

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-13669
Non-Argument Calendar

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT March 25, 2008 THOMAS K. KAHN CLERK

D. C. Docket No. 07-00061-CR-T-26-MSS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HERMINIO CASTRO-PALACIOS,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(March 25, 2008)

Before ANDERSON, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

After pleading guilty to possession with intent to distribute five kilograms or

more of cocaine while aboard a vessel subject to U.S. jurisdiction and conspiracy to possess with intent to distribute five kilograms or more of cocaine while aboard a vessel subject to U.S. jurisdiction, Herminio Castro-Palacios appeals the district court's imposition of 135-month concurrent sentences. Specifically, Castro-Palacios argues on appeal that the district court erred in denying him a mitigating-role reduction because: (a) his role was merely that of a deckhand who was involved in refueling operations; (b) he had no control over the events that occurred that day; (c) there was no evidence that he had ever owned, sold, or otherwise distributed drugs; and (d) he did not actually receive, nor did he believe that he would share in, any of the drug proceeds. Also, Castro-Palacios contends that his role as a courier must be viewed in light of the entire drug trafficking scheme, and that such a role is clearly less culpable than that of other participants comprising the entire conspiracy.

The U.S. Sentencing Guidelines permit a court to decrease a defendant's offense level by four levels if it finds that the defendant was a "minimal participant" in the criminal conspiracy, or by two levels if it finds that the defendant was a "minor participant" in the criminal activity. U.S. Sentencing Guidelines Manual § 3B1.2(a), (b) (2007). "The proponent of the downward adjustment . . . always bears the burden of proving a mitigating role in the offense

by a preponderance of the evidence.” United States v. Rodriguez De Varon, 175 F.3d 930, 939 (11th Cir. 1999) (en banc). We review the district court’s interpretation of the Sentencing Guidelines de novo, but we must accept the court’s factual findings unless they are clearly erroneous. United States v. Jordi, 418 F.3d 1212, 1214 (11th Cir. 2005). Specifically, we review the district court’s determination of a defendant’s role in the offense only for clear error. See Rodriguez De Varon, 175 F.3d at 937, 945. “So long as the basis of the trial court’s decision is supported by the record and does not involve a misapplication of a rule of law, we believe that it will be rare for an appellate court to conclude that the sentencing court’s determination is clearly erroneous.” Id. at 945.

In Rodriguez De Varon, we identified two principles that should inform the district court’s determination of whether the defendant’s role in an offense entitles him to a mitigating-role reduction. Id. at 940, 945. First, and most importantly, “the district court must measure the defendant’s role against the relevant conduct for which [he] has been held accountable” at sentencing. Id. at 940. That is, “the district court must assess whether the defendant is a minor or minimal participant in relation to the relevant conduct attributed to the defendant in calculating [his] base offense level.” Id. at 941. Thus, in the drug courier context, a courier “cannot prove that [he] is entitled to a minor role adjustment simply by pointing to some

broader criminal scheme in which [he] was a minor participant but for which [he] was not held accountable.” Id. Although courier status alone neither precludes nor establishes minor participation in an offense, “when a drug courier’s relevant conduct is limited to [his] own act of importation, a district court may legitimately conclude that the courier played an important or essential role in the importation of those drugs.” Id. at 942-43.

Second, although we have acknowledged that the first method of analysis will be dispositive in many cases, the district court may also measure a defendant’s culpability against that of other participants in a conspiracy. Id. at 945. However, a district court is limited to considering only those participants who are identifiable by the evidence and who were involved in the relevant conduct attributed to the defendant. Id. at 944. “The conduct of participants in any larger criminal conspiracy is irrelevant.” Id. Furthermore, a defendant is not entitled to a minor-role reduction merely because he demonstrates that his role in the relevant conduct was less than that of other identifiable participants; oftentimes, no participants play a minor role. Id. To receive a mitigating-role reduction, the defendant must prove that he was substantially less culpable than most other participants in the relevant conduct. Id.; U.S. Sentencing Guidelines Manual § 3B1.2 cmt. n.3(A) (2007).

After carefully reviewing the record and considering the parties’ briefs, we

discern no reversible error. The relevant conduct for which Castro-Palacios was held accountable at sentencing only concerned the 2,500 kilograms of cocaine that ultimately ended up on board a fishing boat, the Don Juan K, along with Castro-Palacios and the other conspirators. Although the original plan called for transporting the drugs solely by “go fast” boat without ever storing the drugs aboard the Don Juan K, the conspirators expected to use the Don Juan K as a refueling platform manned by Castro-Palacios. Castro-Palacios’s paid role as the operation’s refueler constitutes an integral part in the conspiracy to possess this large quantity of drugs with intent to distribute it, and he is no less culpable, let alone substantially less culpable, than the crew of the “go fast” boat or any other discernable participants. We may not, as Castro-Palacios urges, compare his role to that of any individuals involved in a larger drug trafficking conspiracy that extends beyond this one sizeable shipment. The district court did not clearly err in denying Castro-Palacios a mitigating-role reduction, and accordingly, we affirm.

AFFIRMED.¹

¹Castro-Palacios’s request for oral argument is **DENIED**.