IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60233
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DANIEL MERCADO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(M-93-CR-196-1)

(April 21, 1995)

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

PER CURIAM:[*]

Daniel Mercado appeals his conviction of, and sentence for, conspiracy to possess with intent to distribute in excess of 100 kilograms of marihuana, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) and 846. 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

Mercado was charged with conspiracy to possess with intent to distribute over 100 kilograms of marihuana beginning in November 1992 and continuing to March 11, 1993 (count one); possession with intent to distribute about 83 kilograms of marihuana on or about March 11, 1993 (count two); and possession with intent to distribute about 128 kilograms of marihuana on or about November 20, 1992 (count three). A jury found him guilty of the conspiracy alleged in count one but acquitted him of the two substantive counts. The district court sentenced Mercado to 78 months of imprisonment, to be followed by a four-year term of supervised release.

II.

A.

Mercado argues that the evidence was insufficient to support his conspiracy conviction. In reviewing a challenge to the sufficiency of the evidence, we determine whether a rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt. United States v. Ivey, 949 F.2d 759, 766 (5th Cir. 1991), cert. denied, 113 S. Ct. 64 (1992). Moreover, we view "all evidence and any inference that may be drawn from it in the light most favorable to the government." Id. The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and we accept all credibility choices that tend to support the verdict. United States v. Pofahl,990 F.2d 1456, 1467 (5th Cir.), cert.

denied, 114 S. Ct. 266 and 114 S. Ct. 560 (1993).

To prove the drug conspiracy charges, the government was required to establish beyond a reasonable doubt (1) that a conspiracy existed, i.e., that two or more people agreed to violate the narcotics laws; (2) that the defendant knew of the conspiracy; and (3) that he voluntarily participated in the conspiracy. United States v. Cardenas, 9 F.3d 1139, 1157 (5th Cir. 1993), cert. denied, 114 S. Ct. 2150 (1994). The elements of the conspiracy need not be proven by direct evidence; rather, they may be inferred from circumstantial evidence. Id. Thus, agreement may be inferred from "concert of action," and voluntary participation inferred from a "collection of circumstances." Id. Similarly, knowledge of the conspiracy may be inferred from a "collection of circumstances," including evidence of erratic and evasive behavior. Id. "Although mere presence at the scene of the crime or a close association with a co-conspirator alone cannot establish voluntary participation in a conspiracy, presence or association is a factor that, along with other evidence, may be relied upon to find conspiratorial activity by the defendant." Id. (internal citation omitted). Finally, "to establish a violation of 21 U.S.C. § 846, the Government need not prove the commission of any overt acts in furtherance of the conspiracy." United States v. Shabani, 115 S. Ct. 382, 385 (1994).

Testimony established the following: Cesar Cuellar, a deputy sheriff in Zapata County, Texas, was arrested in November 1992 and charged with conspiracy to possess with intent to distribute approximately 500 pounds of marihuana, actual possession with

intent to distribute about 100 pounds of marihuana, and two gun counts. Cuellar pleaded guilty and agreed to cooperate with the government.

In March 1993, Heriberto Garcia, Daniel Mercado, and Erasmo Cuellar, who is not related to Cesar Cuellar, solicited Cesar Cuellar's help to transport marihuana. On March 8, 1993, Mercado went to Cesar Cuellar's home and asked whether he could help move about 200 pounds of marihuana from Roma, Texas, through a check point going to Houston, Texas. Cuellar agreed and immediately contacted Sigifredo Gonzalez, Jr., a task force investigator for the Drug Enforcement Administration (DEA).

Two days later, Garcia picked Cuellar up at home and brought him to the Hill Top Store in La Rosita, south of Roma. Garcia is a former brother-in-law of Mercado's and a friend of Cesar Cuellar. When they arrived at the store, Garcia got out of the truck and went inside. Eventually, Mercado came out of the store and got into the truck with Cesar Cuellar to discuss moving the 200 pounds of marihuana. Mercado mentioned to Cuellar that he had 600 pounds to move but that they were going to move just 200 pounds.

