

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7304
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RENE B. GONZALEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR M-91-296-01)

September 9, 1993

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Rene B. Gonzalez appeals his conviction and sentence for conspiracy to possess more than 50 kilograms of marijuana with intent to distribute, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(C). We **AFFIRM**.

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

In October 1991, Gonzalez contacted Rolando Garcia, an undercover police officer posing as a drug dealer, to purchase marijuana. They met the following day; and Gonzales agreed to purchase 70 pounds of marijuana for \$40,000, with Garcia fronting him another 50 pounds to be paid for after Gonzalez sold it to his Michigan associates.

Several days later, Garcia and his partner went to Gonzalez's home to complete the transaction. When they arrived, Gonzalez introduced them to Joe David Tejeda; Tejeda stated that he would be handling the Michigan end of the transaction. After a brief discussion, Gonzalez retrieved \$40,000 from his bedroom. He also showed the officers two hollow logs that he intended to use to transport the marijuana. Gonzalez and Tejeda were then arrested. During a subsequent search of the house, the officers found two loaded firearms in Gonzalez's bedroom, financial ledgers, and \$230,000 cash buried under a room off of the garage.

Gonzales was charged in a two-count indictment with conspiracy to possess marijuana with intent to distribute and possession of a firearm during and in relation to a drug trafficking offense. In April 1992, he was convicted of the conspiracy count, but acquitted of the firearms count.

The Presentence Report (PSR) recommended a base offense level of 20, because the conspiracy involved 120 pounds of marijuana; a two-level enhancement under U.S.S.G. §2D1.1(b)(1) for possession of a dangerous weapon during the commission of the offense; and a two-

level enhancement under U.S.S.G. §3B1.1(c) for being a leader and organizer of the conspiracy. Gonzalez objected to both enhancements; but the district court overruled the objections, adopted the findings in the PSR, and sentenced Gonzalez accordingly.

II.

Gonzalez contends that the evidence was insufficient to support his conviction, and that the district court erred in imposing the dangerous weapon enhancement, and in failing to determine on the record the quantity of marijuana involved in the conspiracy for sentencing purposes.

A.

This court reviews a claim regarding the sufficiency of the evidence *de novo*.² **United States v. Restrepo**, 994 F.2d 173, 182 (5th Cir. 1993). The evidence, as well as all reasonable inferences drawn from it, is viewed in the light most favorable to the verdict, and the jury is the final arbiter of the weight of the evidence and the credibility of the witnesses. **Id.** The verdict will be upheld if "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt". **United States v. Bell**, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), *aff'd*, 462 U.S. 356 (1983). The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except guilt. **Restrepo**, 994 F.2d at 182.

² We decline to impose a higher standard of scrutiny for conspiracy cases involving paid confidential informants, as requested by Gonzalez.

To establish a drug conspiracy under 21 U.S.C. § 846, the government must prove the existence of an agreement to violate the narcotics law; the defendant's knowledge of the agreement; and the defendant's voluntary participation in it. ***United States v. Lopez***, 979 F.2d 1024, 1029 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2349 (1993). The evidence at trial, which included several recorded conversations, was in part that Gonzalez initiated negotiations for purchasing the marijuana; that he negotiated to purchase 120 pounds from Garcia, with \$40,000 to be paid initially and the balance to be paid later; that Tejeda was his associate in the enterprise and was responsible for negotiating with the Michigan buyers; that Gonzalez prepared two hollow logs to transport the marijuana; that he presented \$40,000 in payment for the marijuana; that the money smelled foul because it had been buried; that additional buried money was discovered in a room off of the garage; that it was common for drug dealers to bury their money; and that the money was in small denominations, which was typical in drug deals. Needless to say, this evidence is more than adequate to support the verdict.

Gonzalez essentially contends that some of the testimony presented at trial was unreliable, and that the defense provided a legal and innocent reason for Tejeda's presence during the negotiations. These arguments challenge the weight and credibility of the evidence, which, as noted, fall within the province of the jury. His contentions are, therefore, meritless.

B.

With respect to the enhancement for possession of a dangerous weapon, Gonzalez contends that there was insufficient evidence to support the district court's finding that he possessed a dangerous weapon during the course of the conspiracy. The district court's finding under § 2D1.1(b)(1) is a factual finding reviewed only for clear error. **United States v. Eastland**, 989 F.2d 760, 769 (5th Cir. 1993), *petition for cert. filed*, No. 93-5368 (July 6, 1993). "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 ...". **Anderson v. City of Bessemer City**, 470 U.S. 564, 573-74 (1985).

The comments to § 2D1.1 provide that the two-level enhancement should be applied "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense". U.S.S.G. § 2D1.1, comment. (n.3). To satisfy this requirement, the government must prove by a preponderance of the evidence "that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant". **Eastland**, 989 F.2d at 770 (internal quotations and citation omitted). The government must show that the weapon was found with the drugs or drug paraphernalia or where part of the transaction occurred. **Id.**

As noted, the trial testimony established that two loaded firearms were found in Gonzalez's bedroom, and that Gonzalez retrieved the \$40,000 from there. Additionally, \$230,000 cash was found buried in a room off of the garage, and the hollow logs

Gonzalez intended to use to transport the marijuana were located in the garage. Finally, the negotiated sale was to take place in Gonzalez's home. This evidence is more than adequate to establish a temporal and spatial relation between the firearms and the offense; the district court did not err.

C.

Finally, with regard to the district court's finding on the quantity of marijuana for the base offense level, Gonzalez's failed to raise his contentions in district court. Accordingly, we review only for plain error. **United States v. Lopez**, 923 F.2d 47, 50 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2032 (1991). Plain error is error that seriously affects the fairness, integrity, or public reputation of the judicial proceeding. **United States v. Olano**, ___ U.S. ___, 113 S.Ct. 1770, 1779 (1993).

All factual disputes regarding information contained in the PSR must be resolved on the record. Fed. R. Crim. P. 32(c)(3)(D); **United States v. Warters**, 885 F.2d 1266, 1272 (5th Cir. 1989). If a defendant does not offer rebuttal evidence, however, the district court may adopt facts stated in the PSR without a more specific inquiry if they have an evidentiary basis. **United States v. Thomas**, 932 F.2d 1085, 1091 n.4 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 887 (1992).

The PSR stated that Gonzalez negotiated to purchase 70 pounds of marijuana and to receive another 50 pounds on credit. Gonzalez did not object to these facts, so the district court was permitted

to adopt them in determining the quantity of marijuana involved in the conspiracy. In short, there was no plain error.

III.

For the foregoing reasons, the conviction and sentence are

AFFIRMED.