IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 94-60568
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARCELLOUS LAND aka "Cellous,"

Defendant-Appellant.

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Appeal from the United States District Court for the
Northern District of Mississippi
(4:93 CR 134 S)

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September 12, 1995

Before GARWOOD, WIENER and PARKER, Circuit Judges.*

PER CURIAM:

Defendant-appellant Marcellous Land (Land) was convicted, on his plea of guilty, of one count of conspiracy to possess with intent to distribute and to distribute cocaine base (crack cocaine), and was sentenced for that offense to 360 months' imprisonment, a $5,000 fine, and 5 years' supervised release. Land

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

brings this appeal, challenging only his sentence, which he claims was improper because the district court failed to properly resolve all disputed factual issues respecting the drug quantity attributable to him for sentencing purposes, and the ratio used in determining drug trafficking sentences for cocaine base as opposed to other forms of cocaine is unconstitutional. We affirm.

Land filed objections to the PSR, most of which pertained to the quantity of crack cocaine attributable to him for sentencing purposes. The PSR provided that in August 1992 Marvis Tabor contacted the "Rolling Twenties Blood Gang" in Los Angeles, California, about setting up a crack cocaine distribution organization in Greenwood, Mississippi. According to the PSR, Land's involvement in the conspiracy to distribute crack cocaine in Greenwood spanned from September 1992 through January 1993. At sentencing, the district court overruled all of Land's objections to the PSR pertaining to drug quantity, determining that the relevant quantity of crack cocaine for sentencing purposes was 6.29 kilograms, resulting in a total offense level of 40, criminal history category VI, and an imprisonment range of 360 months to life imprisonment.

Land argues that the district court failed properly to resolve factual disputes at sentencing, resulting in the erroneous attribution to him for sentencing purposes of 6.29 kilograms of crack cocaine. He concedes that an estimate of drug quantity for sentencing purposes is not necessarily improper; he suggests, however, that the 6.29 kilogram quantity resulted from mere "guesswork."

Land notes that he testified at the trial of his codefendants, Canada and Jamerson, and argues that as a result of his choosing to testify, he was "unable to cross-examine and confront witnesses who testified to circumstances which were presented at Land's sentencing to his detriment." The district judge who sentenced Land presided over the joint trial of Canada and Jamerson. Land argues that, at sentencing, the court was unclear whether it was relying upon sworn testimony or unsworn assertions and that "due process requires that uncertainties be resolved" in his favor. He also argues that the PSR supports his contention that the crack cocaine sold for $3,500 per ounce rather than $1,000 per ounce.

The probation officer and the district court relied upon testimony at the trial of Canada and Jamerson in making drug-quantity determinations.[1] Land does not dispute the substance of that trial testimony as presented in the PSR or as represented by the district court at sentencing. Rather, he suggests that the district court's reliance upon that testimony at sentencing was improper and argues that the court failed clearly to identify when it was relying upon trial testimony and when it was relying upon unsworn assertions at sentencing.

A defendant's base offense level for drug-trafficking offenses may be based on both "drugs with which the defendant was directly involved, and drugs that can be attributed to the defendant in a conspiracy as part of his 'relevant conduct' under §

This Court affirmed the sentences of Canada and Jamerson in an unpublished opinion. *United States v. Canada*, No. 94-60556 (5th Cir. March 27, 1995) (unpublished).

1B1.3(a)(1)(B)." *United States v. Carreon*, 11 F.3d 1225, 1230 (5th Cir. 1994); *see* § 2D1.1(a)(3). "Relevant conduct" includes "'all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.'" *Carreon*, 11 F.3d at 1230 (quoting § 1B1.3(a)(1)(B)).

This Court reviews the relevant-quantity determination under the clearly erroneous standard. *United States v. Mergerson*, 4 F.3d 337, 345 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1310 (1994). Factual findings concerning a defendant's relevant conduct for sentencing purposes are not clearly erroneous if they are "plausible in light of the record read as a whole." *United States v. Puig-Infante*, 19 F.3d 929, 942 (5th Cir.), *cert. denied*, 115 S.Ct. 180 (1994). The court may consider any evidence which has "sufficient indicia of reliability," including estimates of drug quantities. *United States v. Sherrod*, 964 F.2d 1501, 1508 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 832, *cert. dismissed*, 113 S.Ct. 834, *cert. denied*, 113 S.Ct. 1367, and *cert. denied*, 113 S.Ct. 1422 (1993). A PSR generally bears sufficient indicia of reliability to be considered as evidence by the district court in resolving disputed facts. *United States v. Montoya-Ortiz*, 7 F.3d 1171, 1180 (5th Cir. 1993).

Rule 32(c)(1) requires that the sentencing court rule on any "unresolved objections to the presentence report." Fed. R. Crim. P. 32(c)(1); *see United States v. Hurtado*, 846 F.2d 995, 998 (5th Cir.), *cert. denied*, 488 U.S. 863 (1988). A district court may adopt facts contained in the PSR without further inquiry if the facts have an adequate evidentiary basis and the defendant does not

present rebuttal evidence. *Puig-Infante*, 19 F.3d at 943. Although Land objected to the information in the PSR regarding drug quantity, he did not offer affidavits or other sworn testimony to rebut the evidence contained in the PSR. Land provided only his own *unsworn* assertions at the sentencing hearing.

