

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

June 17, 2022

Lyle W. Cayce
Clerk

No. 21-40845
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

OSIEL GUTIERREZ-LARA,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:21-CR-1501-3

Before BARKSDALE, COSTA, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Osiel Gutierrez-Lara pleaded guilty to one count of conspiring to transport aliens within the United States, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(v)(I), 1324(a)(1)(A)(ii), 1324(a)(1)(B)(i), and was sentenced to, *inter alia*, 24 months' imprisonment. Gutierrez challenges the

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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application of a base-offense level enhancement under Sentencing Guideline § 2L1.1(b)(5)(C) based upon his possession of a box cutter. He contends the district court erred because: it relied upon hearsay evidence contained within the record, rather than his in-court statements denying that he reached for the box cutter while resisting arrest; he was in possession of a box cutter due to his career as a construction laborer and not as a weapon; he never used or brandished the box cutter while committing the offense; and the court made factual findings during the sentencing of his codefendant which reflect a misapplication or a misunderstanding of the Guidelines.

Although post-*Booker*, the Sentencing Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 46, 51 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence is reviewed for substantive reasonableness under an abuse-of-discretion standard. *Id.* at 51; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed *de novo*; its factual findings, only for clear error. *E.g.*, *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008).

Gutierrez objected to the Guideline § 2L1.1(b)(5)(C) enhancement in district court on the grounds that he was in possession of the box cutter in connection with his work as a laborer, and not as a weapon, and that he never used or brandished the box cutter while committing the offense. As discussed *supra*, for properly preserved objections, factual findings are reviewed for clear error; Guidelines interpretations, *de novo*. Clear-error review requires “a factual finding to be plausible in [the] light of the record as a whole”. *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011).

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Gutierrez did not, however, object to the court's: reliance upon hearsay evidence in the record over his in-court statements in imposing the enhancement; or factual findings at sentencing, which he contends reflect a misunderstanding or misapplication of the Guidelines. Accordingly, review is only for plain error. *E.g., United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). Under that standard, Gutierrez must show a forfeited plain error (clear or obvious error, rather than one subject to reasonable dispute) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes that showing, we have the discretion to correct the reversible plain error, but generally should do so only if it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings”. *Id.*

Defendant's offense level is increased by two levels “[i]f a dangerous weapon (including a firearm) was possessed”. Guideline § 2L1.1(b)(5)(C). When making factual findings for sentencing purposes, the district court may consider any relevant information, irrespective of its admissibility under the Federal Rules of Evidence, if “the information has sufficient indicia of reliability to support its probable accuracy”. Guideline § 6A1.3(a), p.s.; FED. R. EVID. 1101(d)(3) (stating rules, “except for those on privilege”, do not apply to sentencing proceedings); *United States v. Zuniga*, 720 F.3d 587, 590–91 (5th Cir. 2013) (reciting general rule).

For making factual findings, “[a] presentence [investigation] report [(PSR)] generally bears sufficient indicia of reliability to be considered as evidence”. *United States v. Piper*, 912 F.3d 847, 859 (5th Cir. 2019) (citation omitted). And, for obvious reasons, the district court has significant discretion in evaluating reliability; and, accordingly, our court “defer[s] to a sentencing court's credibility determinations”. *United States v. Kearby*, 943 F.3d 969, 975 (5th Cir. 2019).

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The court’s finding that Gutierrez possessed a dangerous weapon, a box cutter, in connection with his alien-transporting offense is plausible in the light of the record. The court was within its discretion to credit the information in the PSR over the objections by Gutierrez. *See United States v. Sotelo*, 97 F.3d 782, 799 (5th Cir. 1996) (“Credibility determinations in sentencing hearings are peculiarly within the province of the trier-of-fact.” (citation omitted)). Gutierrez’ other challenges to the application of the enhancement likewise do not show an error by the court, plain or otherwise.

First, even assuming Gutierrez carried a box cutter for his employment as a laborer, such an assumption does not render implausible the court’s finding that Gutierrez possessed the weapon in connection with his offense of conviction. *See United States v. Ruiz*, 621 F.3d 390, 394, 396–97 (5th Cir. 2010) (rejecting police officer’s claim that his duty sidearm was merely an “extension of his uniform” and should not have been considered for purposes of the Guideline § 2D1.1 dangerous-weapon enhancement). Second, it is irrelevant whether Gutierrez used or brandished the box cutter during the offense of conviction, because, as stated *supra*, the enhancement applies “[i]f a dangerous weapon (including a firearm) was *possessed*”, and not whether the weapon was used or brandished. Guideline § 2L1.1(b)(5)(C) (emphasis added); *cf.* Guideline § 2L1.1(b)(5)(B) (directing enhancement “[i]f a dangerous weapon . . . was brandished or otherwise used”). Third, our court “may affirm the district court’s judgment on any basis supported by the record”. *United States v. Chacon*, 742 F.3d 219, 220 (5th Cir. 2014).

AFFIRMED.