simply followed the directions of Jackson does not satisfy her burden under the authority cited in the preceding section. The district court was therefore entitled to rely on information contained in the PSR. The PSR plainly states the authority for its conclusions, and

⁶ Appellant and Jackson were married at some point prior to sentencing.

nowhere indicates that immunized testimony was the foundation for its recommendations. Appellant has failed to establish that the district court's conclusion that she was a leader or organizer of the conspiracy was clear error.

II. CONCLUSION

Appellant has failed to carry her burden of showing that the district court had insufficient evidence or relied on immunized evidence in calculating the amount of cocaine base attributable to the Appellant or in determining that Appellant was a leader or organizer of the conspiracy. The sentence imposed by the district court is

AFFIRMED.