UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-41339
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MANUEL GARZA, JR., a/k/a MANNY,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas
(4:94 CR 3 5)

(August 14, 1995)

Before GARWOOD, EMILIO GARZA, and PARKER, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant Manuel Garza, Jr., (Garza) complains of the sentence imposed under the United States Sentencing Guidelines following his conviction on his plea of guilty to a charge of possession with the intent to distribute one hundred or more kilograms of marihuana in violation of 21 U.S.C. § 814(a)(1).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Finding no reversible error, we affirm.

Facts and Proceedings Below

In a two-count indictment dated January 12, 1994, Garza and some 20 others were charged with conspiring to distribute 1,000 or more kilograms of marihuana in violation of 21 U.S.C. §§ 841(a)(1) and with criminal forfeiture pursuant to 21 U.S.C. § 853. The alleged drug trafficking conspiracy, which was headed by Jesus Rodriguez (Rodriguez) and his sons, involved the purchase of marihuana in Mexico and its transportation to the Lower Rio Grande Valley of Texas, where the marihuana was concealed under loads of produce and delivered by truck to destinations in the Midwest, including Michigan, Illinois, and Missouri. Truck drivers were recruited to transport the marihuana, while other conspirators were employed as lookouts, riding with the truck drivers or behind them in trailing cars to ensure that the drugs were properly delivered. Other members of the conspiracy acted as loaders, money couriers, warehouse operators, and distributors. The Government estimated that, all told, the conspiracy involved some 62 trips from south Texas and that approximately 1,600 pounds of marihuana were transported per trip, resulting in a total of 99,200 pounds of marihuana attributable to the conspiracy.

On April 11, 1994, Garza appeared before the district court for his arraignment and pleaded not guilty to the two counts in the indictment. Jury selection was set for May 16, 1994. After Garza filed two pre-trial motions (for a bill of particulars and for severance), the district court reset jury selection for August 22, 1994. On August 19, 1994, the government agreed to dismiss the

indictment against Garza in exchange for his plea of guilty to a one-count information charging him with possession with the intent to distribute one hundred or more kilograms of marihuana "on or about an unknown date, believed to be in early 1990," in violation of 21 U.S.C. § 841(a)(1). At the plea hearing, Garza, through statements of counsel and questions posed by counsel to establish the factual basis for the plea, insisted that although he was *not* pleading guilty to a conspiracy, but only to possession with the intent to distribute one hundred or more kilograms of marihuana "sometime in early 1990" in Grayson County, Texas, nevertheless the possession offense to which he was pleading guilty "was a part of a larger importation and distribution of marihuana" and "was part of the conspiracy that is charged in the indictment." The district court accepted the plea and ordered the preparation of a Presentence Investigation Report (PSR).

The PSR outlines Garza's role in the drug-trafficking conspiracy; it is based mainly on information from a co-conspirator, Mickie Don Kirkpatrick (Kirkpatrick). Kirkpatrick claims that he was accompanied by Garza on four or five drug runs to the Midwest and that Garza not only acted as a lookout but also took over part of Rodriguez's role of handling the tractor trailers and expense money. Kirkpatrick also stated that, between late 1989 and May 1990, he delivered a tractor trailer loaded with marihuana to Garza in Dallas and that Garza later informed him that he had offloaded it, or had had it offloaded, in Weatherford, Texas. The PSR also indicates, based on information from Kirkpatrick and another co-conspirator, Gene Lockaby (Lockaby), that on several

occasions Garza planned the hauling of the marihuana and the distribution of the money received to purchase it and that he accompanied members of the conspiracy other than Kirkpatrick on several trips. On the basis of this relevant conduct, the PSR concluded that Garza was responsible for four loads of 1,600 pounds of marihuana each, resulting in a total 6,400 pounds of marihuana, or some 2,903 kilograms. *See* U.S.S.G. § 1B1.3; *id.* commentary n.2.

Given the total amount of drugs for which Garza was held accountable, the PSR calculated his offense level to be 32. Garza received a two-point increase for his aggravating role in the offense, *see* U.S.S.G. § 3B1.1(c), which was offset by a two-point reduction for acceptance of responsibility, *see id.* § 3E1.1(a). Garza was also assigned a Criminal History Category of VI, based on a criminal history score of fourteen. Six of these fourteen criminal history points were based on two state adjudications for marihuana offenses in Hidalgo County, Texas, one for the delivery, in March 1991, of more than 200 but less than 2,000 pounds of marihuana; the other for the delivery, in August 1991, of more than 50 but less than 200 pounds of marihuana. These two offenses were adjudicated in the same court on December 2, 1993. Combining the total offense level of 32 with the Criminal History Category of VI, the PSR calculated an imprisonment range of 210 to 265 months.