Around March 10, Cesar Cuellar rode in Mercado's black Mustang GTO to the same store to continue negotiating the sale of the marihuana. At this second meeting, Mercado met with Garcia and some other men, one of whom was Torillo Fernandez. Mercado and Cuellar stayed in constant contact, either on the phone or at each other's home, to discuss moving the marihuana.

On the evening before the marihuana was to be transported,

Mercado picked Cuellar up at home and drove to Garcia's residence. The three rode around in Mercado's car on back streets. Mercado advised Garcia that the man who was to deliver the marihuana to him the next morning was unable to, but that some "fat guy" was going to do it. Garcia said that he was going to use his sister's car, a white four-door Dynasty, Plymouth Dodge, or some kind of Chrysler. Mercado had offered Garcia $10,000 to transport the marihuana. The three men agreed to leave Zapata at 6:30 the next morning. Mercado gave Garcia his digital beeper. Cuellar was to drive a blue truck, which was to be the "heat vehicle." The truck had a cellular phone that Cuellar would use to beep Garcia if something went wrong. The truck was owned by Garcia's girlfriend, Thelma Bustamente.

The next morning Garcia arrived at Cuellar's home but was driving a white Beretta, not the vehicle he had planned on driving. Garcia drove Cuellar to Garcia's girlfriend's house to get the blue truck. After Cuellar got the blue truck, he used a pay phone to contact Gonzalez, who would be conducting surveillance, to tell him about the change in the cars. Cuellar then picked up Mercado, and they drove to Roma, where they were to meet Garcia at a Dairy Queen and then proceed to Zapata. The plan was to take the marihuana back to Garcia's girlfriend's ranch, where it would be stored in a trailer until Cuellar could pick it up and get it past the checkpoint. Id.

At the Dairy Queen, Mercado made some phone calls. Eventually, Garcia arrived at the Dairy Queen, having previously picked

up the marihuana. Mercado and Cuellar then proceeded to Zapata. En route, Torillo Fernandez flashed them down with his lights. Mercado got out of the truck and talked with Fernandez, who advised that a checkpoint was ahead. Cuellar paged Garcia on the beeper with the information. Mercado and Cuellar turned around and drove back to Roma. On the way, they saw that Garcia had been arrested. Therefore, Cuellar turned off the road and headed back to Zapata through the checkpoint.

The local police officer who arrested Garcia obtained permission to search the car. He seized 185 pounds of marihuana.

Prior to the above-described incident, Cesar Cuellar had met with Mercado and Erasmo Cuellar in November 1992, shortly after Cuellar was arrested but before he had agreed to cooperate with the government. Erasmo Cuellar had been arrested for possession of marihuana, and the other men wanted Cesar Cuellar's help in getting Erasmo Cuellar a light sentence. Cesar Cuellar recommended that Erasmo Cuellar cooperate with the government. At the meeting, Mercado disclosed that the marihuana that Erasmo Cuellar was caught with was Mercado's and that Mercado had lost $60,000 as a result of the arrest.

Thus, the testimony at trial was such that the jury could have reasonably found that in March 1993 Mercado had an agreement with Cesar Cuellar and Garcia, and possibly others, to transport 200 pounds of marihuana. Cuellar's testimony establishes that Mercado solicited Cuellar's help and that he discussed the details of the plan with him and Garcia on more than one occasion. Moreover,

Mercado was instrumental in facilitating Garcia's transporting of the marihuana, inasmuch as he offered to pay Garcia $10,000 for the job and gave him a beeper to be used in case of emergency. Finally, Mercado was in the "heat vehicle" the day Garcia was arrested. This collocation of circumstances supports the jury's finding that Mercado agreed with at least one other person to violate the narcotics laws, knew of the conspiracy, and voluntarily participated in it. See Cardenas, 9 F.3d 1139 at 1157.

B.

