UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-50430

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARIO ALBERTO DE LA GARZA,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
A 93 CR 31

August 8, 1995

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

PER CURIAM:*

Mario Alberto De la Garza appeals the district court's sentencing determination following his plea of guilty to conspiracy to possess with intent to distribute cocaine and marijuana in violation of 21 U.S.C. §§ 841(a)(1), 846 (1988). We affirm.

I

After law enforcement officers arrested De la Garza in a

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* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

"buy/bust" operation, which they had arranged with the assistance of a confidential informant ("CI1"), De la Garza pled guilty to conspiracy to possess with intent to distribute cocaine and marijuana, *see* 21 U.S.C. §§ 841(a)(1), 846. In calculating De la Garza's sentence, the district court expressly adopted the findings contained in De la Garza's pre-sentence investigation report ("PSR") and overruled De la Garza's objections to those findings. The findings in the PSR were based primarily De la Garza's own admissions and on information provided by two confidential informants, CI1 and his son ("CI2").

In a videotaped statement, CI1 claimed to have been involved in fifty illegal drug transactions with De la Garza, usually involving one kilogram of cocaine and fifteen pounds of marijuana. CI1 also stated that he had used CI2 to transport drugs purchased from De la Garza. CI2 corroborated CI1's statement that the "standard order" was for one kilogram of cocaine and approximately fifteen pounds of marijuana.[1] CI2 also stated that he transported drugs purchased from De la Garza on at least fifteen to twenty occasions.

De la Garza admitted to having engaged in at least twenty illegal drug transactions involving an average of fifteen pounds of marijuana. He also admitted that he had negotiated the sale of one kilogram of cocaine and fifteen pounds of marijuana to CI1 on the day of his arrest. However, he admitted to having sold a total of

[1] The transaction negotiated during the "buy/bust" operation that lead to De la Garza's arrest also involved one kilogram of cocaine and fifteen pounds of marijuana.

only one and one-half kilograms of cocaine on prior occasions. Based on these admissions and the statements of CI1 and CI2, the probation officer concluded that De la Garza had sold one kilogram of cocaine and fifteen pounds of marijuana on twenty occasions.

The PSR also contained a finding that in light of De la Garza's trade skills as a carpenter and his ability to manage his finances, he would be able to pay a fine, even though he owed his mother $7,000 for her payment of his legal fees and had "virtually no assets."

Based on these findings, the district court calculated De la Garza's base offense level to be 34. *See* United States Sentencing Commission, *Guidelines Manual*, §§ 2D1.1(a)(3), 2D1.1(c), (Nov. 1993).[2] Based on findings in the PSR regarding De la Garza's prior convictions, the court determined his criminal history category to be III. *See* U.S.S.G. §§ 4A1.1(c), 4A1.1(d). These determinations yielded an applicable guideline range for imprisonment of 188 to 235 months. *See* U.S.S.G. ch. 5 pt. A (sentencing table). In response to the Government's motion under U.S.S.G. § 5K1.1, the district court departed downward from the applicable guideline range based on De la Garza's substantial assistance to law enforcement, and it sentenced De la Garza to a ninety-six-month term of imprisonment. The district court also determined the applicable guideline range for a fine to be $17,500 to $4,000,000. *See* 21 U.S.C. § 841(b)(1)(A) (1988); U.S.S.G. §§ 5E1.2(c)(3),

[2] The district court calculated De la Garza's sentence using the 1993 Guidelines Manual.

5E1.2(c)(4). Noting De la Garza's "inability to pay," the district court departed downward from the guideline range and imposed a fine in the amount of $15,000.

De la Garza now appeals, contending that the district court improperly determined the quantity of drugs attributable to him for sentencing purposes and erroneously imposed an excessive fine.[3]

II

We review the district court's interpretation of the Sentencing Guidelines de novo and its factual findings for clear error. *United States v. Ford*, 996 F.2d 83, 85 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 704, 126 L. Ed. 2d 670 (1994).

