

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40600
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOUIS SMITH, a/k/a "BO",

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:94-CR-50025

- - - - -
(January 25, 1995)

Before POLITZ, Chief Judge, and HIGGINBOTHAM and DeMOSS,
Circuit Judges.

PER CURIAM:*

Louis Smith, a/k/a "Bo," appeals his sentence for accessory after the fact of an escape from federal custody. Smith argues that there is no evidence from which the district court could determine that Smith knew or reasonably should have known about the underlying facts of the escape which support the application of specific offense characteristics. A district court's factual findings are reviewed for clear error. See United States v. Puig-Infante, 19 F.3d 929, 942 (5th Cir.), cert. denied, 115 S.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Ct. 180 (1994). "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." Id.

The probation officer noted that Smith was the cousin of two of the federal escapees and that the evidence presented at Smith's preliminary examination/detention hearing indicated that the escape was discussed between Smith and the escapees. "[A] presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the sentencing guidelines." United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990) (footnote omitted).

"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).

Smith failed to present any evidence at the sentencing hearing. By failing to present evidence to refute the information at issue, "[t]he district court . . . was free to adopt the facts in the [PSR] without further inquiry." United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990).

In light of the evidence before the district court and in light of the standard of review, the district court did not clearly err in finding that Smith knew or reasonably should have known about the details of the escape.

Smith also argues that the district court misapplied the guidelines in calculating his criminal history score.

Application of the guidelines are reviewed de novo. United States v. Bryant, 991 F.2d 171, 177 (5th Cir. 1993).

"[P]rior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." U.S.S.G. § 4A1.2, comment. (n.3). Smith's prior convictions for simple battery and for hit and run carried separate docket numbers, stemmed from Smith's actions on separate days, and resulted in concurrent sentences. Smith failed to offer evidence of a state-court order of consolidation. "A court should not assume that otherwise distinct cases involving sentencing on the same day were consolidated." Bryant, 991 F.2d at 178. The district court did not err in its application of § 4A1.2. See id.

AFFIRMED.