

IN THE UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-40569
(Summary Calendar)

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

KENNETH RICHARD,

Defendant-Appellant.

Appeal from United States District Court
for the Eastern District of Texas
(93-CR-203-1)

(January 27, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Kenneth Richard pleaded guilty to a two-count information charging him with distribution of cocaine base (Count I) and money laundering (Count II). The district court sentenced him to 240 months imprisonment on Count I and 240 months imprisonment on Count II. Twenty-two months of the sentence on count II was to run consecutively to the sentence on Count I, for a total period of imprisonment of 262 months.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published."

Richard appeals his sentence, asserting that the district court erred in its relevant conduct determination, in denying his request for a hearing on the reliability of hearsay information in the presentence investigation report (PSR), and in its determination that he was an organizer or leader. Richard also contends that the district court misapplied the guidelines by sentencing him to the maximum sentence on Count II. Finding no error in either the district court's factual and legal determinations or in its application of the guidelines, we affirm.

FACTS

Richard was indicted on four counts of distribution of cocaine base. This indictment arose out of an investigation by the FBI into Richard's drug-trafficking activities. On September 16, 1992, the FBI used a confidential informant (CI) who purchased crack cocaine from Richard. The CI again purchased crack from Richard on October 22, 1992, October 23, 1992, and February 11, 1993. Richard plead guilty to an information which charged one count of distribution of cocaine base and one count of money laundering. However, the PSR describes the following other drug activities in which Richard was allegedly involved:

- 1) In June of 1991, Richard hired Anthony Moore as a courier and supplied Moore with cocaine from June 1991 to August 1991. On September 4, 1991, Beaumont police found crack in a search of Moore's residence and business. Moore received this crack from Richard. Moore continued to receive crack and cocaine powder from Richard from September to approximately December 1991. During January 1992, Richard brought 8 kilos of powder cocaine to Moore's

residence and told Moore that he expected to make a big profit from its redistribution.

2) On June 13, 1991, in Abbeville, Louisiana, police officers stopped a vehicle occupied by Cassandra Cooper and recovered crack cocaine. Cooper stated that she received the crack in Beaumont, Texas, from Richard, who instructed her to transport it to Abbeville.

3) On August 21, 1991, Special Customs Service Agent Stan Daspit received information from a CI that Richard was transporting a large quantity of cocaine from Houston to Beaumont in a certain vehicle. Later that day, law enforcement officers observed that vehicle parked at an apartment in Beaumont, got search and arrest warrants, and attempted unsuccessfully to arrest Richard. Richard got away, but a search of the vehicle and apartment yielded powder cocaine and other evidence of drug-trafficking.

4) On March 18, 1993, law enforcement officers in Orange County, Texas, stopped a vehicle driven by Leo Major, who possessed 10 crack cocaine cookies. Major told officers that the crack was given to him by Richard to transport to Louisiana, and Major described his knowledge of Richard's drug-trafficking activities.

Richard was indicted for four offenses of possession of cocaine with intent to distribute which occurred during September through October 1992 and in February 1993. Pursuant to a plea agreement, he pleaded guilty to an information which charged only the September 1992 possession of cocaine with intent to distribute (Count I), and a February 1993 money laundering charge (Count II).

Based upon criminal activity described in the indictment, information, and PSR, Richard was sentenced to serve 240 months on each count. All but 22 months of the two sentences were to run concurrently for a total of 262 months imprisonment.

Although he concedes that the criminal activity alleged in the indictment is relevant conduct, Richard challenges the district court's use of the amount of cocaine from the other criminal activity, alleged in the PSR, in calculating his U.S.S.G. § 1B1.3 relevant conduct. He also challenges the district court's use of the other alleged criminal activity in its U.S.S.G. § 3B1.1(c) determination that he was a leader or organizer. Finally, Richard asserts that his sentence on Count II was a misapplication of the guidelines. We disagree.

DISCUSSION

RELEVANT CONDUCT AND EVIDENTIARY HEARING

According to the PSR, Richard was engaged in the large scale distribution of cocaine from at least June 1991, to March 18, 1993. The PSR indicates that during this time, Richard was responsible for the distribution of approximately 10.5 kilos of cocaine powder and 1.75 kilos of crack cocaine. The probation officer used these quantities of cocaine in recommending a base offense level for Richard pursuant to U.S.S.G. § 1B1.3(a)(1)(A) and (a)(2), the relevant conduct guideline.