A

De la Garza challenges the district court's determination of the quantity of drugs attributable to him on two grounds. First, he argues that the district court failed to make sufficient factual findings regarding the quantity of drugs attributable to him. De la Garza correctly states that Rule 32 of the Federal Rules of Criminal Procedure requires district courts to make findings of fact when a defendant disputes the facts contained in a PSR. *See* Fed. R. Crim. P. 32(c)(1).[4] However, it is well-settled in this

[3] The Government argues that by partially waiving his right to appeal his sentence in his plea agreement, De la Garza forfeited his right to challenge the district court's imposition of a fine. Because the language in De la Garza's plea agreement on which the Government relies is ambiguous, and because De la Garza's arguments fail on the merits, we assume, arguendo, that De la Garza did not effectively waive his right to appeal his sentence with respect to the fine.

[4] Prior to the 1994 amendments to Rule 32, the relevant language in subsection (c)(1) appeared in subsection (c)(3)(D). *See* Fed. R. Crim. P. 32 advisory committee's note.

Circuit that a district court may satisfy the findings requirement of Rule 32 by overruling a defendant's objections to the PSR and expressly adopting the PSR's factual findings. *United States v. Brown*, 29 F.3d 953, 957-58 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 587, 130 L. Ed. 2d 501 (1994); *accord United States v. Sparks*, 2 F.3d 574, 588 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 720, 126 L. Ed. 2d 684 (1994); *United States v. Mora*, 994 F.2d 1129, 1141 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 417, 126 L. Ed. 2d 363 (1993); *United States v. Sherbak*, 950 F.2d 1095, 1099 (5th Cir. 1992).[5] Consequently, the district court complied with Rule 32 by expressly overruling De la Garza's objections to the PSR and expressly adopting its factual findings.[6]

Second, De la Garza challenges the district court's drug

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[5] De la Garza dismisses this line of cases as inconsistent with earlier Fifth Circuit precedent, specifically *United States v. Warters*, 885 F.2d 1266 (5th Cir. 1989) and *United States v. Manotas-Mejia*, 824 F.2d 360 (5th Cir.), *cert. denied*, 484 U.S. 957, 108 S. Ct. 354, 98 L. Ed. 2d 379 (1987). However, neither *Warters* nor *Manotas-Mejia* is inconsistent with the rule that a district court's express adoption of the factual findings contained in a PSR satisfies Rule 32. In *Warters*, the district court made no findings regarding the amount of drugs attributable to a defendant and did not adopt the findings of the PSR. *See Warters*, 885 F.2d at 1272. In *Manotas-Mejia*, we remanded a sentencing determination because the district court did not address a defendant's objection to a fact contained in a sentencing memorandum filed by the United States Attorney, *Manotas-Mejia*, 824 F.2d at 368, and did not state whether it relied on the sentencing memorandum in determining the defendant's sentence, *id.* at 369.

[6] The remainder of De la Garza's procedural objections to the district court's sentencing determination similarly lack merit. De la Garza contends that the district court denied him a "meaningful" hearing on his objections to the drug quantity findings in the PSR because the district court, at De la Garza's sentencing hearing, expressed disinterest in the evidence that De la Garza sought to introduce regarding the reliability of CI1 and CI2. While De la Garza has pointed to colloquies early in the sentencing hearing to support his claim, the sentencing transcript reveals that the district court later considered De la Garza's argument and overruled his objections on the record.

De la Garza also contends that the district court failed to articulate its reasons for setting De la Garza's sentence at a particular point within the guideline range, as required by 18 U.S.C. § 3553(c)(2) (1988). This argument is frivolous because the district court *departed downward* from the applicable ranges for De la Garza's prison sentence and fine, and it clearly stated its reasons for doing so in its judgment.

quantity determination itself. We review a district court's drug quantity findings for clear error. *United States v. Rogers*, 1 F.3d 341, 342 (5th Cir. 1993). "Under the `clearly erroneous' standard, `[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *Id.* (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985)).

The PSR's findings regarding the quantity of drugs attributable to De la Garza are based on statements by two confidential informants, CI1 and CI2. De la Garza himself corroborated most of the information provided by CI1 and CI2, but he contested the finding that the typical quantity of drugs he sold to CI1 included one kilogram of cocaine. According to De la Garza, he sold only two and one-half kilograms of cocaine throughout the twenty transactions that he admitted conducting. Although the PSR credited De la Garza's admission of only twenty transactions in reaching its drug quantity determination, it credited the statements of CI1 and CI2 in finding that De la Garza typically sold CI1 one kilogram of cocaine along with the admitted fifteen pounds of marijuana.

