

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50065
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANA MARIA MONTELONGO,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-93-CR-111-1)

(August 15, 1994)

Before JOLLY, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

In this direct criminal appeal, Defendant-Appellant Ana Maria Montelongo challenges her convictions for violating 21 U.S.C. §§ 846 and 841(a)(1) and 18 U.S.C. § 924(c). As error in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

connection with her conviction, Montelongo assigns insufficiency of the evidence and entrapment; as error in connection with her sentence, she complains of erroneous calculation of drug quantity and denial of a two-level reduction for acceptance of responsibility. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Montelongo was indicted for one count of conspiracy to possess with intent to distribute cocaine, two counts of possession with intent to distribute cocaine, and one count of possession of a firearm during a drug trafficking offense. The indictment arose from a drug trafficking relationship between Montelongo and Lu Davila, an undercover Special Agent of the FBI. Davila, through confidential informant Celia CoronadoSQa drug dealer herself who had been arrested and was cooperating with the authoritiesSQhad himself introduced to Montelongo in an attempt to learn more about alleged drug trafficking activities at Leonor's Bridal and Flower Shop in Austin, Texas.

In June of 1992, Davila was introduced to the shop's namesake, Leonor, as "Carlos," a major drug trafficker. He also met Leonor's daughters, one of whom is Montelongo. Over the course of the following six months Davila purchased cocaine from Montelongo and negotiated transactions for heroin and guns with her. She was arrested by authorities on February 5, 1993.

Montelongo pleaded not guilty to the indictment, but was convicted of all four counts following a jury trial. She was

sentenced to 80 months in prison on the conspiracy and drug possession counts, and to another 60-months term of imprisonment on the gun count (to be served consecutively), plus four years of supervised release and a \$200 special assessment. Montelongo timely appealed.

II

ANALYSIS

A.

Montelongo challenges the sufficiency of the government's evidence to convict her of possession with intent to distribute cocaine. We review the evidence in the light most favorable to the verdict. United States v. El-Zoubi, 993 F.2d 442, 445 (5th Cir. 1993). Ordinarily, we affirm "if a rational trier of fact could have found that the evidence establishes the essential elements of the offense beyond a reasonable doubt." Id. Although Montelongo moved for judgment of acquittal following the government's case, she failed to renew the motion at the close of the evidence. Under these circumstances we "may set aside the conviction only if affirmance would result in a `manifest miscarriage of justice.'" El-Zoubi, 993 F.2d at 445 (citation omitted). The conviction may be reversed "only if the record is devoid of evidence pointing to guilt." Id. (internal quotation and citation omitted).

To establish possession with intent to distribute under § 841, the government must prove (1) knowledge, (2) possession, and (3) intent to distribute drugs. United States v. Garza, 990 F.2d 171, 174 (5th Cir.), cert. denied, 114 S.Ct. 332 (1993). Here the

evidence establishes that Montelongo sold cocaine to Davila on two separate occasionsSOone on November 11 and another on November 23, 1992. Montelongo sold four ounces of cocaine to Davila on each occasion. The record is thus not devoid of evidence of Montelongo's guilt, so we affirm her conviction for possession with intent to distribute.

B.

Montelongo also challenges the sufficiency of the government's evidence used to convict her of conspiracy to possess with intent to distribute, relying exclusively on her contention that the government entrapped her into participating in the instant conspiracy. As such, we shall first address her separate contention that she was entrapped by the government.

When, as here, the jury has been instructed on the entrapment issue but has rejected that defense, our standard of review is "whether, when viewing the evidence in the light most favorable to the Government, a reasonable jury could find, beyond a reasonable doubt, that the defendant was predisposed to commit the offense." United States v. Hudson, 982 F.2d 160, 162 (5th Cir.) (internal quotations and citations omitted), cert. denied, 114 S.Ct. 100 (1993). The jury clearly rejected the defense in the instant case.

A defendant's willing participation in an offense is sufficient evidence to establish predisposition. United States v. Mora, 994 F.2d 1129, 1137 (5th Cir.), cert. denied, 114 S.Ct. 417 (1993) (based on defendant's willing participation in a drug transaction, jury could reject his testimony that he was entrapped

and find beyond a reasonable doubt a predisposition to commit the crime); see also Hudson, 982 F.2d at 162 (recognizing that a defendant's enthusiasm for the crime can satisfy the predisposition requirement). A reasonable jury could, from the evidence presented here, find that Montelongo was predisposed to conspire to possess with intent to distribute cocaine.

