

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10500

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN MORALES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-136-A)

(March 6, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

John Morales pleaded guilty to one count of conspiracy to distribute and to possess with intent to distribute more than one kilogram of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii), and 846. The district court accepted his plea and sentenced Morales to 120 months' imprisonment, five years' supervised release, and a \$50.00

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

special assessment. Morales appeals his sentence, contending that the district court erred in calculating the relevant quantity of drugs for which Morales should be held responsible. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A federal grand jury in Texas indicted Morales, along with Debbie Campbell (Morales' wife, from whom he is separated), and Jeanene Trickett, of one count of conspiracy to distribute and possess with an intent to distribute greater than one kilogram of methamphetamine, and one count of possession with intent to distribute greater than one kilogram of methamphetamine. Pursuant to a plea agreement, each of the defendants pleaded guilty to the conspiracy count, and the government agreed to dismiss the substantive count of possession.

A stipulation of facts signed by Morales indicated the following. On October 15, 1993, a package containing 1,827 grams of methamphetamine was delivered via United Parcel Service ("UPS") to Phillip Allen, 7445 Van Natta, in Forth Worth, Texas. The package had been opened en route by a Drug Enforcement Agency agent pursuant to a valid search warrant. Agents made a controlled delivery to Debra Sue Allen, at the address specified on the package. Immediately following Allen's acceptance of the package, Allen was arrested.

Subsequent to her arrest, Allen agreed to cooperate with the authorities. Allen told the authorities that she was supposed to

send payment for the drugs to Morales' address. Allen and DEA agents then prepared a package, containing \$250.00, and sent it to Morales. After Morales received the package, agents searched his home and found Morales in the bathroom, holding the package and attempting to flush the cash down the toilet.

Allen told authorities that she received methamphetamine on several occasions from Trickett and Campbell, both of whom resided near Los Angeles, California. Upon receipt of the drugs, Allen would sell them to her customers in Texas, then send the money via mail or wire to addresses provided by Trickett and Campbell. One of the addresses to which Allen had been instructed to send money was Morales' address. The PSR indicates that UPS shipments were sent to Morales' address from Allen on December 21, 1992, and October 1, 1993. The first package was received by "a man" and the second package was left at the front door. In addition, Allen sent Morales a wire transfer of \$2,000 via Western Union on October 14, 1993.

The presentence investigation report ("PSR") calculated that the conspiracy had involved at least 23 kilograms (approximately 51 pounds) of methamphetamine. However, the PSR concluded that "as [Morales'] involvement in the conspiracy is considered to be very limited, it does not appear that he should be accountable for all relevant conduct of his co-conspirators due to the limited scope of the criminal activity jointly undertaken by the defendant." The PSR stated that while Morales *could* be held accountable for approximately 7 pounds, 8 ounces (3.17

kilograms), it recommended that Morales be held accountable only for the amount actually seized upon Allen's arrest (1.669 kilograms).¹ As such, the PSR calculated Morales' base offense level to be 32.

Combined with a criminal history category of I, a three level reduction for his role in the offense, and a three level downward adjustment for acceptance of responsibility, the applicable sentencing guidelines yielded a total offense level of 26 and a corresponding punishment range of, inter alia, 63 to 78 months' imprisonment. However, because the statute under which Morales was convicted imposes a mandatory minimum sentence which "may not be less than ten years," 21 U.S.C. § 841(b)(1)(A), the PSR concluded that Morales' sentence should be 120 months. See U.S.S.G. § 5G1.1(b) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.").

The district court agreed and adopted the recommendation of the PSR. Pursuant to U.S.S.G. § 5G1.1(b), the district court sentenced Campbell to the minimum applicable punishment within the Guidelines of 120 months' imprisonment, five years of supervised release, and a special assessment of \$50.00.

II. STANDARD OF REVIEW

¹ 1,669 net grams of methamphetamine is noted in the PSR addendum as being the equivalent of 1,827 grams of methamphetamine.

A sentencing court's factual findings must be supported by a preponderance of the evidence, United States v. McCaskey, 9 F.3d 368, 372 (5th Cir. 1993), cert. denied, 114 S. Ct. 1565 (1994), and we review such findings under the clearly erroneous standard. United States v. Palmer, 31 F.3d 259, 261 (5th Cir. 1994). In particular, a district court's determination of the amount of drugs involved in an offense will be reversed only for clear error. United States v. Mergerson, 4 F.3d 337, 345 (5th Cir. 1993), cert. denied, 114 S. Ct. 1310 (1994); United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990). A factual finding is clearly erroneous if it is not plausible in light of the record taken as a whole. See Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985). Whether the district court correctly applied the Guidelines is a question of law subject to de novo review. United States v. Diaz, 39 F.3d 568, 571 (5th Cir. 1994).