Garza filed numerous objections to the PSR, among them his sworn assertion that he acted only as a lookout and messenger in the conspiracy and that he never took over from Rodriguez the work of handling tractor trailers or expense money. Consequently, Garza argued, he should not have received a two-point enhancement in his

base offense level, under section 3B1.1, for exercising management responsibility over the property or assets of the criminal organization. In response to this objection, an addendum to the PSR stated that, according to Jeff Gambrell (Gambrell), a DEA agent involved in the case, Garza "did not organize, lead, manage, or supervise another participant [in the conspiracy]; however, [he] did manage responsibility over the activities of the criminal organization when asked to do so by Rodriguez." Garza also objected to the calculation of his criminal history points, claiming that some of the prior state adjudications covered conduct involved in the instant conviction in violation of double jeopardy principles.

At the December 2, 1994, sentencing hearing, the district court overruled Garza's objections and adopted the findings of the PSR as modified by the addendum. Expressly rejecting Garza's contention that he was involved only minimally in the criminal conspiracy, the district court sentenced Garza to 220 months in prison and imposed a 5-year term of supervised release, a $17,500 fine, and a $50 mandatory special assessment. Garza filed a timely notice of appeal.

Discussion

Garza contends first that the district court lacked a factual basis for finding that he exercised management responsibility over the assets or property of the criminal organization and thus erred in enhancing his base offense level by two points pursuant to U.S.S.G. § 3B1.1(c). In reviewing challenges to sentences imposed under the Sentencing Guidelines, we review the district court's

legal conclusions *de novo* and its factual findings for clear error. *United States v. Fitzhugh*, 984 F.2d 143, 146 (5th Cir.), *cert. denied*, 114 S.Ct. 259 (1993).

We consider first whether the district court clearly erred in finding that Garza exercised management responsibility over "the property, assets, or activities of a criminal organization." U.S.S.G. § 3B1.1(c) commentary n.2. Confronted with an objection to a sentencing enhancement, the Government "must establish the factual predicate justifying the adjustment" by a preponderance of relevant and sufficiently reliable evidence. *United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990); *see also United States v. Elwood*, 999 F.2d 814, 817 (5th Cir. 1993); *United States v. Patterson*, 962 F.2d 409, 415 (5th Cir. 1992). PSRs are generally deemed to have sufficient indicia of reliability and therefore may be used as evidence to support factual determinations made by the district court. *Elwood*, 999 F.2d at 817.

In this case, the PSR provided sufficient evidence that Garza exercised management responsibility over the property, assets, or activities of the criminal organization. Kirkpatrick indicated that Garza took over part of Rodriguez's role of handling the tractor trailers and expense money and, further, that he delivered to Garza one of the organization's tractor trailers, which was then used in a trafficking operation. Also, Lockaby identified Garza as someone who occasionally was involved in planning the hauling of marihuana and the distribution of money. Finally, as indicated in the addendum to the PSR, Agent Gambrell stated that Garza, though not a manager of people in the organization, did in fact manage

some of its activities when told to do so by Rodriguez, the leader of the conspiracy. Indeed, in his own sworn affidavit filed with his objections to the PSR, Garza admits that he did "[a]t one point . . . take possession of an empty trailer, but . . . was not present when it was offloaded." Although it is true that Garza also asserted in this affidavit that he was nothing more than a messenger or lookout, that he "never exercised any independent management," the statement quoted above undercuts this assertion. In any event, the district court did not clearly err in deciding not to credit Garza's own self-serving, conclusory allegation in his affidavit that he was never a manager of the organization's property, assets, or activities.[1] Garza presented no evidence at the sentencing hearing. The PSR contains sufficient, reliable evidence to support the district court's determination.[2] We find no clear error.

We do, however, perceive a potential legal problem with the district court's decision to enhance under these circumstances.

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[1] At the sentencing hearing, the district court told Garza, "The Court is convinced that you were considerably more than a mere messenger in this case. The evidence supports the conclusion by this Court that you had substantial involvement in this conspiracy and in implementing the conspiracy."