Richard argues that the district court erred in finding that quantities of powder cocaine and cocaine base described in the presentence report (PSR), which were not involved in the charged

offenses, were relevant conduct. He contends that these other quantities were not related to the offense of conviction. He argues that the district court failed to weigh the U.S.S.G. § 1B1.3 elements of similarity, regularity, and temporal proximity. He also argues that the information in the presentence report regarding these other quantities of drugs was not reliable, that it was based on uncorroborated hearsay, and that the court erred in failing to conduct an evidentiary hearing.

Richard objected to the PSR, arguing that the amounts of cocaine attributed to him by Moore, Cooper, Daspit, and Major were not relevant conduct under § 1B1.3. He also challenged the reliability of the information provided by Moore.

The district court found that the facts in the PSR were reliable, adopted the PSR, and found that the conduct in question was relevant conduct. The court's finding of relevant conduct was based on its determination that Richard had furnished drugs in the Beaumont area with considerable regularity and had been engaged in a common scheme of transporting and selling drugs in this area for a long period of time. The court further found that the information provided by Moore had sufficient indicia of reliability and trustworthiness and that Moore was a credible witness, based on the court's observation of Moore's testimony in another trial. The court thus denied Richard's request to probe the reliability of the information provided by Moore in the PSR by cross-examining Moore in an evidentiary hearing.

The first step is to determine whether the district court

properly relied on the information in the PSR without an evidentiary hearing. A district court's denial of an evidentiary hearing is reviewed for abuse of discretion. United States v. Pologruto, 914 F.2d 67, 69 (5th Cir. 1990). A presentence report generally bears sufficient indicia of reliability to be considered as evidence by the district court in resolving disputed facts. United States v. Montoya-Ortiz, 7 F.3d 1171, 1180 (5th Cir. 1993) (quoting United States v. Robins, 978 F.2d 881, 889 (5th Cir. 1992)). A district court may adopt facts contained in the PSR without further inquiry if the facts have an adequate evidentiary basis and the defendant does not present rebuttal evidence. United States v. Puig-Infante, 19 F.3d 929, 943 (5th Cir.), cert. denied, 115 S. Ct. 180, 130 L.Ed.2d 115 (1994). The defendant bears the burden of showing that the information in the PSR relied on by the district court is materially untrue. Id.

Richard requested an opportunity to cross-examine Moore. He did not offer to present any evidence to rebut the information provided by Moore in the PSR. He denied Moore's allegations and asserted through argument by his attorney that Moore was lying, but he did not offer his own sworn testimony. A defendant's unsworn assertions do not have sufficient indicia of reliability and should generally not be considered by the district court in making its factual findings. United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990).¹

¹ But see U.S. v. Ashburn, 20 F.3d 1336, 1349 & n.15 (5th Cir.), vacated and reinstated in part on rehearing en banc, 38 F.3d 803 (5th Cir. 1994) (Where we questioned, but did not

Because the district court specifically noted that it had the opportunity to observe and evaluate Moore's credibility in another trial, this is not an instance of sole reliance upon the PSR's hearsay information: the district court evaluated the credibility of the declarant, not merely of the declaration. Moreover, Richard does not challenge the reliability of some of the other similar criminal activity alleged in the PSR. Under these circumstances, it is difficult to conclude that the district court abused its discretion in denying Richard an evidentiary hearing, in finding the facts in the PSR to be reliable, and in adopting the PSR recommendation.

We now turn to examine whether this challenged criminal activity was relevant conduct under § 1B1.3. Unadjudicated extraneous offenses may be considered by the court as relevant conduct in determining a defendant's offense level. *Application Note 3*, U.S.S.G. § 1B1.3; U.S.S.G. § 3D1.2(d). Relevant conduct includes quantities of drugs not specified in the count of conviction, if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction.

§ 1B1.3(a)(2); United States v. Bryant, 991 F.2d 171, 177 (5th Cir. 1993). In determining whether conduct is "relevant," this Court considers the similarity, regularity, and temporal proximity of the conduct. United States v. Bethley, 973 F.2d 396, 401 (5th Cir. 1992), cert. denied, 113 S. Ct. 1323, 122 L.Ed.2d 709 (1993)

address en banc, the reliability of unsworn assertions in a PSR provided by a co-defendant who was not available for cross-examination).

(citing United States v. Hahn, 960 F.2d 903, 910 (9th Cir. 1992)). A district court's factual findings regarding relevant conduct are reviewed for clear error. Bryant, 991 F.2d at 177. A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole. Puig-Infante, Id. at 942; United States v. Whitlow, 979 F.2d 1008, 1011 (5th Cir. 1992).