Mercado claims that the district court failed to make a correct finding pursuant to FED. R. CRIM. P. 32(c)(3)(D) regarding the amount of drugs attributable to him. Rule 32(c)(3)(D) requires that the district court resolve specifically disputed factual issues if it intends to use the facts as a basis for its sentence. Rule 32 is satisfied if the district court rejects the defendant's objections and specifically adopts responsive portions of the presentence report ("PSR"). United States v. Mora, 994 F.2d 1129, 1141 (5th Cir.) (adoption of findings of PSR sufficient factual determination of quantity of drugs under rule 32), cert. denied, 114 S. Ct. 417 (1993).

The PSR stated that, pursuant to U.S.S.G. § 1B1.3, the total amount of marihuana connected to Mercado's offense was 398.7956 kilograms. Testimony and the PSR show that Mercado owned the 128 kilograms of marihuana for which Erasmo Cuellar was arrested in November 1992 and which was the subject of count three. Further,

testimony established that Mercado conspired to move 200 pounds of a 600-pound shipment of marihuana. The PSR stated that according to the confidential informant ("CI"), the source of the 600 pounds was a man known as "El Gusanito." Further, at one of the meetings at the Hilltop Grocery Store at which Mercado was present, it was decided that 200 pounds of the 600-pound load would be transported in a "trial run" and that the remaining 400 pounds would be moved at a later time. Id. Thus, the total amount of marihuana the PSR attributed to Mercado was derived from the 128 kilograms seized when Erasmo Cuellar was arrested and the 600 pounds involved in the March 1993 transaction.

In his objections to the PSR, Mercado disputed the amount, arguing, inter alia, that the 400 pounds should not be included because "there is no credible and reliable evidence that '400 pounds' ever existed and/or El Gusanito never agreed to transfer said '400 lbs.' to any member of this indictment's alleged conspiracy." The probation officer responded that the 600 pounds, less three pounds for wrappings, could be attributed to Mercado pursuant to the relevant conduct provisions of § 1B1.3(a)(1)(A). Mercado raised the objection at sentencing, arguing that his only role in the case was aiding in the transportation of about 180 pounds of marihuana. The district court overruled the objection, stating that the court did not find that Mercado was a mere passenger in that transaction. The court subsequently adopted the findings of the PSR, making them part of the record.

Mercado argues that the district court did not comply with

rule 32 because it did not make fact findings regarding the amount of marihuana attributed to him based upon what he should have reasonably foreseen as part of the conspiracy. Mercado relies upon United States v. Webster, 960 F.2d 1301 (5th Cir.), cert. denied, 113 S. Ct. 355 (1992), to support his argument. In that case, however, the court held that because the PSR failed to state the amount of drugs that each coconspirator should have foreseen, the district court's adoption of the PSR did not satisfy rule 32. Webster, 906 F.2d 1309-10. In the instant case, the PSR specifically addressed Mercado's argument. Moreover, the amount of drugs the PSR attributed to Mercado was not based upon what he should have reasonably foreseen pursuant to § 1B1.3(a)(1)(B), but on the basis of all his acts pursuant to § 1B1.3(a)(1)(A).[1] Inasmuch as the PSR specifically addressed Mercado's objection, as did the court, both in adopting the PSR and in responding orally to Mercado's argument at sentencing, the court was in compliance with rule 32(c)(3)(D).

C.

Mercado argues that the court erred when it calculated the amount of marihuana attributable to him because it lumped amounts of marihuana charged in counts two and three to obtain a single sentence and because the charges in those counts were not related

[1] Section 1B1.3(a)(1)(B) provides that when a defendant is part of a conspiracy, "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity" may be considered in reaching his base offense level.

to the charge stated in count one because different times, places, and conspirators were involved. He also asserts that the court erred when it found that 461.6 pounds were involved for sentencing purposes. Id. at 17.[2]

"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." United States v. Maseratti, 1 F.3d 330, 340 (5th Cir. 1993), cert. denied, 114 S. Ct. 1096 (1994).

> A finding of fact is clearly erroneous when, although there is enough evidence to support it, the reviewing court is left with a firm and definite conviction that a mistake has been committed. If 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 weighted the evidence differently.

