

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7264
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NICANOR INOCENCIO,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. L-92-CR-249-2
- - - - -
(January 6, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Nicanor Inocencio pleaded guilty to conspiracy and possession with intent to distribute five or more kilograms of cocaine and was sentenced to concurrent 192 month terms. Inocencio appeals his sentence and argues that the district court erred in applying a two level increase on the basis of firearm possession. Inocencio contends that the district court failed to make an explicit or implicit finding that he could have

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

reasonably foreseen his co-defendant's possession of a weapon.

U.S.S.G. § 2D1.1(b)(1) requires a two level increase in the offense level where "a dangerous weapon (including a firearm) was possessed." The Government can prove possession in two ways. First, the Government can prove that the defendant personally possessed the weapon by showing that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant. Second, when another individual involved in the commission of the offense possessed the weapon, the Government must show that the defendant could have reasonably foreseen that possession. United States v. Hooten, 942 F.2d 878, 882 (5th Cir. 1991); United States v. Aguilera-Zapata, 901 F.2d 1209, 1215-16 (5th Cir. 1990). Application of § 2D1.1(b)(1) is essentially a factual determination to be made by the district court and is reviewed under the clearly erroneous standard. United States v. Paulk, 917 F.2d 879, 882 (5th Cir. 1990).

Application of § 2D1.1(b)(1) was not clearly erroneous. Contrary to Inocencio's contentions, the district court did not base the increase on a finding that the co-defendant possessed a firearm. Rather, the district court examined the temporal and spatial relationship between the handgun, the drug trafficking activity, and Inocencio and concluded that Inocencio personally possessed the firearm. This conclusion is supported by the record: The firearm was in the glove compartment of Inocencio's vehicle; the glove compartment was directly in front of Inocencio; an ammunition clip was easily accessible to Inocencio;

and Inocencio was acting as a lookout for a large cocaine shipment. These facts establish the requisite temporal and spatial relationship between the firearm, the drugs, and Inocencio. As personal possession of a firearm is a sufficient basis for applying § 2D1.1(b)(1), the sentence is AFFIRMED.