

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40539
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

UMAR SHUKIR MUHAMMAD,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(93-CR-30040-01)

(February 3, 1995)

Before JOHNSON, WIENER, and STEWART, Circuit Judges.

JOHNSON, Circuit Judge:¹

This is a criminal case in which Umar Shukir Muhammad ("Muhammad") appeals the district court's sentence on the grounds that the court erred in calculating the drug amounts attributable to Muhammad and in making an upward adjustment for aggravating role in the underlying offense. Because we cannot find any clear error in the district court's calculations or aggravation adjustment, we affirm.

¹Local 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 Pursuant to this Rule, the Court has determined that this opinion should not be published.

I. Facts and Procedural History

Muhammad² appeals the sentence he received after pleading guilty to conspiracy to distribute cocaine and cocaine base. He was arrested along with co-defendant, Jeannette Phillips ("Phillips"), after a federal and state investigation revealed that he had been trafficking cocaine in the Tallulah, Louisiana area.

In February of 1993, a confidential informant ("CI")³ advised a Louisiana state criminal investigator that Muhammad had been dealing large quantities of cocaine and had "fronted" the CI with five ounces of rock cocaine. The CI told the investigator that Muhammad was expecting a \$3,000 payment on the "front" soon. Upon further investigation, officers discovered that only one-half ounce of the original five ounce "front" remained. Evidently, the CI's brothers had already paid Muhammad \$2,000 in cash and two and one-half ounces had been sold for \$2,500 in cash. The CI had in his possession the \$2,500 cash which he received as payment for the cocaine. Thus, operating under the presumption that the other four and one-half ounces had already been sold, the officers seized the remaining one-half ounce of cocaine along with the cash.

The police had the CI deliver \$2,000 of the seized cash to Phillips on her promise that she would deliver the money to Muhammad as further payment on the "front." Officers then observed

²Muhammad was known as Donald Ray Washington until he legally changed his name to Umar Shukir Muhammad while in prison.

³The FBI had received assistance from this CI before. In fact, the FBI agents had purchased 68.33 grams of cocaine base from Muhammad on October 9, 1991, with the CI's assistance.

co-defendant Phillips deliver the \$2,000 cash to Muhammad. Several days later, the officers paid the remaining \$1,000 to Muhammad through undercover operations and the CI. When this \$1,000 payment was made to Muhammad, Muhammad proceeded to front one and one-half ounces of crack cocaine and one ounce of cocaine powder to the CI.⁴ On February 9, the CI contacted Muhammad at Phillips' residence and paid Muhammad \$2,500 for the crack cocaine and cocaine powder Muhammad had most recently fronted to the CI.

Pursuant to the above transactions, the police arrested Muhammad and obtained a search warrant for Phillips' residence. While executing the search warrant, the police located and seized a small plastic container holding an unidentified fine white powder and a shoe box containing \$2,500 in cash.

The CI told the investigators that the CI had previously purchased larger quantities of cocaine from Muhammad, but that more recently the quantities available for purchase had diminished. The CI attributed the diminishment in available cocaine to the fact that Muhammad now had several street dealers selling for him. Additionally, the CI told the police investigators that Phillips often delivered cocaine on Muhammad's behalf and also received payment on his behalf, frequently at her residence.

Pursuant to a written plea agreement, Muhammad plead guilty to one count of conspiracy to distribute cocaine and cocaine base. However, at sentencing Muhammad objected to the pre-sentence

⁴The cocaine was later analyzed to be 32.35 grams of crack cocaine and 27.05 grams of cocaine powder.

report's ("PSR") calculation cocaine attributable to him. He also objected to the upward adjustment to his offense level for his having had an aggravating role. The district court overruled Muhammad's objections and adopted the PSR. The district court then sentenced Muhammad to one hundred sixty-eight months of imprisonment followed by three years of supervised release. Muhammad now appeals the sentence, arguing that the district court erred by miscalculating the amount of cocaine and crack attributable to him and by adjusting his sentence on the grounds that he played an aggravating role in the offense.