For example, Davila testified that, although he and Montelongo had already met when she unsuccessfully attempted to broker a cocaine transaction between him and Olga Chapa, it was Montelongo who subsequently approached Davila with the proposition that she, rather than Chapa, provide him with cocaine. Montelongo was also able to provide samples of both cocaine and heroin, and she maintained a steady contact of narcotics transactions with Davila from the time they met until the time of her arrest. She further demonstrated her willing participation by providing Davila, on several occasions, with supplies of cocaine and, on one occasion, with a machine gun.

Montelongo, on the other hand, posits the following theory: Special Agent Davila, unable to obtain evidence of a suspected narcotics ring involving some acquaintances of Montelongo's mother "romanced" Montelongo with the intention of inducing her to participate in a narcotics transaction. This was, according to Montelongo, so that she would be forced into cooperating with the government against the drug ring to protect her family. She testified that she had not had any dealings with narcotics prior to the time when Davila came into her life.

Montelongo's argument amounts to a challenge to the credibility and weight of the evidence. The jury is the sole determiner of the weight and credibility of the evidence. United States v. Martinez, 975 F.2d 159, 161 (5th Cir. 1992), cert. denied, 113 S.Ct. 1346 (1993). The instant jury chose to disbelieve Montelongo's version of the events and, as the ultimate arbiter of witness credibility, was entitled to credit the testimony of Davila and of the other government witnesses over that of Montelongo. Id. The evidence was sufficient to sustain the government's burden of proving that Montelongo was predisposed to conspire to possess with intent to distribute narcotics.

As for the conspiracy count, the government is required to prove that there was an agreement between two or more persons to possess cocaine with the intent to distribute it, that Montelongo knew of the agreement, and that Montelongo participated in the conspiracy voluntarily. United States v. Pierre, 958 F.2d 1304, 1311 (5th Cir.) (en banc), cert. denied, 113 S.Ct. 280 (1992). Montelongo contends that the government never established the existence of a conspiracy between her and Olga Chapa.

The government, however, adduced evidence that Montelongo was acting on behalf of Chapa who, according to Montelongo, would deal with Davila or Coronado only through Montelongo. Montelongo later informed authorities that she had been dealing in cocaine, and that three individuals--Chapa, Arturo, and another man later identified as Paulino Tavera--supplied her with cocaine. The government also adduced testimony that Montelongo "brokered" a deal for cocaine

between Davila and Arturo.

Moreover, on November 11, 1992, Montelongo brokered a deal for four ounces of cocaine between Davila and two other sources. Montelongo informed Davila that she received a commission on the sale of cocaine to him of \$100 per ounce on each ounce she sold for \$950. Montelongo also provided Davila with two samples of black tar heroin, which cost \$4,500 per ounce. She informed Davila that she would receive her commission from the suppliers of the heroin.

The record in the instant case is not "devoid of evidence pointing to [Montelongo's] guilt." El-Zoubi, 993 F.2d at 445. Therefore, her conspiracy conviction is affirmed.

C.

Montelongo also challenges the sufficiency of the government's evidence used to convict her of possession of a firearm during a drug trafficking offense. To support a firearms conviction in relation to a narcotics trafficking offense, the evidence must "show that the firearm was available to provide protection to the defendant in connection with [her] engagement in drug trafficking; a showing that the weapon was used, handled or brandished in an affirmative manner is not required." United States v. Molinar-Apodaca, 889 F.2d 1417, 1424 (5th Cir. 1989). It is enough to show that the weapon facilitated or could have facilitated the drug trafficking offense. United States v. Capote-Capote, 946 F.2d 1100, 1104 (5th Cir. 1991), cert. denied, 112 S.Ct. 2278 (1992).

Montelongo's challenge to the sufficiency of the evidence on this count is a legal one: She contends that the gun here at issue

was not "used" as part of a narcotics transaction. Rather, she argues, the gun was an element of the transaction and did not, therefore, "facilitate" the transaction as required by the statute. It was not on her person, brandished in any fashion, or hidden in close proximity to her; neither was it used as a weapon. Rather it was used as consideration, i.e., merely "as a part of a barter for exchange transaction."

This argument was expressly rejected by the Supreme Court in Smith v. United States, ___ U.S. ___, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993). In Smith, the Supreme Court held that a conviction under 18 U.S.C. § 924(c)(1) could be based on the use of a firearm as a weapon or the use of a firearm as a medium of exchange. 113 S.Ct. at 2058. The Court noted that, in enacting the statute, "Congress apparently was of the view that one could use a gun by trading it." Id. at 2057. As that is precisely the challenge issued by Montelongo in the instant case, her argument must fail and her conviction under that statute must be affirmed.

