IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50150
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

JUAN MANUEL ALANIZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CR-185 (4))

(December 14, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Appellant Juan Manuel Alaniz appeals from the district court's sentencing determination, alleging that the district court erred by enhancing his offense level for obstruction of justice and for his supervisory role, and by denying him a decrease in his offense level for acceptance of responsibility. We affirm the judgment of the district court.

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 10, 1993, Alaniz pleaded guilty to a charge of conspiracy to possess with intent to distribute a quantity of marijuana. Alaniz's plea was entered, however, only after a full day of his trial had transpired on October 9, 1993. The probation officer prepared a Presentence Investigation Report ("PSR") which calculated Alaniz's base offense level at 34. The PSR assessed a three-level increase for Alaniz's role as a manager or supervisor, and allowed a two level decrease for acceptance of responsibility. Alaniz objected to the "supervisor" findings, asserting that he was not a manager or supervisor in the drug trafficking conspiracy because he "was never responsible for the people that he delivered mari[j]uana to." The government also objected to the original PSR, contending not only that Alaniz had obstructed justice by threatening a co-defendant, but also that he had not fully accepted responsibility for his offense.

On January 26, 1994, the probation officer prepared a revised PSR that calculated Alaniz's base offense level at 32. A three-level adjustment for a supervisory role in the offense was added, and a two-level adjustment for obstruction of justice was added as well. Furthermore, in this revised PSR, a two-level deduction for acceptance of responsibility was not given. Alaniz filed objections to this revised PSR, asserting that the government's objections to the original PSR were not timely. The probation officer made no further revisions to the PSR.

At sentencing, the district court adopted the factual statements and the sentencing recommendations of the revised PSR, enhancing Alaniz's base offense level for his role as a supervisor and for his obstruction of justice, and denying a reduction for acceptance of responsibility. Alaniz was sentenced to a 180-month term of imprisonment, a five-year period of supervised release, a $10,000 fine, and a $50 special assessment. Alaniz appeals from this sentence and the propriety of its related enhancements and denials.

II. STANDARD OF REVIEW

Findings of fact that underlie the district court's sentence are reviewed under a clearly erroneous standard. See United States v. Velasquez-Mercado, 872 F.2d 632, 635 (5th Cir. 1989). Whether a defendant is a manager or supervisor of criminal activity is a question of fact. See United States v. Barreto, 871 F.2d 511, 512 (5th Cir. 1989). Similarly, whether a defendant obstructed justice is a factual determination. See United States v. Rivera, 879 F.2d 1247, 1254 (5th Cir. 1989). Finally, the district court's finding on acceptance of responsibility is also reviewed under the clearly erroneous standard. See United States v. Thomas, 12 F.3d 1350, 1372 (5th Cir. 1994). For purposes of appellate review, a finding is not clearly erroneous if it is plausible in light of the record read as a whole. See United States v. Whitlow, 979 F.2d 1008, 1011 (5th Cir. 1992).

III. ANALYSIS AND DISCUSSION

A. Manager or Supervisor Enhancement

Alaniz initially contends that the district court erred in determining that he was a manager or supervisor of criminal activity that involved five or more participants. He argues that only two other individuals were involved, Veronica Estrada and her husband, Marcos Castillo.

A defendant's offense level may be increased by three levels if he "was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." United States Sentencing Commission Guidelines Manual § 3B1.1(b). For purposes of § 3B1.1, we have observed that:

> [i]t is not the contours of the offense charged that defines the outer limits of the transaction; rather it is the contours of the underlying scheme itself. All participation firmly based in that underlying transaction is ripe for consideration in adjudging a leadership role under section 3B1.1.

United States v. Mir, 919 F.2d 940, 945 (5th Cir. 1990). In addition, the guidelines themselves explicitly state that "[t]o qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of ***one or more*** other participants." United States Sentencing Commission Guidelines Manual § 3B1.1(b) cmt. 2. Thus, as long as the defendant supervised at least one participant, an enhancement can be properly based on relevant conduct ***underlying*** the offense of conviction, rather than only considering the defendant's specific

role in the named offense. See United States v. Eastland, 989 F.2d 760, 769 & n.19 (5th Cir. 1993).

In resolving disputed factual matters at sentencing, "[a] presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial judge . . . ." United States v. Sherbak, 950 F.2d 1095, 1100 (5th Cir. 1992); accord United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990). As mentioned, in the instant case, the district court explicitly adopted the factual findings in the PSR. A defendant bears the burden of demonstrating that the information relied upon by the district court is materially untrue. See, e.g., United States v. Shipley, 963 F.2d 56, 59 (5th Cir. 1992).