De la Garza argues that the district court's drug quantity determination was clearly erroneous on the grounds that the confidential informants were unreliable and their statements were not corroborated by an independent source. In determining the

quantity of drugs on which to base a defendant's sentence, "`the district court may rely on the information presented in the [PSR] so long as the information has `some indicium of reliability'[7] . . . . The defendant bears the burden of demonstrating that information the district court relied on at sentencing is `materially untrue.'" *United States v. Young*, 981 F.2d 180, 185 (5th Cir. 1992) (quoting *United States v. Vela*, 927 F.2d 197, 201 (5th Cir.), *cert. denied*, 502 U.S. 875, 112 S. Ct. 214, 116 L. Ed. 2d 172 (1991)), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2983, 125 L. Ed. 2d 680 (1993).

We rejected an argument similar to De la Garza's in *United States v. Rogers*, 1 F.3d 341 (5th Cir. 1993). In *Rogers*, we reviewed a district court's drug quantity determination that was based on the reports of two confidential informants. Rogers, like De la Garza, argued that the district court's drug quantity determination was clearly erroneous because the confidential informants' information on which it was based was unreliable and not corroborated. The Government in *Rogers* had not offered corroborating evidence to support the confidential informants' statements regarding the drug quantities involved in that case, and Rogers had offered rebuttal evidence that "clearly established that at least some portion of the CI reports were wrong." *Id.* at 344. We upheld the district court's reliance on the confidential informants' reports, noting that the defendant herself had

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7 "The `some indicia of reliability' language has been interpreted by this Court to require that the facts used by the district court for sentencing purposes be reasonably reliable." *Rogers*, 1 F.3d at 344 (citing *United States v. Shacklett*, 921 F.2d 580, 585 (5th Cir. 1991)).

corroborated the reports on issues not related to the drug quantities, such as the fact that the drug transactions took place in the Fall of 1990, and that the government investigation had corroborated "many of the other details of the drug distribution scheme." *Id.*

The confidential informants' statements in this case were corroborated to a substantially greater degree than the statements in *Rogers*. In this case, not only did De la Garza corroborate facts not related to the drug quantity determination, such as the timing of the transactions, but he also corroborated much of the information provided by CI1 and CI2 regarding the drug quantities. Specifically, De la Garza admits that he had sold drugs to CI1 on at least twenty occasions and that each transaction involved approximately fifteen pounds of marijuana. In addition, De la Garza admits that the transaction that lead to his arrest involved one kilogram of cocaine and fifteen pounds or marijuana.

Furthermore, unlike the defendant in *Rogers*, De la Garza did not offer rebuttal evidence clearly establishing that the CI reports were wrong in any respect. Consequently, we hold that the district court properly relied on the statements of CI1 and CI2, and in light of the record in its entirety, the district court's decision to credit their statements regarding the quantity of cocaine in a "standard order" was not clearly erroneous.[8]

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[8] *See also Young*, 981 F.2d at 185 (upholding district court's reliance on statements by confidential informants where confidential informants had a history of reliability and where investigation uncovered evidence corroborating informants' statements, such as drug paraphernalia in defendant's trailer). De la Garza distinguishes *Young* and *Rogers* on the grounds that the confidential

B

De la Garza argues next that the district court erred in imposing a $15,000 fine because, according to De la Garza, he established his inability to pay the fine.[9] The district court expressly adopted the findings in the PSR, which included a finding that although De la Garza had "virtually no assets" and owed his mother $7,000 for her payment of his legal fees, his vocational skills and apparent ability to manage his finances indicated his future ability to pay a fine.[10] After adopting these findings, the district court departed downward from the Guideline range and

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informants in those cases had past records of reliability and the government investigations had corroborated the informants' statements. While we did emphasize the informants' history of reliability in *Young*, we did not rely on a history of reliability in *Rogers*, which is the more factually analogous case. With respect to the government investigations, De la Garza is correct that law enforcement officers did not find drug paraphernalia in De la Garza's trailer. However, they did find fifteen pounds of marijuana. In addition, law enforcement officers had tape recorded many of De la Garza's telephone conversations with CI1, in which he and CI1 arranged, speaking in code, the sale of one kilogram of cocaine and fifteen pounds of marijuana that lead to De la Garza's arrest. In *Rogers*, we upheld the district court's reliance on the confidential informants' statements without evidence corroborating the confidential informants' statements with respect to the quantity of drugs involved.

