UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1680
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FERNANDO SALAZAR, a/k/a
"Flaco" Doe,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92 CR 166 P)

(March 12, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Fernando Salazar pleaded guilty to the intentional distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). The Government's factual resume provided that Salazar, along with two others, sold 1½ ounces of cocaine to an undercover law enforcement officer. He was sentenced, inter alia, to 120 months imprisonment and appeals the sentencing decision,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

contending that he is not a career offender and that, if the district court ruled on and rejected Salazar's claim of minimal participant status, it erred. We find no error and affirm.

In reviewing a defendant's sentence under the Guidelines, this Court accepts a district court's factual findings unless they are clearly erroneous, but reviews legal issues pertaining to the application of the Guidelines de novo. U.S. v. Arellano-Rocha, 946 F.2d 1105, 1106 (5th Cir. 1991).

Salazar argues that the district court erred by classifying him as a career offender under U.S.S.G. § 4B1.1. He argues that the two prior state felony convictions used to enhance his offense level to career offender are "related" because they were part of a common scheme or plan.

One of the criteria for career offender status is that the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. Garcia, 962 F.2d at 480 (5th Cir. 1992); see U.S.S.G. § 4B1.1. Prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing. Garcia, 962 F.2d at 480; see U.S.S.G. § 4A1.2, comment. (n.3). This Court reviews de novo a district court's determination whether the previous convictions should be treated as separate or related. Garcia, 962 F.2d at 481.

In Garcia, this Court held that two sales of heroin to an undercover officer within a nine-day period were not part of a

common scheme of plan. Id. at 482. Although the facts surrounding the cases might be similar, the court held, a relatedness finding requires more than a mere similarity of crimes. Id.

Salazar argues that the underlying facts of the two 1991 burglaries of a residence for which he was convicted establish a common scheme or plan and not a "mere similarity" as in Garcia. He argues that the offenses were part of a single common scheme or plan because (1) the offenses occurred within a two-day period, (2) he acted as a lookout for both burglaries, (3) both burglaries occurred in the same area of town, (4) the same car was used in both burglaries, and (5) both burglaries involved the use of heroin. He also seeks to distinguish Garcia by arguing that his crimes occurred within two days whereas the crimes committed by Garcia occurred within nine days. Id. at 16.

Although Salazar's crimes were similar, they were not identical. Each burglary involved different residences and different victims. Salazar executed two distinct, separate burglaries. Although the temporal difference between the two offenses was less than that in Garcia, the offenses were nonetheless separated by two days. Neither is it persuasive that Salazar was suffering from the ravages of his drug addiction when he committed the crimes. The term "single common scheme or plan" must have been intended to mean something more than simply a repeated pattern of criminal conduct. The mere fact that, in engaging in a pattern of criminal behavior, the defendant has as his purpose the acquisition of money to lead a particular lifestyle

does not mean that he has devised a single common scheme or plan. U.S. v. Chartier, 970 F.2d 1009, 1016 (2nd Cir. 1992). The district court did not err by determining that Salazar's two prior convictions were not part of a common scheme or plan.

Alternatively, Salazar argues that the two cases are related because they were consolidated for plea and sentencing. Salazar's state-court attorney testified that the cases were disposed of on the same day, one plea was entered, testimony was offered at one time for both cases, and the sentences were ordered to run concurrently. The Government responds that Salazar entered into a separate plea bargain for each state charge and that the cases were docketed separately.

Cases that are tried together and result in concurrent sentences for the same length of time are not necessarily consolidated for purposes of the career offender provision. U.S. v. Ainsworth, 932 F.2d 358, 360-61 (5th Cir.), cert. denied, 112 S.Ct. 327 (1991). Similarly, contemporaneous sentencing on two distinct cases does not necessitate a finding that the cases were consolidated. Id. If, however, the state court treated the two convictions separately by entering separate sentences, judgments, and plea agreements, these facts support a finding that the cases were not consolidated for trial. See Garcia, 962 F.2d at 483. Salazar's cases fall into this last category and were properly treated as not consolidated.

Salazar also argues that the district court failed to comply with Fed. R. Crim. P. 32(c)(3)(D) when it did not make a

finding as to his allegation that he should be sentenced as a minor participant. At the sentencing hearing, Salazar urged that he should be sentenced as a minimal participant.

