IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50730
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARNOLD ODELL SCOTT,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W 94 CR 44)

July 7, 1995

Before KING, JOLLY, and SMITH, Circuit Judges.

PER CURIAM:*

After a jury trial, Arnold Odell Scott was found guilty of two counts of possession of crack cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Following his conviction, Scott was sentenced to sixty months of imprisonment on each count; the sentences to be served concurrently. Additionally, Scott was fined $1000 for each count, and he was

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

ordered to pay a $100 special assessment. Complaining about the computation of his sentence and the evidence admitted during his trial, Scott appeals. We, however, reject Scott's contentions and affirm his convictions and sentence.

I. BACKGROUND

In late 1993, law enforcement officers conducted an undercover investigation into crack cocaine trafficking in Mexia, Texas. During the investigation, law enforcement officers used videotape surveillance equipment, and on several occasions, undercover deputies and cooperating individuals drove to an area that trial testimony revealed to be a location frequented by drug dealers. Over several weeks, officers made two purchases of crack cocaine from Scott.

During the trial and at sentencing, the officer who made the first purchase testified that Scott retrieved the crack from a container containing "at least a minimum of ten" additional rocks of crack. Similarly, the officer who made the second purchase (which took place several weeks later) testified at trial and at sentencing that when he bought a rock of crack, he saw Scott retrieve the drug from a match box containing ten to fifteen additional rocks.

In making a sentencing recommendation, the presentence report ("PSR") noted that the total weight of the crack actually purchased was .18 grams and .16 grams. Nevertheless, the PSR

noted that both of the undercover officers who purchased observed additional amounts of crack. The PSR states:

> Though it is unlikely that the additional rocks seen by the undercover officer on November 9, 1993 would have been the same `crack' cocaine viewed by the undercover officer on December 15, 1993, to make certain that the additional rocks are not double-counted, the probation officer suggests that only the weight of ten additional rocks of `crack' cocaine be added with the weight of the `crack' cocaine actually purchased and tested by the DPS laboratory.

Scott objected to that finding, but the district court rejected Scott's objections, observing that in light of the evidence adduced at trial and sentencing, "giving Mr. Scott credit for only ten additional rocks would be more than fair."

Additionally, the PSR recommend a sentence enhancement for perjury, stating that "[i]t is believed the defendant attempted to impede or obstruct justice in this matter, and therefore, a two-level increase appears warranted." Scott objected to this finding, arguing that it punished him for exercising his constitutional right to plead not guilty. Additionally, Scott argued that although he denied liability for committing the crimes, the "evidence is not absolute that perjury was committed and to punish Defendant for choosing to plead not guilty requiring, thereby, a trial of the case appears to violate" the sentencing guidelines. The district court disagreed:

> [W]hile certainly the Defendant has a right to plead not guilty and go to trial, that doesn't encompass the right to commit perjury. And I distinctly remember in this case that Mr. Scott testified that the person on the video was not him, when anyone with normal eyesight could tell that--that is him, unless he has a twin brother that we haven't heard about. So, while I think that this particular obstruction of justice penalty

> should be rarely imposed, I do believe this is one of those egregious cases where it should be.

Thus, the district court adopted the findings of the PSR and sentenced Scott. Scott appeals.

II. STANDARDS OF REVIEW

In evaluating a district court's sentence computed under the sentencing guidelines, we will "uphold the district court's sentence so long as it results from a correct application of the guidelines to factual findings which are not clearly erroneous." United States v. Manthei, 913 F.2d 1130, 1133 (5th Cir. 1990) (internal quotation omitted); accord United States v. Sherrod, 964 F.2d 1501, 1506 (5th Cir.), cert. denied, 113 S. Ct. 832, and cert. dismissed, 113 S. Ct. 834 (1992). Specifically, "[a] district court's decision on the amount of [drugs] a defendant is to be held accountable for is a finding of fact which must be accepted by a court of appeals unless clearly erroneous." United States v. Walton, 908 F.2d 1289, 1300-01 (6th Cir.), cert. denied, 498 U.S. 990 (1990); accord United States v. Devine, 934 F.2d 1325, 1337 (5th Cir.), cert. denied, 502 U.S. 929 (1991). Similarly, "[w]e review a district court's determination that a defendant has obstructed justice . . . for clear error." United States v. Laury, 985 F.2d 1293, 1308 (5th Cir. 1993).

In examining a district court's evidentiary determinations when such an error is raised for the first time on appeal, "we will review th[e] belated challenge only for plain error."

United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994) (internal quotation omitted).

III. DISCUSSION

A. Computation of quantity of drugs

Scott first asserts that the district court incorrectly determined the quantity of crack cocaine for which Scott was responsible. Scott contends that the testimony of the two undercover officers as to the number of crack rocks they observed was insufficient to establish that he possessed that quantity of drugs. As Scott states, "[i]t is a clear violation of due process to allow [Scott] to receive a more severe sentence on the cursory examination of the additional `rocks' allegedly seen in [Scott's] hand." We disagree.

