IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50481
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MICHAEL BARRIOS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-92-CR-215)

(May 12, 1995)

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

PER CURIAM:[*]

Michael Barrios appeals his conviction of, and sentence for, aiding and abetting, money laundering, and distribution of heroin, in violation of 18 U.S.C. §§ 2 and 1956 and 21 U.S.C. § 841. Finding no error, we affirm.

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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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Pursuant to a plea agreement, Barrios pleaded guilty. The day before his sentencing hearing, Barrios, through counsel, moved to withdraw his guilty plea; the district court denied the motion. The court sentenced him to two concurrent 180-month terms of imprisonment, to be followed by a three-year term of supervised release; the court also imposed a $10,000 fine.

II.

Through new counsel on appeal, Barrios first contends that he received ineffective assistance of counsel because his attorney did not inform him until the day before his scheduled trial that his public-authority defense was bogus. Barrios concedes his guilt but argues that he would have accepted an earlier, more favorable plea agreement, had he known that the public-authority defense was unavailing. Barrios also contends that counsel had informed him that his sentence would be based only upon his known criminal activity. Additionally, Barrios asserts that he entered his plea with the understanding that his sentence would be based upon only nine ounces of heroin. He contends that counsel's "feeble" objections to the probation officer's consideration of drugs with which his confederates were involved constituted ineffective assistance.

"The general rule in this circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court since no

opportunity existed to develop the record on the merits of the allegations." United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988). The record is sufficiently developed for this court to consider Barrios's claims.

To prevail on an ineffective-assistance-of-counsel claim, a movant must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove deficient performance, the movant must show that counsel's actions "fell below an objective standard of reasonableness." Id. at 688. To prove prejudice, the movant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id. at 694, and that "counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair," Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Washington, 466 U.S. at 694.

To prove unreliability or unfairness, the movant must show the deprivation of a "substantive or procedural right to which the law entitles him." Fretwell, 113 S. Ct. at 844. In the context of a guilty plea, "to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Barrios cannot show a reasonable probability that he would have insisted on going to trial. He concedes that he is guilty. He told the district court that he would have preferred to proceed to trial had he been fully informed. He also told the court that he believed he might have been exposed to life imprisonment had he been convicted on all charges.[1] It is highly unlikely that a defendant who knows he is guilty would reject a 180-month term of imprisonment and risk receiving a life term. Moreover, Barrios does not contend that the court would have based his sentence upon a lesser amount of heroin had he gone to trial and been convicted.

Additionally, Barrios's contention that he would have accepted an earlier, more favorable plea agreement had counsel told him that his defense was unavailing is without merit. While this might be true, it does not satisfy the prejudice requirement of Hill.

III.

Barrios contends that his waiver of the right to appeal his sentence was involuntary. "To be valid, a defendant's waiver of his right to appeal must be informed and voluntary. A defendant must know that he had a 'right to appeal his sentence and that he was giving up that right.'" United States v. Portillo, 18 F.3d 290, 292 (5th Cir.) (citations omitted), cert. denied, 115 S. Ct.

[1] Barrios pleaded guilty to one count of distribution of heroin and one count of money-laundering. The second superseding indictment charged him with distribution of heroin on three occasions, conspiracy to distribute heroin, and money-laundering. The court informed him that the drug count to which he pleaded guilty could carry a life term if his offense involved one kilogram or more of heroin.

244 (1994).

Barrios's plea agreement provided:

> 6. Defendant is aware that his sentence will be imposed in conformity with the Federal Sentencing Guidelines and Policy Statements. The Defendant is also aware that a sentence imposed under the Guidelines does not provide for parole. Knowing these facts, Defendant agrees that this Court has jurisdiction and authority to impose any sentence within the statutory maximum set for his offense, including a sentence determined by reference to the Guidelines, and he expressly waives the right to appeal his sentence on any ground, including any appeal right conferred by 18 U.S.C. § 3742, unless the sentencing court departs from the sentencing guidelines. Similarly, the Defendant agrees not to contest his sentence or the manner in which it was determined in any post-conviction proceeding, including, but not limited to, a proceeding under 28 U.S.C. § 2255.
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> 7. The Defendant is also aware that his sentence has not yet been determined by the Court. The Defendant is aware that any estimate of the probable sentencing range that he may receive from his counsel, the government or the probation office, is a prediction, not a promise, and is not binding on the government, the probation office or the Court. Realizing the uncertainty in estimating what sentence he will ultimately receive, the Defendant knowingly waives his right to appeal the sentence or to contest it in any post-conviction proceeding in exchange for the concessions made by the government in this agreement.