The offense of conviction occurred on September 16, 1992 and involved Richard distributing cocaine base. The conduct which Richard contends cannot be considered relevant conduct occurred between June 1991 and January 1992 (Moore); on June 13, 1991 (Cooper); on August 21, 1991 (Daspit); and on March 18, 1993 (Major). The longest gap between the challenged conduct and the offense conduct is the eight months between January 1992 and September 1992. The conduct on each occasion involved Richard providing cocaine base to another person for redistribution.

Having found no error in the district court's determination that the PSR information was sufficiently reliable, we conclude that its finding that Richard had furnished drugs in the Beaumont area with considerable regularity and had been engaged in a common scheme of transporting and selling drugs in this area for a long period of time is supported by the record. Accordingly, the district court's determination that this common scheme of conduct was relevant within the meaning of § 1B1.3, is not clearly erroneous. See and compare, Robins, 978 F.2d at 889-90 (where evidence showed that the defendant had carried on a large-scale marijuana trafficking business for a number of years, the

transaction for which he was convicted did not reflect the full scale of his activities, and the similar transactions were held to be appropriately considered by the district court in calculating the quantity of marijuana for sentencing purposes.)

ORGANIZER/LEADER

Richard argues that the district court erred in increasing his offense level two levels pursuant to U.S.S.G. § 3B1.1(c) for being an organizer or leader. The PSR recommended the adjustment because Richard employed Moore and Major to transport crack cocaine. Richard objected, arguing that the court could not consider collateral conduct in assessing his role in the offense, that Moore's and Major's statements in the PSR supporting the adjustment were unreliable and not relevant conduct, and that he and Major were equally culpable. The district court denied the objection and found that the evidence clearly showed that Richard used Moore and Major as couriers to further his drug-trafficking activities.

The sentencing guidelines provide for a two level increase in the offense level "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity."

§ 3B1.1(c). A district court's factual finding that a defendant was an organizer or leader is reviewed for clear error. Puig-Infante, 19 F.3d at 944. The district court's consideration of relevant conduct in making this factual finding is an application of the guidelines which is reviewed fully for errors of law, with due deference to the district court. United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991); Robins, 978 F.2d at 889.

The district court's consideration of Richard's relevant conduct, as described by Moore and Major in the PSR, in determining whether Richard was an organizer or leader was a correct application of the guidelines. "The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct) . . . and not solely on the basis of elements and acts cited in the count of conviction." U.S.S.G. Chapter 3, Pt.B, intro.comment.; Montoya-Ortiz, 7 F.3d at 1180-81.

The PSR reveals that Richard hired Moore as a courier to assist in his drug-trafficking activities, and that Richard gave cocaine to Major and paid him to transport cocaine to Louisiana. Recruitment of accomplices, as well as the degree of decision making and organizing, are factors to consider in determining whether a defendant is an organizer or leader. § 3B1.1, comment. (n.4). The district court's finding that Richard was an organizer or leader by using Moore and Major as couriers to further his drug-trafficking activities is not clearly erroneous.

SENTENCING ON MULTIPLE COUNTS

Richard argues that the district court erred in assessing a sentence of 240 months on Count II. He contends that his sentence on Count II should have been within the guideline range for Count II, 70-87 months, based on an offense level of 25.

Richard did not raise this issue in the district court. Although the PSR did not reveal that the guidelines would call for

a sentence of 240 months on Count II, and the sentencing recommendation was not available to Richard, he should have objected at the time the district court imposed the sentence. Because he failed to do so, this issue is reviewed for plain error. See United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994) (Plain error standard applied, where the PSR did not make a recommendation on the fine and defendant failed to object when the fine was imposed).

Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, this Court may remedy the error only in the most exceptional case. Rodriguez, 15 F.3d at 414. See also, United States v. Olano, ___ U.S. ___, 113 S. Ct. 1770, 1777-79, 123 L. Ed. 2d 508 (1993).

Richard has not shown any error. His argument fails to account for the fact that he was sentenced pursuant to the rules for multiple counts, which required the calculation of a combined offense level for both counts pursuant to §§ 3D1.1-4. His combined offense level for Counts I and II before adjustment for acceptance of responsibility was 40, and his guideline range for both counts was 262-327 months. The statutory maximum on each count was 20 years, or 240 months. 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 1956(a)(1)(B)(i). The district court correctly imposed the statutory maximum, 240 months, on both counts, with part of the sentence to run consecutively to achieve the total punishment of 262 months. See Commentary, U.S.S.G. § 5G1.2.

CONCLUSION

We AFFIRM Richard's sentence for the foregoing reasons.