In determining the quantity of drugs that a defendant should be held responsible for, a district court is not limited to the amount of drugs actually seized. Sherrod, 964 F.2d at 1508; United States v. Angulo, 927 F.2d 202, 204 (5th Cir. 1991). Commentary to the sentencing guidelines expressly provides that:

> Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

U.S.S.G. § 2D1.1 cmt. 12; see also Angulo (discussing the commentary). Accordingly, we have noted that "[i]n determining

drug quantities, the district court may consider any evidence which has sufficient indicia of reliability. This evidence may include estimates of the quantity of drugs for sentencing purposes." Sherrod, 964 F.2d at 1508 (internal quotation omitted) (citation omitted); see also Walton, 908 F.2d at 1302 ("If the exact amount [of drugs] cannot be determined, an estimate will suffice . . . .).

A district court's discretion is not without limit, and "[t]he district court's factual findings of the amount of drugs involved must be supported by what it could fairly determine to be a preponderance of the evidence." Sherrod, 964 F.2d at 1508; accord Walton, 908 F.2d at 1302. Finally, if a defendant disagrees with information presented to the district court, "the defendant bears the burden of demonstrating that the information cannot be relied upon because it is materially untrue, inaccurate or unreliable." Angulo, 927 F.2d at 205.

In the instant case, there is no question that Scott failed to meet his burden. The district court based its estimate of the amount of crack for which Scott was responsible on the eyewitness testimony of two undercover law enforcement officers who observed substantial quantities of crack cocaine. Although the drugs were not subjected to laboratory analysis, the officers who observed the drugs were familiar with the appearance of crack cocaine. Moreover, both of the rocks that were pulled from the containers in which the officers saw the other drugs were demonstrated to be crack cocaine. Simply put, the evidence on which the district

court based its determinations had sufficient indicia of reliability, and Scott has failed to demonstrate otherwise. Consequently, we find that there was no clear error in the district court's calculation of the amount of drugs for which Scott was responsible.[1]

B. Enhancement for obstruction of justice.

Scott also contests the district court's upward adjustment of his sentence for obstruction of justice. Specifically, Scott argues that "the District Court failed to address all the elements necessary for a finding of obstruction . . . . Here, it is unclear whether the District Court found the element of willfulness. Without such, the award of the obstruction is error" (footnote omitted). We reject Scott's contention.

Section 3C1.1 of the sentencing guidelines provides that a defendant's offense level may be increased "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the . . . offense [of conviction]."

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[1] Scott's attempt to rely on United States v. Walton, 908 F.2d 1289, 1300-01 (6th Cir.), cert. denied, 498 U.S. 990 (1990), is unavailing. Nothing in that case supports Scott's contention that it is a due process violation to base a sentence on an estimate of drug quantity that arises through observation. In Walton, the Sixth Circuit held that a district court must determine the quantity of drugs for which a defendant is to be held responsible by a preponderance of the evidence. Walton, 908 F.2d at 1302 ("If the exact amount [of drugs] cannot be determined, an estimate will suffice, but . . . a preponderance of the evidence must support the estimate."). We apply the same standard in our circuit, and, as noted above, we find that the district court correctly applied this standard.

U.S.S.G. § 3C1.1; see also United States v. Cabral-Castillo, 35 F.3d 182, 185-87 (5th Cir. 1994) (discussing the guideline provision), cert. denied, 115 S. Ct. 1157 (1995). The commentary accompanying § 3C1.1 recognizes that "`[a] defendant's denial of guilt is not a basis for application of this provision,' inasmuch as the section is not intended to punish a defendant for the exercise a constitutional right." Cabral-Castillo, 35 F.3d at 186 (quoting U.S.S.G. § 3C1.1 cmt. 1(c)) (alteration in original); accord Laury, 985 F.2d at 1308. Yet, it is also clear that "[a]n enhancement may be appropriate where a defendant testifies untruthfully or suborns untruthful testimony concerning a material fact." Laury, 985 F.2d at 1308 (internal quotation omitted); accord Cabral-Castillo, 35 F.3d at 186; see also U.S.S.G. § 3C1.1 cmt. 3(b) (noting that examples of situations to which the enhancement applies include "committing, suborning, or attempting to suborn perjury").

A witness commits perjury when he "testif[ies] under oath . . . [and] gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory." United States v. Dunnigan, 113 S. Ct. 1111, 1117 (1993); accord Cabral-Castillo, 35 F.3d at 187. Further, "[a] matter is `material' if it is `designed to substantially affect the outcome of the case.'" Cabral-Castillo, 35 F.3d at 187 (quoting Dunnigan, 113 S. Ct. at 1117); see also U.S.S.G. § 3C1.1 cmt. 5 ("`Material' evidence . . . as used in this section, means evidence . . . that, if

believed, would tend to influence or affect the issue under determination.").

When, as in the instant case, a defendant objects to the PSR's recommendation of a sentence enhancement for perjury, the Supreme Court requires that "a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition." Dunnigan, 113 S. Ct. at 1117; accord Cabral-Castillo, 35 F.3d at 186. Further, the Court noted that when the district court makes its findings, it is preferable that the court "address each element of the alleged perjury in a separate and clear finding." Dunnigan, 113 S. Ct. at 1117; accord Cabral-Castillo, 35 F.3d at 186.