[9] The Guidelines place the burden of proof on the defendant to establish his inability to pay a fine. *See United States v. Thomas*, 13 F.3d 151, 153 (5th Cir. 1994); *United States v. Fair*, 979 F.2d 1037, 1041 (5th Cir. 1992). The Guidelines provide in pertinent part: "The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." U.S.S.G. § 5E1.2(a). "In determining the amount of the fine, the court shall consider: . . . (2) any evidence presented as to the defendant's ability to pay a fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources . . . ." U.S.S.G. § 5E1.2(d). "If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of the fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine." U.S.S.G. § 5E1.2(f).

[10] De la Garza reiterates his argument regarding the district court's compliance with Rule 32, an argument we reject for the reasons stated *supra* in part II.A. In addition, we have held that a district court need make specific findings regarding the factors it must consider in imposing a fine only if it rejects the recommendation contained in the defendant's PSR. *See Fair*, 979 F.2d at 1040-41.

imposed a fine of $15,000, noting, "The fine is below the guideline range because of the defendant's inability to pay." We interpret the district court's statement to mean that it found that De la Garza was unable to pay a fine within the Guideline range but able to pay the imposed fine of $15,000.[11]

"A district court's finding on a defendant's ability to pay a fine is a factual one, subject to appellate review under the clearly erroneous standard." *United States v. Rodriguez*, 15 F.3d 408, 414 (5th Cir. 1994). "Under the `clearly erroneous' standard, `[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *United States v. Rogers*, 1 F.3d 341, 342 (5th Cir. 1993) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985)).

While De la Garza offered ample evidence that he currently had a negative net worth, we note that "even if [a defendant] had a negative net worth at the time of his sentencing, the sentencing judge could base his sentencing determination on [the defendant's] future ability to earn." *United States v. O'Banion*, 943 F.2d 1422,

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[11] Indeed, that is how De la Garza interprets the district court's finding as well. We note, however, that we have twice stated in dicta that a district court retains the discretion to impose a fine on an indigent defendant "even where [the] defendant demonstrates the current and future inability to pay . . . ." *United States v. Voda*, 994 F.2d 149, 154 n.13 (5th Cir. 1993); *accord United States v. Altamirano*, 11 F.3d 52, 54 (5th Cir. 1993). This interpretation of § 5E1.2 depends primarily on the use of the discretionary "may impose a lesser fine or waive the fine" in § 5E1.2(f). *See supra* note 9. In *Altamirano*, we expressly declined to define the limits of that discretion because we disposed of the appeal on other grounds.

1432 n. 11 (5th Cir. 1991). The district court's finding that De la Garza's vocational skills indicated such a future ability is plausible in light of the record viewed in its entirety; therefore we hold that it is not clearly erroneous. *See United States v. Thomas*, 13 F.3d 151, 153 (5th Cir. 1994) (holding that "[c]onsidering [the defendant's] college education and proven earning capacity, the district court's implicit finding of ability to pay was not clearly erroneous").[12]

III

For the foregoing reasons we **AFFIRM** De la Garza's sentence.

[12] De la Garza also argues that because he is unable to pay his fine, the fine violates the Eighth Amendment's prohibition against excessive fines. De la Garza argues that the Eighth Amendment "should function here to prohibit a fine imposed on a criminal defendant who has no reasonable prospect of paying it and faces the real possibility of resentencing should he inevitably fail to pay." De la Garza offers no authority for this argument, and because we affirm the district court's finding that De la Garza will be able to pay his fine, we decline to address the question of whether a defendant's inability to pay a fine is a proper consideration in determining the constitutionality of a fine under the Eighth Amendment.