United States v. Bermea, 30 F.3d 1539, 1575 (5th Cir. 1994) (citations omitted), cert. denied, 115 S. Ct. 1113 (1995). Applications of the guidelines are reviewed de novo. United States v. Wimbish, 980 F.2d 312, 313 (5th Cir. 1992), cert. denied, 113 S. Ct. 2365 (1993).

As noted above, trial testimony and the PSR show that Mercado owned the 128 kilograms of marihuana for which Erasmo Cuellar was arrested in November 1992 and which was the subject of count three. Further, trial testimony established that Mercado conspired to move

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[2] As discussed below, and as argued by the government, the district court stated that Mercado was involved with more than 220 pounds of marihuana. The district court later adopted, "as justification" of Mercado's sentence, "all justifications which are included in this [PSR]." The PSR stated that Mercado was involved with 398.7956 kilograms of marihuana.

200 pounds of a 600-pound shipment of marihuana.

At the sentencing hearing, the court responded to Mercado's objection regarding how many pounds of marihuana were involved. The court discussed the trial evidence and determined that it showed that Mercado was involved with the 128 kilograms (count three) and with the 180 pounds in Garcia's car that was part of a 600-pound shipment (count two). The court implied that it was irrelevant whether the remaining 400 pounds of the 600-pound shipment was included, as the applicable guideline range was for at least 100 kilograms and less than 400 kilograms. See § 2D1.1(c)(7).[3] The court concluded that, at any rate, Mercado was involved with more than 200 pounds of marihuana.

The guidelines provide that a conviction on a count charging a conspiracy to commit more than one offense shall be treated as though the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit. § 1B1.2(d). Commentary to that guideline references § 3D1.2(d), which permits grouping counts and using an aggregate amount to reach the amount of drugs attributable to a defendant when the offense behavior is ongoing or continuous in nature. See § 1B1.2(d) comment., n.4. Because count one charged that the conspiracy began in November 1992 and continued to March 11, 1993, counts two and three could be grouped to reach an aggregate amount

[3] If the remaining 400 pounds were not attributed to Mercado, the result would be approximately 211 kilograms and would not affect the guideline range, inasmuch as the amount attributed to him would still be more than 100 kilograms but less than 400 kilograms. See § 2D1.1(c)(7).

of marihuana attributable to Mercado. Inasmuch as the evidence shows that Mercado was involved with the amounts of marihuana charged in counts two and three, the district court's finding that he was involved with more than 200 pounds of marihuana was not clearly erroneous.

D.

Mercado challenges the two-level enhancement in his base offense level pursuant to § 3B1.1(c) for his role in the conspiracy. Citing authority outside this circuit, Mercado argues that his offense level should not have been enhanced because he was not the conspiracy's initiator, nor did he control others in the organization.

A district court's determination that a defendant played an aggravating role is a factual finding subject to the "clearly erroneous" standard of review. United States v. Alvarado, 898 F.2d 987, 993 (5th Cir. 1990). Section 3B1.1(c) requires a two-level increase in a defendant's offense level if the defendant was a manager or supervisor in the criminal activity. Factors for consideration in making the determination include

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

§ 3B1.1(c), application note 3.

The PSR indicates that Mercado was part owner of the 200

pounds of marihuana confiscated on March 11, 1993, that he recruited an individual who was a CI to transport the marihuana, and that he instructed the CI to contact Garcia and arrange a meeting at the Hilltop Grocery Store. Testimony established that Mercado was present at two meetings at the grocery store to discuss the deal, that he recruited Garcia by offering to pay him $10,000, that he provided Garcia a beeper to be used while transporting the marihuana, and that he was in constant contact with Cesar Cuellar in March 1993. Thus, the evidence shows that while Mercado might not have been an initiator or "in control," he nevertheless had a big role in planning and that he recruited others to move 200 pounds of marihuana in March 1993. Likewise, the evidence shows that Mercado owned the marihuana for which Erasmo Cuellar was arrested in November 1992 and that he had invested $60,000 in it. Accordingly, the district court's finding that Mercado's base offense level should be increased two levels for his role in the conspiracy was not clearly erroneous.

AFFIRMED.