IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1872
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KELVIN LAMAR OWENS,
a/k/a Pancho Vegas

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(4:92-CR-10-Y-5)

(August 25, 1994)

Before JOLLY, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

In this direct criminal appeal, Defendant-Appellant Kelvin Lamar Owens contests his conviction and sentence for drug related crimes. Specifically, Owens contests evidentiary rulings and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sentence calculation and evidence. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

A Texas grand jury returned a 35-count indictment against Owens and 22 others, alleging drug, weapons, and money-laundering offenses. Following a two-day trial, a jury convicted Owens on the three counts for which he was charged. The district court sentenced Owens to life imprisonment, and this appeal followed.

The district court allowed Texas Highway Patrol Officer John Pellizzari to testify that a narcotics detection dog alerted on the door and trunk area of a vehicle driven by Owens. At trial and on appeal, Owens objected to the testimony as hearsay, arguing that the dog's alert is assertive conduct, and thus a statement for purposes of the hearsay rule.

Pellizzari testified that he stopped a car driven by Owens because he was not wearing a seat belt, then learned that Owens did not have a driver's license. Pellizzari impounded the vehicle because neither Owens nor either of his two passengers could legally operate the car in Texas. Pellizzari searched the vehicle and released its personal contents to the occupants. One of the items was a blue antifreeze jug. Pellizzari testified that the jug appeared to contain water.

Pellizzari arrested Owens for traffic violations, and he was released that same day. The next day a narcotics detection dog searched the vehicle and alerted to the driver's door handle and

the right side of the trunk area, but no drugs were found in the car. According to Shelley Franklin, a co-conspirator in the drug distribution ring, the antifreeze bottle contained one kilogram of cocaine dissolved in water.

II

ANALYSIS

A.

We review the district court's evidentiary rulings for abuse of discretion. United States v. Carrillo, 20 F.3d 617, 619 (5th Cir. 1994). In a criminal case, "review of the trial court's evidentiary rulings is necessarily heightened." Id.

The government argues that the dog's alert could not be a statement under Fed. R. Evid. 801(a), which defines the term "statement" as "nonverbal conduct of a person, if it is intended by the person as an assertion." The government maintains that, as a dog is not a person, its nonverbal assertion--the alert--cannot be a statement for purposes of the hearsay rule.

We need not decide this issue, however, as any error that may have occurred was harmless in view of the overwhelming evidence of Owens' guilt. The harmless-error doctrine mandates that we view the error in relation to the entire proceeding. United States v. Gadison, 8 F.3d 186, 192 (5th Cir. 1993). To reverse a conviction based on the erroneous admission of testimony, we must find "a significant possibility that the testimony had a substantial impact on the jury." United States v. Sanchez-Sotelo, 8 F.3d 202, 210 (5th Cir. 1993) (internal quotations omitted), cert. denied,

114 S.Ct. 1410 (1994).

Franklin testified that Owens was involved with Ronald Fisher, Franklin, and a number of other individuals in the business of selling crack cocaine. Fisher introduced Franklin to Owens in September of 1990 in Fort Worth, Texas. Owens, who was from Las Vegas, took one kilogram of cocaine back there with him. Franklin explained that the usual method of transporting the cocaine was to dissolve it in water in an antifreeze container, then reseal the bottle. Franklin testified that he was involved in cocaine transactions with Owens every six or seven weeks between September 1990 and September 1991, and that they always used the same method to transport the cocaine.

Franklin indicated that Fisher and Owens had a close relationship, that they referred to each other as brothers, and that Owens stayed in Fort Worth for an extended period to protect Fisher after Fisher had been injured. Franklin further testified that Owens made some payments for the cocaine in person, through Western Union, or by wire from Las Vegas to Fort Worth through an intermediary in California. Franklin identified a number of wire transfers from Owens or a friend in Las Vegas to Fort Worth.

Gerald Brown testified that he was involved in drug sales with Fisher and Owens. Brown's role in the organization was to test the cocaine for purity. He first met Owens in late 1990 or early 1991. Brown testified that he attended a meeting with Owens, Fisher, and Victor Costa at a restaurant in Arlington, Texas, early in 1991. The group went to Brown's house from the restaurant to consummate

a cocaine transaction. Brown tested the cocaine Costa produced and informed Fisher of its purity. Owens then gave Costa a large sum of money and a handgun, and Owens left with the cocaine. According to Brown, Costa made three more deliveries of cocaine to Fisher and Owens at Brown's house. Brown testified that the total amount involved in these transactions was about 10 kilograms. Brown further indicated that Owens always carried a firearm.

Victor Costa testified that he met Owens through Fisher in early 1991. The purpose of the meeting was to determine whether Fisher could sell between 100 and 300 kilograms of cocaine a month. Costa testified that, during a February 1991 meeting at a Denny's restaurant, Owens explained how he transported cocaine from Fort Worth to Las Vegas by dissolving it in containers, then transformed it to rock or base there.

The men came to an agreement concerning a cocaine deal and went out to the parking lot to transfer the money. Fisher and Owens got into one vehicle and Costa got into his. Fisher then handed Costa $35,000. Costa testified that the money was final payment on a six-kilogram deal. He also described a four-kilogram deal at Brown's home in which Owens participated. Costa testified that Owens brought $80,000 to the house to pay for the cocaine, and that he (Costa) did three deals involving Owens, delivering between 24 and 30 kilograms of cocaine to Fisher.

This evidence firmly establishes that Owens was a key player in Fisher's organization. In view of this evidence, it is unlikely that Pellizzari's testimony concerning the dog alert had a

significant impact on the jury or its verdict; thus, any error in admitting this testimony would be harmless.

