

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-1924  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ABEL A. TORRES,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:92-CR-94-A  
- - - - -

June 22, 1993

Before POLITZ, Chief Judge, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Abel A. Torres challenges his sentence by arguing that the district court erred in finding that the possession of the firearm by his co-defendant during the drug transaction was reasonably foreseeable to Torres under U.S.S.G. § 2D1.1(b)(1). We find no merit to his arguments and AFFIRM.

We review the district court's finding for clear error. We will not reverse if the court's finding is plausible in light of the whole record. United States v. Fields, 906 F.2d 139, 142

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(5th Cir.), cert. denied, 111 S.Ct. 200 (1990).

"Sentencing courts . . . may ordinarily infer that a defendant should have foreseen a co-defendant's possession of a . . . firearm, if the government demonstrates that another participant knowingly possessed the weapon while he and the defendant committed the offense . . . ." United States v. Aquilera-Zapata, 901 F.2d 1209, 1215 (5th Cir. 1990). The parties stipulated to the co-defendant's knowing possession.

"[T]he sentencing court ultimately may decline to find reasonable foreseeability in light of special circumstances or contrary evidence presented by the defendant in rebuttal." Id. at 1216. Torres had the burden to rebut the permissible inference to the district court. Torres stipulated to the facts triggering the permissible inference and he failed to rebut it. Moreover, a review of the record indicates that the district court's finding is plausible.

Torres argues that the wording used by the district court at sentencing indicates that the court applied an impermissible conclusive presumption, i.e., possession by the co-defendant equals possession by the defendant. Torres has taken one sentence out of context. The district court accurately stated controlling law: "`conduct for which the defendant otherwise is accountable include[s] conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant.'" See U.S.S.G. § 1B1.3, comment. (n.1); Aquilera-Zapata, 901 F.2d at 1213-14.

AFFIRMED.