Fed. R. Crim. P. 32(c)(3)(D) requires the sentencing court to make a finding resolving each controverted matter in the PSR. U.S. v. Webster, 960 F.2d 1301, 1310 (5th Cir.), cert. denied, 113 S.Ct. 355 (1992). The sentencing court may satisfy this requirement by rejecting a defendant's objection and orally adopting the PSR. See U.S. v. Puma, 937 F.2d 151, 155 (5th Cir. 1991), cert. denied, 112 S.Ct. 1165 (1992). The district court is not required "to mouthe any particular magic words or make a talismanic incantation of the exact phraseology" of the rule, statute, or guideline applicable to its finding. See U.S. v. Piazza, 959 F.2d 33, 37 (5th Cir. 1992)(construing Fed. R. Crim. P. 32(c)(3)(D)).

Salazar contends that the district court's general adoption of the PSR without any reference to the specific objection concerning minor participant status falls far short of compliance with Rule 32 and fails to indicate whether the court even considered his objection. The transcript of the sentencing hearing indicates, however, that both the district court and Salazar's counsel knew that the district court was overruling his objection to the denial of minimal participant status. After determining that the career offender provision did apply, the district court heard Salazar's arguments for a downward departure from the career

offender range and for minimal participant status. The court then stated:

> So I'm going to adopt the finding of the probation office in the, contained in the pre-sentence investigation report and overrule that objection. And I'm going to adopt the findings of the probation department both in the pre-sentence investigation report and also the addendum to the pre-sentence report and adopt those as the findings of the Court. I've heard your other objections. Do you have anything else you wish to present?

In context, the court's statement that "I've heard your other objections" clearly referred to Salazar's request for minimal participant status. The statement made by the district court satisfies the requirement that it make a specific finding that Salazar was not a minor participant.

Finally, Salazar argues that in the event that this Court determines that the district court implicitly overruled his objection to the denial of minor participant status, the court's determination that he was not a minor participant was clearly erroneous. U.S. v. Giraldo-Lara, 919 F.2d 19, 22 (5th Cir. 1990). He argues that he is substantially less culpable than the average participant in an offense of this nature and plainly less culpable than his codefendants. Id. at 25.

Section 3B1.2 of the Sentencing Guidelines allows a four-level decrease in the defendant's base offense level if the defendant was a minimal participant, and two-level decrease in the offense level if the defendant was a minor participant. U.S.S.G. § 3B1.2; Molano-Garza v. U.S. Parole Comm'n, 965 F.2d 20, 23 (5th Cir. 1992), cert. denied, No. 92-6589, 1992 WL 347105 (U.S. Jan 11,

1993). A defendant is not entitled to minor participant status unless he is substantially less culpable than most other participants. Id. However, the greater culpability of a co-defendant does not automatically qualify a defendant for minor or minimal participant status; each participant must be separately assessed. U.S v. Thomas, 963 F.2d 63, 65 (5th Cir. 1992).

Salazar argued that he did not possess a firearm during the offense or receive money from the agent; however, he acknowledged that he participated in the negotiations with the undercover agent. His participation in the offense was not substantially less than that of the other participants. The district court did not clearly err by determining that he should not receive a reduction in offense level for his role in the offense.

Salazar also argues that the district court did not state specifically the factual basis for its finding that he was not a minimal participant. He cites U.S. v. Melton, 930 F.2d 1096, 1099 (5th Cir. 1991), in which this Court held that it was error for the district court to deny the defendant a minor participant reduction without stating any factual basis for its conclusion. In Melton, the district court simply concluded that the defendant was an average participant. Further, the Court in Melton, was confronted with an inadequate record and was careful to limit its holding to the particular facts at hand. Id. In the present case, the probation department concluded that Salazar was of equal culpability in the offense and that Salazar displayed a knife

during the transaction. See Addendum to PSR, § III. The district court specifically adopted both the PSR and the Addendum to the PSR, including this finding. The district court sufficiently articulated the factual basis upon which it concluded that Salazar was not a minor participant.

For the foregoing reasons the judgment of the district court is AFFIRMED.