On appeal, Alaniz argues that portions of Veronica Estrada's testimony indicate that the only people involved were Alaniz, Castillo, and Estrada. The portion of the transcript referred to by Alaniz, however, does not support this contention, as it merely recites portions of Estrada's testimony where she used the pronoun "we" to refer to herself and Alaniz. When the relevant conduct underlying Alaniz's conspiracy conviction is examined, it is clear that more than five participants were involved.

The PSR indicates that between 1987 and 1993, Alaniz transported, or caused to be transported, approximately 20 loads of marijuana from Mexico through the Laredo, Texas area, and to Francisco Figueroa and Figueroa's associates in the San Antonio, Texas area. These loads of marijuana were routinely delivered to Figueroa and his associates on consignment without prior payment --

a method known as "fronting." When Alaniz "fronted" the marijuana to Figueroa, Alaniz retained a possessory interest in both the unsold marijuana and in the proceeds from the sale of the marijuana to others. Upon receipt of the marijuana from Alaniz, Figueroa, aided by co-defendant Jose Luis Garza, would arrange for the distribution of marijuana to other persons.

The transportation of the marijuana was often facilitated by the use of drug couriers, known as "mules." The PSR noted that "[t]he government indicated that Alaniz supervised at least seven persons who were truck drivers and money couriers. The probation officer concurs with this assessment." Indeed, Estrada testified that "[a]ll my work I did at the direction of Mr. Alaniz," clearly satisfying the "at least one participant" supervision requirement. Over the years, the government estimated that Alaniz transported a total of approximately two tons of marijuana (4,480 pounds).

Based on these findings in the PSR, there is more than enough evidence to support the district court's enhancement of Alaniz's sentence for a managerial or supervisory role. See United States v. Robins, 978 F.2d 881, 889 (5th Cir. 1992) ("[I]t is proper for the district court to 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."). We conclude that the district court's enhancement was not clearly erroneous.

B. Obstruction of Justice Enhancement

Alaniz suggests that the district court improperly assessed an obstruction of justice enhancement because Alaniz's alleged

threatening of a co-defendant was not corroborated by any evidence. On the contrary, according to Alaniz, it was he who was beaten and was threatened by the other co-defendants. Alaniz also argues that the government failed to raise this obstruction of justice allegation in a timely manner.

With regard to the timeliness issue, Alaniz based his objection in the lower court on Local Rule CR-32(a) for the Western District of Texas. Rule CR-32(a) states that objections to the PSR shall be communicated within ten days after the PSR is disclosed to the parties. Alaniz correctly notes that the PSR was available on January 10, 1994, and that the government's written obstruction of justice allegations were not sent until January 21, 1994. In his "Second Addendum to the Presentence Report," however, the probation officer noted that "[a]lthough the government faxed its objections to the probation office one day after the 10-day deadline, it is the probation officer's recollection that the government had made their objections telephonically and timely." More importantly, however, Rule CR-32(a) is permissive, as it states that "[f]ailure of counsel to comply timely with this provision ***may*** result in sanctions being imposed" (emphasis added). Thus, the district court was not compelled by the language of the rule to ignore the government's allegations. Cf. United States Sentencing Commission Guidelines Manual § 6A1.3 ("[S]entencing judges are not restricted to information that would be admissible at trial. Any information may be considered, as long as it has sufficient indicia of reliability to support its probable accuracy.").

The sentencing enhancement for obstruction of justice applies to various types of conduct, including "threatening" or "intimidating" a "co-defendant, witness, or juror." United States Sentencing Commission Guidelines Manual § 3C1.1 cmt. 3(a). The PSR provided that:

> [t]he probation officer received information suggesting that the defendant impeded or obstructed justice. The case agent reported that Alaniz threatened codefendant Jose Luis Garza while they were both in the Wackenhut detention facility. Specifically, Alaniz told Garza that he knew what would happen to him if he testified against Alaniz. According to the case agent, Alaniz repeated his threat while transported in a van on another occasion.

Moreover, in the "Addendum to the Presentence Report," the probation officer noted that "in light of the government's information regarding obstruction of justice, ***it is the probation officer's recommended finding*** that Alaniz obstructed justice by threatening a codefendant. The finding is based on an interview with the case agent" (emphasis added).