The prosecutor summarized the relevant portions of the plea agreement at the plea hearing.

Barrios testified that he understood the plea agreement and agreed to its terms. Following a discussion of the charges against him, Barrios indicated that he wished to plead guilty. Later in the hearing, the district court informed Barrios that "under certain circumstances that are set out in Title 18, United States Code, Section 3742(a)(1), you might have the opportunity to appeal any sentence that's imposed by this court and in conformity with

your plea agreement." The court asked whether Barrios understood; Barrios answered affirmatively.

> [W]hen the record of the Rule 11 hearing clearly indicates that a defendant has read and understood his plea agreement, and that he raised no question regarding a waiver-of-appeal provision, the defendant will be held to the bargain to which he agreed, regardless of whether the court specifically admonished him concerning the waiver of appeal.

Portillo, 18 F.3d at 293. A defendant's waiver of his right to appeal is ineffective if a district court gives an inadequate explanation of the consequences of the waiver when asked, United States v. Baty, 980 F.2d 977, 979 (5th Cir. 1992), cert. denied, 113 S. Ct. 2457 (1993), or ignores the waiver and informs the defendant that he may appeal his sentence. United States v. Contreras, No. 93-8868, slip op. at 2 (5th Cir. Aug. 30, 1994) (unpublished).

Barrios's plea agreement was unambiguous regarding waiver of the right to appeal the sentence or pursue post-conviction relief unless the district court departed upward from the guideline range. Barrios testified that he understood the agreement and agreed to its terms. The court, however, indicated that Barrios might be able to appeal his sentence. It is uncertain whether the court referred to the appeal right or the sentence itself when it used the words "in conformity with your plea agreement." The court made the ambiguous statement regarding Barrios's right to appeal after Barrios averred that he understood the agreement and agreed to its terms.

The ambiguous statement regarding Barrios's right to appeal

arguably renders the record sufficiently opaque for us to conclude that Barrios's waiver was ineffective. We, however, may bypass determination of the waiver issue and address the merits of Barrios's sentencing contention. United States v. Mendiola, 42 F.3d 259, 260 n.1 (5th Cir. 1994).

IV.

Barrios finally contends that the district court improperly attributed two pounds, ten ounces of heroin to him as relevant conduct. He also argues that the court made insufficient findings regarding the amount of heroin upon which his sentence should be based.

The district court heard both sides' factual and legal arguments before overruling Barrios's objections to the presentence report ("PSR"). The probation officer indicated that Barrios's offense level was calculated based upon ten ounces of cocaine related to $12,000 he received from drug smuggler Sebastian Amador's wife, nine ounces of heroin that Barrios sold, and two pounds of heroin that Barrios's employer, private investigator Roman Lopez, had negotiated to sell to a federal agent.

A district court may make implicit factual findings by adopting a PSR, so long as the PSR is sufficiently clear "that the reviewing court is not left to 'second-guess' the basis for the sentencing decision." United States v. Carreon, 11 F.3d 1225, 1231 (5th Cir. 1994). By overruling Barrios's objections to the PSR, the district court's implicit findings leave nothing for us to

second-guess. Those implicit findings are satisfactory for us to review Barrios's contentions.

The sentencing guidelines provide for a defendant's sentence to be calculated on the basis of, inter alia,

> in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense[.]