A presentence investigation report generally bears sufficient indicia of reliability to be considered by the trial court as evidence in making the factual determinations required by the sentencing guidelines. United States v. Gracia, 983 F.2d 625, 629 (5th Cir. 1993); United States v. Robins, 978 F.2d 881, 889 (5th Cir. 1992). A district court may rely on the PSR's construction of the evidence to resolve a factual dispute rather than rely on the defendant's version of the facts. Robins, 978 F.2d at 889. A defendant challenging the accuracy of the PSR therefore bears the burden of proving that the information relied upon by the district court in sentencing is

materially untrue. United States v. Young, 981 F.2d 180, 185 (5th Cir. 1992), cert. denied, 113 S. Ct. 2454 (1993).

III. ANALYSIS

Morales contends that the district court erred in calculating the relevant quantity of methamphetamine for which he should be held responsible in sentencing. Specifically, he argues that the quantity of methamphetamine that was reasonably foreseeable to him was less than one kilogram. He claims that because the police can directly prove that he received only one package containing \$250.00, the evidence is insufficient to prove, by a preponderance, that he knew or had reason to know that the conspiracy he joined involved an amount of greater than one kilogram.

In support of his argument, Morales contends that our recent decision in United States v. Mergerson, 4 F.3d 337 (5th Cir. 1993), cert. denied, 114 S. Ct. 1310 (1994), stands for the proposition that determining the applicable quantity of drugs for sentencing purposes "need not finally be determined until the sentencing hearing when the district judge, applying a preponderance of the evidence standard, determines the quantity of drugs involved in the offense and applies the guidelines accordingly." While we agree that Morales' correctly characterizes our holding in Mergerson, we find that it offers him no reprieve.

In Mergerson, we held that, in determining the applicable sentence when the Guidelines conflict with a statutory penalty, the statutory penalty trumps. Mergerson, 4 F.3d at 345-47; accord § U.S.S.G. 5G1.1(b). Thus, because the statute under which Mergerson was convicted, 21 U.S.C. § 841(b)(1)(A), required proof that the defendant *actually possess with intent to distribute* the drug, we held that, in order to impose the statutorily mandated penalty which corresponded to the offense, the government had to prove that the defendant actually possessed the specified quantity with an intent to distribute. Id. at 345. Morales correctly contends that Mergerson requires that, in order to impose upon Morales the statutorily mandated minimum penalty of ten years, the government must have proven, by a preponderance of the evidence, that Morales conspired to possess over one kilogram of methamphetamine.

We believe that the PSR and the evidence adduced at Morales' sentencing hearing are sufficient to prove, by a preponderance of the evidence, that Morales knew or reasonably should have foreseen that the conspiracy he willfully joined involved an amount of methamphetamine of greater than one kilogram. At least two UPS shipments of cash were sent to Morales' address. At least one wire transfer of \$2,000 was sent from Allen to Morales. The final UPS delivery, which was indisputably received by Morales, represented partial payment for the 1.669 kilograms of methamphetamine that had been sent to Allen.

Furthermore, the factual resume attached to Morales' plea agreement stated that, in order to prove the offense to which he pleaded guilty, the government would have to present evidence which established, beyond a reasonable doubt:

First: That two or more persons made an agreement to commit the crime of Possession With Intent To Distribute or Distribution of More than 1 Kilogram of Methamphetamine as charged in the indictment; and

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose.

The stipulation of facts further recited that "[t]he defendant, John Morales, with knowledge of the conspiracy to distribute methamphetamine, and with intent to further the conspiracy, would receive the [drug] funds [from Allen] and turn them over to Trickett and Campbell."

The district judge informed Morales prior to accepting his guilty plea that the government had to prove that

two or more persons made an agreement to commit the crime of possession with intent to distribute or distribution of more than one kilogram of methamphetamine as charged in the indictment. And, second, that [Morales] knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose.

When asked by the court if he admitted that all of those elements existed beyond a reasonable doubt, Morales answered "yes." The district court also told Morales that, by entering a guilty plea, he was "subjecting [him]self to a term of imprisonment of ten years, not less than ten years." Morales stated that he understood the consequences of his guilty plea.

Based upon this evidence, the district court found that the government had proven that Morales knew or should reasonably have foreseen that the conspiracy he joined involved more than one kilogram of methamphetamine. The district court's factual finding as to the quantity of drugs about which Morales knew or should have reasonably foreseen is plausible in light of the record as a whole. Thus, Morales has not borne his burden of proving that this factual finding of the district court is clearly erroneous.

IV. CONCLUSION

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