In the district court and on appeal, Alaniz offers no evidence to demonstrate that the PSR findings are "materially untrue"; instead, he merely contends that the government's allegations are false. As mentioned, we have held that the district court may rely on a PSR's construction of evidence to resolve a factual dispute, rather than relying on the defendant's version of the facts. See United States v. Robins, 978 F.2d 881, 889 (5th Cir. 1992). Alaniz is correct in his assertion that the district court, in general, must make specific findings when there are disputed facts material

to the sentencing decision.[1] In Sherbak, however, we noted that "[w]hen a defendant objects to his PSR but offers no rebuttal evidence to refute the facts, the district court is free to adopt the facts in the PSR without further inquiry." 950 F.2d at 1099-1100. In addition, we made the following important observation:

> [T]he district court expressly adopted the facts set forth in [the] PSR. In so doing the court, at least implicitly, weighed the positions of the probation department and the defense and credited the probation department's facts. Rule 32 [of the Federal Rules of Criminal Procedure] does not require a catechismic regurgitation of each fact determined and each fact rejected when they are determinable from a PSR that the court has adopted by reference.

Id. at 1099.

Aside from a naked denial, Alaniz offered no evidence to demonstrate the falsity of the PSR's factual findings on obstruction of justice. See Alfaro, 919 F.2d at 966 ("To the extent that the defendant's objections to the presentence report . . . reflect unsworn assertions, we are reluctant to consider them as evidence in our review of the findings of the trial court."). Moreover, the district court accepted the factual findings of the

---

[1] Rule 32 of the Federal Rules of Criminal Procedure states in the following relevant part:

> If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

Fed. R. Crim. P. 32(c)(3)(D).

PSR, implicitly crediting the probation department's facts and resolving the objections. Cf. United States v. Singer, 970 F.2d 1414, 1419 (5th Cir. 1992) (affirming a district court's "supervisor" enhancement as not clearly erroneous when the district court merely adopted the findings of the presentence report). The district court stated that "[a]s to the Defendant's objections concerning the obstruction of justice, the Court finds [that] the Defendant did obstruct justice by threatening a co-Defendant in the case," and we find that the accompanying two-level enhancement was not clearly erroneous.

C. Acceptance of Responsibility

Alaniz also argues that he was erroneously denied a two-point reduction in his offense level for acceptance of responsibility. The district court found that Alaniz "did not accept responsibility in the case," and we afford "especially great deference to the court's determination of acceptance of responsibility." United States v. Mueller, 902 F.2d 336, 345 (5th Cir. 1990). In addition, we have noted that "[t]he mere entry of a guilty plea . . . does not entitle a defendant to a sentencing reduction for acceptance of responsibility as a matter of right." Shipley, 963 F.2d at 58.

The sentencing guidelines on acceptance of responsibility make the following relevant observation:

> Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments [for acceptance of responsibility] may apply.

United States Sentencing Commission Guidelines Manual § 3E1.1 cmt. 4. Because we found that the district court did not err in concluding that Alaniz had obstructed justice, a downward adjustment for acceptance of responsibility is only warranted in an "extraordinary case." Alaniz has neither alleged that this is an extraordinary case, nor has he presented evidence of any extraordinary circumstances. After a review of the record, we also conclude that this is not an extraordinary case that warrants a downward adjustment, especially because Alaniz pleaded guilty only after his trial had begun. Given the great deference afforded the trial court's determination, we find that the district court's denial of an acceptance of responsibility adjustment was not clearly erroneous.[2]

---

[2] Alaniz also seems to contend that his due process rights have been violated because he was sentenced on the basis of inaccurate information. We have concluded, however, that the district court's reliance on the findings of the PSR was proper, and that Alaniz has not convincingly demonstrated, or even partially demonstrated, that the sentencing information was inaccurate. Thus, his due process argument is without merit.

In addition, Alaniz argues that portions of the guidelines, particularly the obstruction of justice enhancement provisions, are unconstitutional violations of the separation of powers principles. Typically, "we will not consider on appeal matters not presented to the trial court." Quenzer v. United States (In re Quenzer), 19 F.3d 163, 165 (5th Cir. 1993). Alaniz neither develops this argument in his brief nor provides citations to any supporting authority. See United States v. Ballard, 779 F.2d 287, 295 (5th Cir.) (holding that a party who offers only a "bare listing" of alleged errors "without citing supporting authorities or references to the record" abandons those claims on appeal), cert. denied, 475 U.S. 1109 (1986). Even in substance, however, we have noted that "Constitutional challenges to the Sentencing Guidelines have been repeatedly rejected." United States v. Sherbak, 950 F.2d 1095, 1101 (5th Cir. 1992) (citing Mistretta v. United States, 488 U.S. 361 (1989)).

IV. CONCLUSION

For the foregoing reasons, the sentencing judgment of the district court is AFFIRMED.