U.S.S.G. § 1B1.3(a)(1)(B). "The amount of drugs for which an individual shall be held accountable at sentencing represents a factual finding, and will be upheld unless clearly erroneous. A factual finding is not clearly erroneous as long as it is plausible in light of the record of the case as a whole." United States v. Maseratti, 1 F.3d 330, 340 (5th Cir. 1993) (internal and concluding citations omitted), cert. denied, 114 S. Ct. 1096, and cert. denied, 114 S. Ct. 1552, and cert. denied, 115 S. Ct. 282 (1994). A district court may rely upon a PSR when making factual findings. United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992).

Regarding the $12,000 Barrios retrieved from Amador's wife, Barrios's factual and legal contentions are intertwined. Barrios contends that he did not know that the money represented drug proceeds and that he retrieved the money before he became involved in the Amador drug ring. "'[R]elevant conduct' as defined in § 1B1.3(a)(1)(B) is prospective only, and consequently cannot

include conduct occurring before a defendant joins a conspiracy." Carreon, 11 F.3d at 1235-36. The PSR indicates, and Barrios does not dispute, that all of the acts upon which the sentence was based occurred between September and December 1992. Amador and Lopez guided Barrios's activities. Additionally, Barrios does not contend that the $12,000 represented a criminal enterprise other than the one in which he was involved. If it was reasonably foreseeable to Barrios that the $12,000 represented drug proceeds, then that amount did not represent conduct occurring before he joined the enterprise.

The probation officer found that Amador's wife phoned Lopez and told him that Amador had directed her to give Lopez $12,000 to cover legal and investigative expenses. Lopez sent Barrios and William Patterson in a rented car to follow Amador's wife. According to the probation officer, Lopez was aware that Amador was a drug trafficker and was aware that Amador had no legitimate means of support. In response to Barrios's objections to the PSR, the probation officer found that Barrios knew that Amador had drug charges pending against him. The PSR also indicates that Barrios had served as a police officer and that he had worked for Lopez from 1980 through 1992.

At the sentencing hearing, Barrios stated that he believed he did not know that the funds were drug proceeds. He stated that he knew that Amador had been charged with a drug offense. According to Barrios, he knew nothing of Amador's wife's financial situation or occupation. He had no idea how she had obtained the money. He

stated that the transaction, during which he retrieved money contained in a bank bag housed in a storage facility, was not ordinary.

The finding that the $12,000 represented the proceeds of drug trafficking is plausible in light of the record read as a whole. It is plausible to find that an individual with some law-enforcement experience, who had worked for a private investigator, should have become suspicious when sent to retrieve funds kept in a bag inside a storage facility, particularly when the person from whom he was retrieving the funds was the wife of a person he knew to be a drug defendant.

Regarding the two-pound quantity of heroin, the probation officer found that Lopez had discussed selling two pounds of heroin to a federal agent and had stated that Barrios would deliver the heroin. Also, according to the probation officer, "Barrios had had a conversation with Special Agent Sanchez regarding a 'future' shipment." At the sentencing hearing, Barrios stated that he had told Sanchez "that I believed that there were going to be some future shipments of heroin coming into the Austin area[,]" but disclaimed discussion of a two-pound quantity. The district court added a clause to the PSR stating that Barrios "did not know of any specific shipment."

> The sentencing court may make an approximation of the amount of [drugs] reasonably foreseeable to each defendant, and an individual dealing in large quantities of controlled substances is presumed to recognize that the drug organization with which he deals extends beyond his "universe of involvement." When calculating the amount foreseeable to a defendant, a court may consider the defendant's relationship with co-conspirators and his

role in the conspiracy.

United States v. Puig-Infante, 19 F.3d 929, 942 (5th Cir.) (internal citations omitted), cert. denied, 115 S. Ct. 180 (1994). Barrios does not dispute that he sold nine ounces of heroin during his involvement in the Amador-Lopez drug ring. He does not deny that he told the agent that he anticipated future shipments. It is plausible to find, in light of the record read as a whole, that Barrios reasonably could have foreseen that the ring would negotiate a sale for two pounds of heroin, an amount slightly less than four times the amount he had sold.

AFFIRMED.