Land argues that the district court failed to resolve a factual dispute concerning the amount of crack cocaine delivered to the Greenwood organization per week. Prior to sentencing, Land objected to the factual assertion in the PSR that the organization was receiving at least nine ounces of crack cocaine per week from September 1992 through January 15, 1993. In response to Land's objection, the probation officer stated that Christopher Goff, a codefendant of Land's, testified at the Canada-Jamerson trial that "he would receive at least nine . . . ounces of crack cocaine each week and sometimes . . . three . . . packages a week with each package containing at least nine . . . ounces of crack cocaine." At sentencing, the court overruled Land's objection, stating that the amount was supported by the trial testimony.

Land suggests that the district court failed to resolve a factual dispute concerning whether several codefendants traveled from Greenwood to Los Angeles to explain to Land and others the reason for missing funds. Prior to sentencing, Land objected to the following factual assertion in the PSR: "In September 1992, Christopher Goff's organization had approximately $6500 stolen which resulted in Goff's and Tedrick Randall's trip to Los Angeles . . . in order to explain to Steve Goins, Marcellous Land, and an individual by the name of 'Geek' . . . what happened to the money."

At sentencing, the district court overruled Land's objection, noting that the probation officer had conducted a reasonable investigation of the matter and that the information was derived from the testimony at the trial of Tedrick Randall, a codefendant.

Land suggests on appeal that the district court failed to resolve a factual dispute concerning the term of his involvement in the conspiracy. In his written objections to the PSR, Land objected to the factual assertion in the PSR that he was involved in the organization's distribution in Greenwood from September 1992 through January 1993. At sentencing, he reurged the objection.[2]

The PSR provided that according to testimony at the mentioned trial, Land was involved in the conspiracy in September 1992, having been present when certain members of the organization explained to other members the loss of $6500. According to testimony at that trial, Land did not personally send crack cocaine to Greenwood in October 1992, but in early October 1992 coconspirators in Greenwood wired $8650 to Land's mother. Land traveled to Greenwood to take over the Greenwood operation in November 1992, and he served as a supervisor for the organization until its demise in January 1993. Land conceded that he had traveled to Greenwood in November 1992. At sentencing, in overruling Land's objection, the district court noted that the probation officer's information was based on an interview with a DEA agent and testimony at the trial.

At sentencing, Land may have conceded his involvement in the conspiracy as of September. He did state also, however, that he "believes it was December."

Land suggests that the district court failed to resolve factual disputes regarding the calculation of the amount of crack cocaine involved in the conspiracy. Prior to sentencing, Land objected to the drug quantity calculations in the PSR and to the resulting guidelines calculations.

The PSR provided that between August 1992 and January 1993, members of the organization selling crack in Greenwood transferred $207,003 to various coconspirators in Los Angeles. The probation office used this monetary amount to determined the total drug quantity involved in the offense. Because members of the organization were selling the crack for $1,000 an ounce in Greenwood, the probation office divided the dollar value of the money orders received by members in Los Angeles each month by 1,000 to determine the number of ounces of crack cocaine sold per month. The PSR provided that because Land was involved in the conspiracy from September 1992 through January 1993, the amount of crack cocaine attributable to him for sentencing purposes was 6.29 kilograms.

Land argues that the facts of *United States v. Shacklett*, 921 F.2d 580, 584 (5th Cir. 1991), are analogous to those of the instant case. In *Shacklett*, this Court held that an investigatory report did not bear sufficient indicia of reliability because the PSR did not disclose sufficient information regarding the report. This Court rejected the government's argument that the district court had ruled on the credibility of the informant because the unidentified DEA agent involved in the case and the informant had never appeared before the district court.

Shacklett is distinguishable from the instant case. In the instant case, the district judge presided over the trial of some of Land's codefendants and relied extensively upon sworn trial testimony in making his drug-quantity determinations. Further, in the instant case, the PSR referenced trial testimony extensively, and there is no indication that other information relied upon by the probation officer in preparing the PSR was unreliable.

The district court's relevant-quantity determination was not clearly erroneous.

Land's final contention is that the "100 to 1 severity of punishment between cocaine and crack cocaine discriminates disproportionately against blacks." Land concedes that this Court has previously rejected his argument, but he requests that this Court reconsider its ruling on the issue, applying a strict scrutiny standard of review.

This Court has previously rejected arguments that the disparate sentencing provisions for crack cocaine and cocaine powder violate due process or equal protection. *United States v. Thomas*, 932 F.2d 1085, 1090 (5th Cir. 1991), *cert. denied*, 502 U.S. 1038 (1992); *United States v. Galloway*, 951 F.2d 64, 66 (5th Cir. 1992); *United States v. Watson*, 953 F.2d 895, 898 (5th Cir.), *cert. denied*, 504 U.S. 928 (1992); *United States v. Cherry*, 50 F.3d 338, 342-44 (5th Cir. 1994). We overrule Land's said point of error.

Accordingly, Land's conviction and sentence are

AFFIRMED.