D.

Montelongo also contends that the district court erred in calculating her base offense level. Specifically, she argues that the district court erred by including negotiated, but not delivered, amounts of narcotics in arriving at a drug quantity for sentencing purposes.

We will affirm a sentence imposed under the guidelines "so long as it is the result of a correct application of the Guidelines to factual findings which are not clearly erroneous." Mora,

994 F.2d at 1141. 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 on because it is materially untrue, inaccurate, or unreliable. United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). A finding is clearly erroneous only if, in spite of the evidence showing a certain quantity of drugs, we are still "left with the definite and firm conviction that a mistake has been committed." United States v. Mitchell, 964 F.2d 454, 457-58 (5th Cir. 1992) (citation omitted).

Under the sentencing guidelines, "[t]ypes and quantities of drugs not specified in the count of conviction may be considered in determining the offense level." U.S.S.G. § 2D1.1, comment. (n.12). "In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount." Id.; see Mora, 994 F.2d at 1142 n.14. The commentary qualifies this language by providing that

where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

§ 2D1.1, comment. (n.12); see Mora, 994 F.2d 1129, 1142 and n.14.

Montelongo contests the district court's inclusion of an additional kilogram of cocaine. This amount, contends Montelongo, was never transacted; she could not produce the kilogram, so the

district court's reliance on it in calculating her base offense level was clearly erroneous.

The district court based its inclusion of the kilogram on the evidence presented at trial, principally the testimony of Davila. The kilogram at issue was an amount negotiated between June 14 and June 15, 1992. Montelongo initially telephoned Coronado, in a recorded conversation, and told her in a coded statement that Montelongo had obtained a kilogram of cocaine for \$22,000. Coronado arranged for her and Davila to purchase the cocaine from Montelongo the next day.

The next day, June 15, 1992, Coronado, Davila, and Montelongo met in a parking lot. "Arturo" arrived shortly thereafter and informed Davila that he had the kilogram. Davila, however, backed out of the transaction, as the FBI had not authorized the payment of \$22,000 to an unknown individual such as Arturo. Davila told Arturo that his sources had already purchased a kilogram from someone else. Arturo was upset that the transaction was not completed.

This evidence comprised the testimony of Davila and the recorded conversation between Coronado and Montelongo. It contradicts Montelongo's current contention that any attempt by her to institute discussions regarding the sale of a kilogram of cocaine was mere "puffing" on her part. The evidence establishes, however, that the sole reason for the collapse of the transaction was the federal agent's refusal to hand over the money. Montelongo and her confederate, Arturo, were clearly able and prepared to

consummate the transaction. The district court's inclusion of this amount in the calculation of Montelongo's base offense level was not clearly erroneous.

E.

Montelongo also contends that the district court erroneously denied her a two-level decrease in her offense level under the guideline provision for acceptance of responsibility. In particular, she insists that her subsequent cooperation with the government merited the decrease. She contends further that she deserved the downward adjustment because she "admitted to her limited involvement" to a degree which entitled her to the decrease, and that her decision to go to trial and assert an entrapment defense should not preclude her from being awarded the decrease under § 3E1.1.

Section 3E1.1(a) directs the sentencing court to decrease the offense level by two levels "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense" The commentary provides that, even though conviction by trial does not automatically preclude a defendant from consideration for a § 3E1.1 reduction, the adjustment is not intended for "a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." § 3E1.1, comment. (n.2).

Further, § 3E1.1, comment. (n.4), provides that adjustments for both obstruction of justice and acceptance of responsibility

are reserved for "extraordinary cases."¹ "The trial court's determination of acceptance of responsibility is entitled to great deference on review and will not be disturbed unless it is without foundation." United States v. Lara, 975 F.2d 1120, 1129 (5th Cir. 1992).

The district court found that Montelongo was not truthful during her testimony at trial, and that, although she did cooperate with the government, such cooperation was limited. Also, she later recanted her cooperation without explanation. Her entire defense at trial was based on an attempt to minimize her own role in the offense conduct. She testified that she had no involvement with drugs prior to her introduction to Davila, but the jury clearly disbelieved this testimony. The district court's conclusion was not "without foundation." Lara, 975 F.2d at 1129. In light of this finding, and Montelongo's failure to provide any authority for her proposition that even limited cooperation with the government entitles her to a reduction for acceptance of responsibility, we must affirm her sentence.

AFFIRMED.

¹ Montelongo's base offense level was increased by two levels for obstruction of justice under § 3C1.1. Her brief on appeal, however, does not challenge the district court's increase under § 3C1.1.