IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 94-40655
Summary Calendar

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

MARIA CARMEN LOPEZ, Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas
(1:94-CR-12)

January 30, 1995

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM*:

Appellant Maria Carmen Lopez ("Lopez") is a documented resident alien who came to this country from Mexico in 1974. She was charged, with others, in a one-count indictment for conspiracy to possess with intent to distribute more than five kilograms of cocaine. After entering a plea of guilty, she was sentenced to 188 months imprisonment and five years of supervised release. The district court recommended the Bureau of Prisons allow Lopez's sentence to run concurrently with a 25-year state narcotic sentence

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

she was serving.

Delvin Livingston ("Livingston"), a co-conspirator who has testified for the government in other cases, told the probation officer that he met Lopez in 1991, through another co-conspirator Carlos Cabezas ("Cabezas"). At that time, Lopez was supplying cocaine to Cabezas, who was Livingston's source.

Livingston stated that he purchased large quantities of cocaine from Lopez between 1991 and February 1992, usually between five and ten kilograms per transaction. He estimated that he purchased a total of 100 kilos of cocaine from Lopez. Livingston also stated that Lopez supplied large quantities of cocaine to others. Lopez's state conviction was based on an attempted sale of two kilograms in February 1992. Consequently, the probation officer concluded that Lopez was responsible for 102 kilograms of cocaine, for which the guideline base level is 36.[1] Lopez's criminal history category was I, so the guideline range for her total offense level, 36, was 188 to 235 months' imprisonment. The court adopted the factual findings and guideline application as stated in the Presentencing Report ("PSR").

Lopez contends that the Due Process Clause of the Fifth Amendment requires the government to produce witnesses for cross-examination on drug quantity in a sentencing proceeding to protect a defendant's rights and further the goals of the Sentencing Reform Act. In her objections to the PSR, Lopez complained that

[1] U.S.S.G. § 2D1.1(c)(4) (1993) (at least 50 but less than 150 kilograms).

Livingston was not submitted for cross-examination. At the sentencing hearing, however, she did not testify under oath, produce any witness, or submit any affidavits. Specifically, she did not request an evidentiary hearing or subpoena Livingston, whom she could have interrogated as a hostile witness.[2] Thus, we find that the district court did not deny Lopez due process.

Lopez next contends that the district court's findings concerning the type and amount of controlled substance involved should not have been based on hearsay. However, she fails to cite any case in which this Court has so held. We have held that the sentencing court is entitled not only to rely on but also to adopt the factual findings of a PSR, which itself contains hearsay statements.[3] If a defendant "present[s] no relevant affidavits or evidence in rebuttal, the district court [is] free to adopt the findings of the [PSR] without more specific inquiry or explanation." *United States v. Mueller*, 902 F.2d 336, 346 (5th Cir. 1990). A "district court [may] rely on a presentence report's construction of evidence to resolve a factual dispute, rather than relying on the defendant's version of the facts." *United States v. Robins*, 978 F.2d 881, 889 (5th Cir. 1992). Moreover, as shown by the following discussion, the court did not rely solely on the PSR.

Lopez next contends that the information provided to the sentencing court concerning the quantity of cocaine involved did

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[2] *See* FED. R. EVID. 611(c).

[3] *See United States v. Sherbak*, 950 F.2d 1095, 1099 (5th Cir. 1992).

not bear a sufficient indicia of reliability to support its probable accuracy. Therefore, she asserts, the district court's finding that she was accountable for 102 kilograms of cocaine was clearly erroneous because it was not supported by legally sufficient evidence.

"The clearly erroneous standard applies to the factual determination of what quantity of drugs is implicated by the crime under consideration by the sentencing court." *United States v. Robins*, 978 F.2d at 889. "The district court may consider a variety of evidence, not limited to amounts seized or specified in the indictment, in making its findings." *United States v. Thomas*, 870 F.2d 174, 176 (5th Cir. 1989). Furthermore, "[i]n sentencing determinations, the court is not bound by the rules of evidence and may consider any relevant information without regard to its admissibility provided the information considered has sufficient *indicia of reliability*." *United States v. Shacklett*, 921 F.2d 580, 584 (5th Cir. 1991).

The district court did not rely solely upon the PSR in determining the relevant drug quantity resulting in Lopez's base offense level of 36. Judge Cobb had presided over the trials of two of Lopez's codefendants, André Routt and Tiffany Shepherd, at which Livingston testified. Based on Livingston's testimony, the court found that Livingston's statements to Lopez's probation officer concerning drug quantity were trustworthy and reliable. The court also found that Livingston's statements to Lopez's probation officer were corroborated and buttressed by Lopez's

admission at sentencing that the $350,000.00 or more seized from her by customs was "drug money." Livingston stated that he had sold cocaine for $17,500 per kilogram. Thus, $350,000 would pay for more than 20 kilograms at the wholesale price that Livingston was paying Lopez. Lopez admitted to the probation officer that she may have sold 20 to 30 kilograms, but at sentencing she stated, not under oath, that she did not remember how much drug was involved with the persons with which she was involved.

For Lopez's base offense level to be 36, the district court only had to find that at least 50 kilograms of cocaine distributed by the conspiracy was attributable to her.[4] The court sentenced her to a term of 188 months, the minimum for the offense level of 36. Although both Livingston and Lopez stated that Lopez distributed cocaine to others beside Livingston, such quantities were not attributed to her for sentencing purposes. Therefore, Lopez's contentions of error in determining the drug quantity attributable to her have no merit.

Lopez lastly contends that the district court erred by denying her a two-point reduction in her offense level on grounds of acceptance of responsibility. She argues that her guilty plea and admission of guilt show that she accepted responsibility. She further argues that because Livingston's drug estimate lacks a sufficient indicia of reliability she is entitled to the reduction. As shown by the foregoing discussion, Livingston's drug estimate is reliable.

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[4] U.S.S.G. § 2D1.1(c)(4).

Section 3E1.1(a) of the guidelines provides for a two-level decrease in the offense level of a defendant who "clearly demonstrates acceptance of responsibility for [her] offense." "[T]he determination of the sentencing judge [relative to acceptance of responsibility] is entitled to great deference on review." U.S.S.G. § 3E1.1, comment. (n.5). "The sentencing court's factual determinations with regard to acceptance of responsibility, therefore, are entitled to even greater deference than that accorded the court under a clearly erroneous standard of review." *United States v. Smith*, 13 F.3d 860, 866 n.14 (5th Cir.), *cert. denied*, ___U.S.___, 114 S.Ct. 2151. 128 L.Ed.2d 877 (1994). Furthermore, "[a] defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right." U.S.S.G. § 3E1.1, comment. (n.3).

Lopez's contention lacks merit because Livingston's drug estimate was and is reliable. Livingston's corroborated statements to the probation officer show, as the officer concluded, that Lopez falsely denied conduct comprising the offense of conviction, thereby attempting to greatly minimize her role in the conspiracy. Lopez admitted to the probation officer only that she was involved in the conspiracy, and that she may have sold 20 to 30 kilograms of cocaine. She refused to provide any additional information or to cooperate with the government by providing information regarding other known drug traffickers. At sentencing, Lopez told the district court that she did not remember how much drugs were involved, and that she did not know who else was involved other

than herself and Livingston. Accordingly, the court did not err in finding that Lopez failed to demonstrate a sufficient acceptance of responsibility to qualify for the § 3E1.1(a) reduction in her offense level.[5] AFFIRMED.

[5] *See United States v. Diaz*, 39 F.3d 568, 572 (5th Cir. 1994).