[2] On appeal, Garza contends that the district court clearly erred in adopting the PSR's finding that he exercised any management responsibility in the criminal organization, because the government offered no evidence at the sentencing hearing to support this claim. The district court, however, already had ample evidence in the amended PSR to resolve this contested finding. Given the adequacy of the proof already before the district court at the sentencing hearing, it could hardly be said to commit clear error in not requiring yet more evidence on this point. *United States v. Mora*, 994 F.2d 1129, 1141 (5th Cir.) ("The district court may accept the facts set forth in the PSR even when these facts are disputed."), *cert. denied*, 114 S.Ct. 417 (1993).

The guideline section at issue, U.S.S.G. § 3B1.1(c), requires a two-point increase in the offense level "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity." According to the commentary effective November 1, 1993, that accompanies this section, *see id.* appendix C, amend. 500, an upward "adjustment" under section 3B1.1 is available when the defendant's management responsibility is over *other participants* in the criminal organization, as opposed to the organization's property, assets, or activities, *id.* commentary n.2, the basis for the enhancement here. *See generally United States v. Ronning*, 47 F.3d 710, 711-12 (5th Cir. 1995). The commentary reads,

> "To qualify for an *adjustment* under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward *departure* may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization." U.S.S.G. § 3B1.1(c) commentary n.2 (emphasis added).

An argument can certainly be made, based on the above, that an *adjustment* of the base offense level is appropriate only when the management responsibility concerns other participants of the criminal organization and that, by negative implication, when such responsibility concerns instead the property, assets, or activities of the organization, no *adjustment* to the *offense level* as such is proper, although an upward *departure* from the calculated imprisonment range *may be*. It is clear from the record that the district court, the parties, and the probation officer who compiled the PSR all believed that Garza's management responsibility triggered a two-point adjustment in the *offense level* rather than

a departure from the guideline range.[3] It is equally clear that the district court and the parties did not perceive, or at least ignored, any distinction between these two routes to an ultimate enhancement of Garza's sentence.

However, no objection was ever made below, and no argument is advanced here, that the district court erred in treating Garza's sentence enhancement as an offense level adjustment rather than a departure.[4] Even if we assume the adjustment made here was plainly erroneous at the time of sentencing,[5] an argument not advanced by Garza in this appeal, "plain forfeited errors affecting substantial rights should be corrected on appeal only if they `seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Calverley*, 37 F.3d 160, 164 (5th

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[3] At the sentencing hearing, the district court concluded that Garza "does qualify for a two-level increase under [§ 3B1.1(c)] because [the court] think[s] he was a manager in a criminal activity . . . ."

[4] Garza did object below to the adjustment on the ground that, since the "property, assets, and activities" language appears only in the commentary, it should not add to the terms of the actual guideline provision. This objection was not concerned, however, with the method of enhancing Garza's sentence, either by adjusting the offense level or by departing upwardly from the guideline range, but with the fact that his sentence was enhanced at all. In any event, no such contention has been brought forward on appeal.

[5] Since the commentary to section 3B1.1 was amended in 1993, at least two Circuits have determined that management responsibilities over the organization's property, assets, or activities alone cannot justify an enhancement under that section, although an upward departure may be warranted. *See United States v. Fones*, 51 F.3d 663, 668-70 (7th Cir. 1995) (overruling *United States v. Carson*, 9 F.3d 576, 592 (7th Cir. 1993), *cert. denied*, 115 S.Ct. 135 (1994)); *United States v. Greenfield*, 44 F.3d 1141, 1146 (2d. Cir. 1995) ("[T]he Application Note seems clearly to preclude management responsibility over property, assets, or activities as the basis for an *enhancement* under § 3B1.1(c).").

Cir. 1994) (en banc) (quoting *United States v. Olano*, 113 S.Ct. 1770, 1778 (1993)), *cert. denied*, 115 S.Ct. 1266 (1995). Here, regardless of any error, plain or otherwise, Garza was nonetheless subject to some form of sentencing enhancement for his management responsibilities over the property, assets, or activities of the criminal organization by way of an upward departure from the guideline range. Failure to consider this unassigned and forfeited error will not result in a fundamental miscarriage of justice. Furthermore, we emphasize that Garza has not raised this forfeited point on appeal; plain error analysis typically presupposes that the error at issue, though forfeited below, has been urged on appeal. *United States v. Johnson*, 718 F.2d 1317, 1325 n.23 (5th Cir. 1983) (en banc). Aside from jurisdictional defects, we do not scan the record for unassigned error; contentions not raised on appeal are generally deemed waived. *Id.*; *see also United States v. Wallington*, 889 F.2d 573, 580 n.9 (5th Cir. 1989). We therefore do not resolve the merits of this legal issue.

