UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-2873
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MONROE KIRKPATRICK,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-93-56-5)

(February 6, 1995)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:[1]

Monroe Kirkpatrick pleaded guilty to two counts of odometer tampering (Counts 12 and 13 of a multiple-count indictment). Kirkpatrick now appeals his conviction and sentence. We find no error and affirm.

I.

Kirkpatrick seeks to withdraw his guilty plea because the trial court declined to adjust his sentence for acceptance of responsibility under U.S.S.G. § 3E1.1. As part of Kirkpatrick's

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

plea agreement, the government agreed to stipulate that he had accepted responsibility for his conduct. Although the government made the promised stipulation, the district court did not give Kirkpatrick this adjustment. Kirkpatrick now claims that his "plea agreement was not voluntarily given based on the representations made to him prior to sentencing."

This claim is meritless. The government completely fulfilled its end of the plea agreement. It recommended, both in the PSR and to the district court at the sentencing hearing, that Kirkpatrick receive a reduction in sentence for acceptance of responsibility. Moreover, Kirkpatrick was well aware that the sentencing recommendations of the government were not binding on the court. The plea agreement made this fact exceedingly clear. At the guilty plea hearing, Kirkpatrick acknowledged that he understood that the government's recommendations were not binding on the court. At sentencing, the court again reiterated that it was not bound by the stipulation. Kirkpatrick is not entitled to withdraw his guilty plea on the basis of his "disappointed but unfounded expectations." **United States v. Badaracco**, 954 F.2d 928, 939 (3d Cir. 1992).

II.

Kirkpatrick appeals his sentence on several grounds which are discussed below.

A.

Kirkpatrick argues next that the district court erred in determining the number of vehicles attributable to him for purposes of calculating the amount of loss upon which his offense level was

based. The district court accepted the findings of the PSR, which determined that Kirkpatrick was accountable for odometer tampering on at least 2,000 vehicles. The PSR's estimate was based on Kirkpatrick's "own admissions that he altered 800 vehicles (collectively) for Travis Barnes, Sr., and William Whitlow; and his acknowledgment before the grand jury that he had been altering odometers since the age of 12, which involved thousands of odometers over his lifetime."

This Court reviews factual findings of the sentencing court for clear error. **United States v. Morales-Vasquez**, 919 F.2d 258, 263 (5th Cir. 1990). In making sentencing decisions, the district court properly considers any relevant evidence, "provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a). The PSR is considered reliable and may be considered as evidence by the court when making sentencing determinations. **United States v. Lghodaro**, 967 F.2d 1028, 1030 (5th Cir. 1992).

Kirkpatrick argues that the 2000-vehicle figure is based on all the odometers that he had altered over the course of his lifetime and all the odometers rolled back by all the members of the various conspiracies with which he was involved. However, the district court explicitly found that this figure was not based on either a lifetime of vehicles or entire conspiracies. The court found that 2000 vehicles represented the number of vehicles Kirkpatrick altered since 1972, the date the government illegalized odometer tampering, and the activity of his co-conspirators that

was reasonably foreseeable to him. Aside from his unsworn assertions that this figure was too large, Kirkpatrick provided nothing to contradict the 2000-vehicle figure. In this circumstance, the district court was entitled to rely on the PSR. **Id.**

Furthermore, even if we were to determine that the district court should have accepted the 500-vehicle figure advocated by Kirkpatrick, that error would not require a remand for resentencing. In overruling Kirkpatrick's objection on this issue, the court noted that the guideline range resulting from 500 vehicles overlapped the range resulting from 2000 vehicles. Because the court explicitly found that the distinction between 500 and 2000 vehicles would not "make any difference", remand would be unwarranted. **Williams v. United States**, 112 S.Ct. 1112, 1120-21 (1992).

B.

Kirkpatrick argues next that he is entitled to a two-level downward adjustment in his offense level because he was a minor participant. He argues that he fulfilled a discrete function within the conspiracy - rolling back odometers when asked to do so - and that he did not handle the money, purchase the cars, alter the titles or misrepresent low mileage to car buyers.

We review a district court's decisions about minor participant status under a clearly-erroneous standard. **U.S. v. Thomas**, 932 F.2d 1085, 1092 (5th Cir.), **cert. denied**, 112 S. Ct. 264 (1991). A minor participant is "any participant who is less culpable than

most other participants, but whose role could not be described as minimal." § 3B1.2(b), comment. (n.3). It is not enough that the defendant did less than other participants; rather, the defendant's activities must be insignificant enough to be considered at best "peripheral to the advancement of the illicit activity." **Thomas**, 932 F.2d at 1092.

The PSR showed that Kirkpatrick actively and regularly participated in odometer rollback schemes for many years. The district court found that the PSR was supported by a preponderance of credible and reliable evidence. Aside from his unsworn objections to this portion of the PSR, Kirkpatrick did not provide any evidence to the contrary. Thus, the district court did not clearly err in denying Kirkpatrick minor-participant status.

C.

Kirkpatrick contends next that the court erred in denying him a reduction for acceptance of responsibility under § 3E1.1, because he admitted his crimes and entered a guilty plea. This court applies a deferential standard of review to a district court's refusal to credit a defendant's acceptance of responsibility. **See United States v. Thomas**, 12 F.3d 1350, 1372 (5th Cir.), **cert. denied**, 114 S.Ct. 1861 (1994).

Kirkpatrick's guilty plea did not entitle him to a reduction for acceptance of responsibility as a matter of right. **United States v. Nevarez-Arreola**, 885 F.2d 243, 246 (5th Cir. 1989). Although Kirkpatrick acknowledged some acts of odometer tampering, the district court was entitled to find that "he did not

demonstrate sincere contrition regarding the full extent of his criminal conduct." **Thomas**, 12 F.3d at 1372 (internal citation omitted). The district court found that Kirkpatrick had excused his conduct by saying that he did not believe rolling back odometers was wrong and that he blamed the automobile industry for creating the incentives to engage in this criminal conduct. Kirkpatrick also gave inconsistent statements about the number of odometers he had altered. The district court recognized that the government recommended this reduction but rejected it "with great reluctance and with a genuine feeling of being compelled [by] the full evidence and information before me." We conclude that the district court did not err.

D.

Finally, Kirkpatrick argues that the sentencing court failed to state adequately its reasons for choosing a sentence. However, "when the spread of an applicable Guideline range is less than 24 months, the district court is not required to state its reasons for imposing a sentence at a particular point within the applicable range." **United States v. Matovsky**, 935 F.2d 719, 721 (5th Cir. 1991) (internal citation omitted). In Kirkpatrick's case, the spread was eleven months.[2] Further, we note that the district court did specify that its sentence was based on Kirkpatrick's criminal history and the extent and duration of his criminal

[2]In his brief, Kirkpatrick states that the spread of his guideline range was 36 months. This is simply erroneous. Kirkpatrick's combined offense level was 22 and his criminal history category was II. This gave Kirkpatrick a range of 46 - 57 months.

involvement. Additionally, the district court sentenced Kirkpatrick at the bottom of the guideline range.

Kirkpatrick also disputes the district court's decision to make his sentences run consecutively. However, the district court properly sentenced Kirkpatrick consecutively to 36 months on Count 12 and 10 months on Count 13, to arrive within the range established by Kirkpatrick's combined offense level, 46 to 57 months. **See** § 5G1.3. The district court's sentence is proper.

For the reasons discussed above, the judgement of the district court is AFFIRMED.