II. Discussion

The Court will uphold a sentence under the Guidelines unless it was imposed in violation of the law; imposed as a result of an incorrect application of the sentencing guidelines; or outside the range of the applicable sentencing guideline and is unreasonable. *United States v. Howard*, 991 F.2d 195, 199 (5th Cir.), cert. denied, 114 S.Ct. 395 (1993). Application of the guidelines is a question of law subject to de novo review by this Court. *Id.* However, this Court reviews a district court's factual findings concerning the quantity of drugs attributable to a defendant for clear error. *United States v. Eastland*, 989 F.2d 760, 767 (5th Cir.), cert. denied, 114 S. Ct. 246 (1993). This Court also applies the clear error standard in evaluating a district court's determination as to the role of the defendant in the offense. See *United States v. Alfardo*, 919 F.2d 962, 966 (5th Cir. 1990). The Court will affirm as harmless an erroneous sentence if the Court is

persuaded that the district court would have assessed the same sentence if the error had not occurred. *United States v. Tello*, 9 F.3d 1119, 1131-32 (5th Cir. 1993).

A. Drug Quantity Calculation.

Muhammad argues that the district court erred in calculating the amount of crack and cocaine involved in the offense on three different bases. Each of these bases will be analyzed individually.

1. Alleged Error in Attributing Five Ounces to Muhammad.

The Sentencing Guidelines make clear that "[w]here there is no drug seizure or the amount seized does not reflect the scale of the offense the court shall approximate the quantity of the controlled substance." U.S.S.G. § 2D1.1, comment, n.12. The court may consider the price generally obtained for the controlled substance in making this determination. *Id.*

Muhammad argues that the district court clearly erred in attributing five ounces of cocaine from the February 3, 1993, transaction to him given that only one-half of an ounce was actually seized. This argument fails because there was more than sufficient evidence, in addition to the amount of drugs actually seized from Muhammad, on which the district court could base its drug quantity finding. At the sentencing hearing, the district court heard testimony from a law enforcement agent that the remaining four and one-half ounces of crack cocaine had probably been sold by the confidential informant and his associates prior to the seizure of the one-half ounce. Additionally, agents also

testified that approximately \$4,500 was paid to Muhammad for the four and one-half ounces of crack—an amount consistent with the "going rate" of that particular drug quantity. In light of such circumstantial evidence, it cannot be said that the district court clearly erred in finding the drug quantity to be five ounces.

2. Alleged Lack of a Certain Source for the Crack Cocaine.

Muhammad also argues that the cocaine from the February 9, 1993, transaction could not be attributed to him because there was no explanation given in the PSR or in the hearing establishing him as the source of the drugs. This argument is without merit given that the PSR states that the cocaine Muhammad left at the CI's home was seized and subjected to laboratory analysis. The laboratory tests established that the substance Muhammad delivered was, in fact, cocaine.⁵

3. Use of Incorrect Amounts in Calculations.

Muhammad also argues that the district court erred by using incorrect drug amounts to make its sentencing calculations. Even if Muhammad is correct in believing the calculations were based on erroneous amounts, the error was harmless because the amounts asserted to be the correct ones would still have led to the same

⁵That the facts on which the district court relied in establishing Muhammad as the source of the cocaine were set forth in the PSR instead of during a formal hearing does not diminish their reliability. A PSR generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determination required by the Guidelines. *United States v. Elwood*, 999 F.2d 814, 817 (5th Cir. 1993).

sentence.⁶

II. Sentencing Departure for Aggravating Role.

Guideline section 3B1.1(c) requires a two-level increase in a defendant's offense level if the defendant was an organizer, leader, manager, or supervisor of the criminal activity. U.S.S.G. § 3B1.1(c). Factors for consideration in making an aggravation adjustment include: the exercise of decision-making authority, the nature of the participation in the offense, and the degree of control and authority over others. *United States v. Alvarado*, 898 F.2d 987, 993 (5th Cir. 1990). As the party seeking the adjustment, the Government must establish the factual predicate justifying the adjustment by a preponderance of relevant and sufficiently reliable evidence. *Elwood*, 999 F.2d at 817.

The PSR reveals that Jeanette Phillips delivered cocaine for Muhammad on numerous occasions and that Muhammad used Phillip's residence to receive payment for the cocaine. Muhammad also "fronted" cocaine to the CI. Further, the CI told law enforcement agents that Muhammad had approximately eleven individuals selling drugs on his behalf. Based on this evidence, the district court did not clearly err by determining that Muhammad had an aggravating role in the offense.

⁶Using either the district court's or Muhammad's sets of numbers, the total attributable amount results in a calculation equivalent to well over 4,000 kilograms of marijuana. Since all amounts of marijuana between 3,000 and 10,000 kilograms result in an offense level of 34, any error which may have been made by the district court had no effect on the calculation of Muhammad's base offense level.

III. Conclusion

Because we do not find that the district court clearly erred either in calculating the amount of cocaine attributable to Muhammad or in finding Muhammad to have played an aggravating role in the offense, we must affirm.

AFFIRMED.