Such separate findings are not always required, and the Court observed that "[t]he district court's determination that enhancement is required is sufficient . . . if . . . the court makes a finding of an obstruction or impediment of justice that encompasses all of the factual predicates for a finding of perjury." Dunnigan, 113 S. Ct. at 1117; accord Cabral-Castillo, 35 F.3d at 186. Moreover, these findings may be included in the PSR, for when "the sentencing judge expressly adopts the findings of the presentence report, they are treated as his own findings." Cabral-Castillo, 35 F.2d at 186; accord Laury, 985 F.2d at 1308 n.18.

In the instant case, there is little doubt that through its statements during sentencing and its adoption of the PSR, the

district court's factual findings encompass all of the elements of perjury. First, the court found that Scott gave false testimony under oath. As the district court judge stated, "I distinctly remember in this case that Mr. Scott testified that the person on the video was not him, when anyone with normal eyesight could tell that--that is him, unless he has a twin brother that we haven't heard about." Second, the PSR, which the district court expressly adopted, found that the testimony was material and observed that "[h]ad the jury been persuaded by the defendant's untruthful testimony, it is likely it would have affected the determination of guilt."[2] Additionally the PSR determined that "the statements made by the defendant were made in an attempt to obstruct or impede the administration of justice

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[2] Scott argues that the district court "plainly believe[d] that [Scott's] testimony [was] so unbelievable that no rational juror could have believed [it]." Therefore, according to Scott, "the District Court made an implied finding that the testimony that is the subject of the enhancement could not have been reasonably considered by the jury in their determination of the case." Scott contends that this implied finding precludes a finding that the testimony was material, and therefore impedes an enhancement for the obstruction of justice. We reject this contention.

This argument contravenes the very language of the guidelines commentary and the cases surrounding it. As noted above, a statement is material "if it is `designed to substantially affect the outcome of the case.'" Cabral-Castillo, 35 F.3d at 187 (quoting Dunnigan, 113 S. Ct. at 1117) (emphasis added); see also U.S.S.G. § 3C1.1 cmt. 5 ("`Material' evidence . . . as used in this section, means evidence . . . that, if believed, would tend to influence or affect the issue under determination.") (emphasis added). Not surprisingly, Scott cites nothing indicating that the false testimony of the defendant must be believable or actually affect the outcome of the case in order to be material, and we will not add such a requirement to the guidelines.

during prosection." This finding satisfies the willfulness requirement. Between the PSR and its statements during sentencing, the district court's findings encompassed all of the factual predicates for a finding of perjury. Thus, we find no error in the district court's upward adjustment of Scott's sentence for obstruction of justice.

C. Challenges to Evidence

Scott next argues that certain testimony adduced during trial was admitted in violation of Federal Rule of Evidence 404(b). Specifically, Scott contests the admission of statements by law enforcement officers that the area in which Scott conducted the drug transactions was an area with "a lot of drug activity." Scott also contends that the district court erred in allowing testimony that Scott was frequently seen in that area. Scott, however, did not object to this testimony during trial. Thus, "we will review th[e] belated challenge only for plain error." Rodriguez, 15 F.3d at 414 (internal quotation omitted).

Under the plain error standard, an appellant who raises an issue for the first time on appeal must show that there has been an error, that the error was "plain," and that the error affected substantial rights. United States v. Olano, 113 S. Ct. 1770, 1776-79 (1993); Rodriguez, 15 F.3d at 414. Plain errors are errors that are "obvious, clear or readily apparent; they are errors which are so conspicuous that the trial judge and prosecutor were derelict in countenancing [them], even absent the

defendant's timely assistance in detecting [them]." United States v. Calverley, 37 F.3d 160, 163 (5th Cir. 1994) (en banc) (footnotes omitted) (internal quotations omitted) (alterations in original).

Additionally, even when error is plain, the error must affect substantial rights. Id.; accord Rodriguez, 15 F.3d at 415. As we noted in Calverley, "in most cases the affecting of substantial rights requires that the evidence be prejudicial; it must affect the outcome of the proceeding. The burden of persuasion lies with the defendant. Absent a showing that a substantial right has been compromised no remedy is available." Calverley, 37 F.3d at 164.

In the instant case, assuming arguendo that the admission of the complained of testimony constituted error, we find that it did not affect Scott's substantial rights. The jury heard the testimony of two law enforcement officers who, in their undercover capacity, bought crack cocaine directly from Scott and identified Scott as the individual who sold them drugs. Moreover, the jury also watched a videotape that depicted Scott engaging in the crack sales. Because we find that the jury would have found Scott guilty even if the evidence complained of had been excluded, we find that the admission of the testimony, even if improper, does not require reversal. See United States v. Tomblin, 46 F.3d 1369, 1388 (5th Cir. 1995) (finding that character evidence which was improperly admitted did not require

reversal when "the jury would have returned a verdict of guilty . . . even without the prejudicial testimony").

IV. CONCLUSION

For the foregoing reasons, we AFFIRM.