Garza's second claim on appeal is that the district court erred in factoring the two Hidalgo County marihuana convictions into his total criminal history score because those convictions, he alleges, form part of the relevant conduct for the instant offense. We observe at the outset that Garza has inadequately briefed this issue, as he cites no authority, not even the sentencing guidelines, in support of his position. Although Garza did cite the Double Jeopardy Clause in the district court, a recent Supreme Court decision forecloses that argument. *Witte v. United States*, 115 S.Ct. 2199 (1995) (upholding against a multiple punishment

challenge the sentencing court's consideration of drug amounts involved in prior, "relevant conduct" offenses under U.S.S.G. § 1B1.3, at least when the resulting guideline range is within the legislatively authorized punishment range).[6] Moreover, the prior convictions in question are state convictions, and the Constitution does not prohibit dual sovereigns from separately punishing an individual for the same conduct that violates both state and federal laws. *United States v. Rosogie*, 21 F.3d 632, 634 (5th Cir. 1994).

In any event, even assuming that Garza's attack is launched from authority beyond the Double Jeopardy Clause, we still believe it to be without merit. Six of Garza's fourteen criminal history points were based on two "prior sentences" for the delivery of marihuana in Hidalgo County. *See* U.S.S.G. § 4A1.1(a). A prior sentence is defined "as any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct *not part of the instant offense*." *Id.* § 4A1.2(a)(1) (second emphasis added). Garza contends that his Hidalgo County convictions should not be counted as prior sentences under section 4A1.1(a) because they were based on conduct in the instant criminal conspiracy. The district court disagreed, and so do we. Garza's argument on this point is based on nothing more than his undocumented assertion that "the marijuana involved in the most serious of my offenses was derived from [Rodriguez's]

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[6] The statutory range for Garza's offense, 21 U.S.C. § 841(a), is between five and forty years. *Id.* § 841(b)(1)(B). His actual sentence of 220 months (less than 19 years) falls within this range. *See Witte*, 115 S.Ct. at 2206.

operation." Beyond this statement, there is no indication in the record that there is any connection whatever between the Hidalgo County offenses and the instant conspiracy. More importantly, conspiracy is not the offense of which Garza was convicted, either here or in state court; he was convicted only for possession with the intent to deliver one hundred or more kilograms of marihuana sometime in early 1990 in Grayson County. The state convictions involved marihuana offenses occurring in Hidalgo County during March and August of 1991.[7] We also note that these Hidalgo County offenses and convictions are still "prior sentences" even though they took place *after* the offense conduct charged in this case.

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[7] Furthermore, there is nothing to indicate that the drug amounts involved in these prior state convictions were counted as "relevant conduct" used to compute the base offense level under U.S.S.G. § 1B1.3. The 2,903 kilograms of marihuana for which the PSR held Garza accountable were based on four drug trafficking trips that each involved some 1,600 pounds of marihuana. These amounts were considered relevant conduct and factored into calculations under the Drug Quantity Table because the Government had information that Garza was involved in some significant way on each of these trips. The Government had no such information regarding the two offenses charged in Hidalgo County, neither of which is mentioned in the PSR's discussion of relevant conduct. For that reason they clearly were not counted under the Drug Quantity Table in determining Garza's base offense level. Although Garza asserts in his affidavit that the marihuana involved in his state offenses "was derived from [Rodriguez's] operation," that allegation does not support a claim that these amounts were used to calculate his base offense level. After all, Garza was not held accountable for all 99,200 pounds of the organization's trafficked marihuana, but only for those four trips in which he was found to have participated. Finally, even if we were to assume, *arguendo*, that all the marihuana amounts involved in the prior state offenses (a maximum of 2,200 pounds) had been erroneously included in the offense level calculation, such an error would be harmless because if such amounts were entirely subtracted from the total for which he was held accountable (6,400 pounds or 2,903 kilograms), the difference (4,200 pounds or 1,905 kilograms) would still fall within the applicable range found in the Drug Quantity Table (1,000 to 3,000 kilograms).

United States v. Lara, 975 F.2d 1120, 1129 (5th Cir. 1992); *see also* U.S.S.G. § 4A1.2, commentary n.1 (including as a prior sentence one "imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense"). We thus find no error in the district court's reliance on Garza's prior state convictions in determining his Criminal History Category.

Conclusion

For these reasons, Garza's sentence is

AFFIRMED.