B.

Owens next contends that the district court erred by overruling his objection to using the guideline for crack rather than the guideline for powder cocaine in the presentence investigation report (PSR) to establish his offense level. Owens argues that the evidence at trial indicated, at most, that he picked up and delivered powder cocaine for Fisher and Costa. Owens maintains that the PSR's reliance on testimony from the trials of co-defendants to establish his involvement with crack violates his Sixth Amendment right to confrontation.

The PSR states that, as part of the conspiracy, Fisher obtained multi-kilogram quantities of cocaine from Costa and converted it to crack for distribution. Fisher provided crack to Owens, who transported it to Las Vegas and distributed it. Owens ran a number of crack houses in Las Vegas, which he pointed out to Franklin and Fisher during a visit. The PSR indicates that the Fisher organization, in which Owens played a managerial role, manufactured bulk quantities of crack cocaine from the powder cocaine obtained from Costa. The PSR explained that Costa's testimony at Owens' trial did not paint a complete picture of the scope of the Fisher organization. Therefore, to supplement this testimony, the probation officer relied on Costa's testimony from Fisher's trial, investigative materials, and interviews with DEA agents.

In computing Owens' base offense level, the author of the PSR observed that Costa delivered between 24 and 30 kilograms of cocaine to Fisher between December 1990 and February 1991. As the object of the Fisher organization was to convert cocaine into crack for distribution, the probation officer interviewed a DEA chemist to ascertain how much crack could be produced from 24 to 30 kilograms of cocaine. The chemist reported that 24 kilograms of cocaine could be converted to 21.36 kilograms of crack. Using this information, Owens' base offense level was calculated in the PSR as 42, pursuant to U.S.S.G. § 2D1.1(c)(1) (15 kilograms or more of cocaine base).[1]

We review a sentencing court's factual findings for clear error. United States v. Eastland, 989 F.2d 760, 767 (5th Cir.), cert. denied, 114 S.Ct. 246, and cert. denied, 114 S.Ct. 443 (1993). Although Owens objected to the PSR's determination that he should be sentenced under the crack guideline, he offered no evidence to rebut the PSR's factual findings. See United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991) (defendant bears burden of proving contents of PSR unreliable), cert. denied, 112 S.Ct. 1677, and cert. denied, 112 S.Ct. 2290 (1992). Accordingly, the district court was free to adopt the facts in the PSR without further inquiry, provided those findings had a sufficient evidentiary basis. United States v. Sherbak, 950 F.2d 1095, 1099-

[1] If the PSR had used the amount of cocaine involved rather than converting it to crack, Owens' base offense level would have been 34. See § 2D1.1(c)(5) (at least 15 but less than 50 kilograms of cocaine).

1100 (5th Cir. 1992). In determining whether the findings had a sufficient evidentiary basis, the district court could consider any information, so long as there were sufficient indicia of reliability to support its probable accuracy. United States v. Angulo, 927 F.2d 202, 204-05 (5th Cir. 1991); see § 6A1.3, comment.

The district court did not clearly err by sentencing Owens under the guideline for crack. According to the PSR, the purpose of the Fisher organization was to manufacture and distribute crack, see United States v. Fisher, 22 F.3d 574, 575 (5th Cir. 1994); and Owens played a major role in this organization. Franklin and Costa testified at Owens' trial regarding Owens' involvement with crack. The PSR also relied on investigative materials, interviews with DEA agents, and testimony from the trials of co-conspirators to establish that Owens had sold and transported crack. Contrary to Owens' argument, the district court did not err in relying on this material. See, e.g., United States v. Vaquero, 997 F.2d 78, 84 (5th Cir.) (affirming leadership enhancement based on statements from confidential informants and cooperating defendants), cert. denied, 114 S.Ct. 614 (1993); United States v. Ramirez, 963 F.2d 693, 707-08 (5th Cir.) (affirming drug quantity finding based on testimony from co-conspirators' trial; court must comply with § 6A1.3 by giving defendant right to respond to information), cert. denied, 113 S.Ct. 388 (1992); United States v. Manthei, 913 F.2d 1130, 1137-38 (5th Cir. 1990) (affirming drug quantity finding based on DEA investigative materials and testimony from state criminal case against defendant).

In a related argument, Owens contends that the district court violated the Confrontation Clause by using testimony from the trials of co-defendants to support the finding that he was involved in the crack distribution. This argument is singularly lacking in merit. "[A] defendant's confrontation rights at a sentencing hearing are severely restricted. A court may rely upon uncorroborated hearsay testimony, and even on an out-of-court statement by an unidentified informant." United States v. Rodriguez, 897 F.2d 1324, 1328 (5th Cir.) (internal citations omitted), cert. denied, 498 U.S. 857 (1990). As long as evidence used at sentencing has "sufficient indicia of reliability to support its probable accuracy," it may be considered. § 6A1.3. Owens does not contend that the testimony from the prior trial is unreliable.

C.

Owens' final argument is that by imposing harsher penalties for crack offenses than for offenses involving powder cocaine, the Guidelines violate the Due Process Clause of the Fifth Amendment, and the Eighth Amendment's prohibition of cruel and unusual punishment. We rejected a similar Eighth Amendment challenge in the appeal of Owens' co-conspirators, Fisher and Dunkins. See Fisher, 22 F.3d at 579-80. Owens' due process challenge is foreclosed by United States v. Watson, 953 F.2d 895, 897 (5th Cir.), cert. denied, 112 S.Ct. 1989 (1992).

AFFIRMED.