[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEPTEMBER 3, 2010
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No. 10-11017
Non-Argument Calendar

D.C. Docket No. 1:07-cr-00149-CAP-AJB-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

PAUL LEE LONGORIA,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(September 3, 2010)

Before EDMONDSON, MARTIN and KRAVITCH, Circuit Judges.

PER CURIAM:

Paul Longoria appeals the 144-month sentence imposed for conspiracy to

possess and possession with intent to distribute cocaine. After a thorough review of the record, we affirm.

I. Background

In 2007, Longoria was involved in the transport of more than 400 kilograms of cocaine from Texas to Georgia.[1] In the first transaction, one of Longoria's co-conspirators hired a confidential informant to deliver a tractor trailer loaded with cocaine from Texas to Longoria's fencing company, where the 200 kilograms of cocaine was off-loaded. After leaving Longoria's business, the informant met with authorities and handed over the proceeds from the drugs, an amount in excess of three million dollars. In the second transaction, authorities stopped a tractor trailer driven by another of Longoria's co-conspirators. Although the police did not find any drugs in the truck, they confirmed that the trailer had been at Longoria's business earlier that day. When they searched the business, they found 200 kilograms of cocaine.

Longoria explained his involvement as follows: He met a group of people in a bar, and they asked him if he wanted to make easy money. He accepted and received ten thousand dollars per delivery. Although he knew his conduct was

[1] We take the facts from the plea colloquy and the presentence investigation report, to which Longoria did not object.

illegal, he did not know the contents of the trucks.

To determine the applicable guideline range, the probation officer grouped the two offenses together and assigned a base offense level of 38 in light of the amount of drugs involved. The probation officer recommended a two-level reduction for acceptance of responsibility, U.S.S.G. § 3E1.1(a), but no other enhancements or reductions. Longoria had a criminal history score of one, which placed him in category I. The resulting guideline range was 188 to 235 months' imprisonment, and there was a statutory minimum sentence of ten years' imprisonment. 21 U.S.C. § 841(b)(1)(A)(ii).

Longoria raised three objections to the calculations. First, Longoria argued that he was entitled to a reduction for his mitigating role in the offense, U.S.S.G. § 3B1.2, because he did not know who the drivers were, was not involved in hiring the drivers, and he had nothing to do with arranging for the cocaine to come into the United States. He explained that his role was simply to off-load the drugs. Second, he argued that he was entitled to a sentence below the mandatory minimum under the sentencing guidelines safety-valve provision, U.S.S.G. § 5C1.2, because he had cooperated fully with the government and had identified other participants as best he could. Third, he argued that he was entitled to an additional one-point reduction for acceptance of responsibility under § 3E1.1(b)

because he timely notified the government of his intent to plead guilty. He alleged that the government was refusing to move for the additional reduction out of spite and with an unconstitutional motive.

The district court overruled the objections and, after considering the sentencing factors in 18 U.S.C. § 3553(a), determined that it would "depart three levels" to avoid any sentencing disparity with the sentences imposed on Longoria's co-conspirators.[2] With an adjusted level of 33, the guideline range was 135 to 168 months' imprisonment. The court sentenced Longoria to 144 months' imprisonment. Longoria now appeals.[3]

II. Standards of Review

In reviewing the reasonableness of a sentence, we apply an abuse of discretion standard using a two-step process. *United States v. Pugh*, 515 F.3d 1179, 1189-90 (11th Cir. 2008). First, we look at whether the district court committed any significant procedural error, such as miscalculating the advisory guidelines range, treating the guidelines as mandatory, failing to consider the 18

[2] Although the court used the phrase "depart three levels," it appears that the court imposed a variance under § 3553(a) rather than an actual guideline departure. The parties do not address this issue or argue that the court erred in this respect.

[3] Longoria's counsel did not file a notice of appeal, and, as a result, Longoria filed a motion to vacate his sentence, 28 U.S.C. § 2255, on the ground of ineffective assistance of counsel. The district court granted the motion, vacated the sentences, and reimposed the same sentence, after which Longoria filed a timely notice of appeal.

U.S.C. § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence. *Id.* at 1190. Then, we look at whether the sentence is substantively unreasonable under the totality of the circumstances. *Id.* Here, Longoria argues that his sentence is procedurally unreasonable because the district court improperly calculated the guideline range.

We review a district court's determination of a defendant's role in the offense for clear error . *United States v. De Varon*, 175 F.3d 930, 937 (11th Cir. 1999) (*en banc*). We also review a district court's factual findings concerning a reduction for acceptance of responsibility for clear error. *United States v. Williams*, 408 F.3d 745, 756 (11th Cir. 2005). When reviewing the denial of a safety-valve reduction, we review the district court's legal conclusions *de novo* and its factual findings for clear error. *United States v. Johnson*, 375 F.3d 1300, 1301 (11th Cir. 2004). Under clear error review, we give great deference to the district court, and we will not find clear error unless the record leaves us "with the definite and firm conviction that a mistake has been committed." *United States v. White*, 335 F.3d 1314, 1319 (11th Cir. 2003); *United States v. Sawyer*, 180 F.3d 1319, 1323 (11th Cir. 1999).

III. Discussion

A. Role Reduction

Longoria argues that he was entitled to a minor-role reduction because he only provided a location to off-load the drugs and he did not have any decision-making authority or sell or distribute the drugs.

Section 3B1.2 of the Sentencing Guidelines provides for a two-level decrease if the defendant was a minor participant in any criminal activity. U.S.S.G. § 3B1.2(b). A defendant is a minor participant if he is less culpable than most other participants, but his role cannot be described as minimal. *Id.* § 3B1.2 comment. (n.5). The defendant has the burden of establishing his role in the offense by a preponderance of the evidence. *De Varon*, 175 F.3d at 939.

"Two principles guide the district court's consideration: (1) the court must compare the defendant's role in the offense with the relevant conduct attributed to him in calculating his base offense level; and (2) the court may compare the defendant's conduct to that of other participants involved in the offense." *United States v. Alvarez-Coria*, 447 F.3d 1340, 1343 (11th Cir. 2006). When the relevant conduct attributed to the defendant is the same as his actual conduct, "he cannot prove that he is entitled to a minor-role adjustment simply by pointing to some broader scheme for which he was not held accountable." *Id.*; *see also De Varon*, 175 F.3d at 942-43 (concluding that "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").

As to the second prong, the district court is permitted to "measure the defendant's conduct against that of other participants," but only "where the record evidence is sufficient." *De Varon*, 175 F.3d at 934. Furthermore, "[t]he fact that a defendant's role may be less than that of other participants engaged in the relevant conduct may not be dispositive of role in the offense, since it is possible that none are minor or minimal participants." *Id.* at 944.

Here, Longoria cannot show that he was entitled to a minor-role reduction because he was held accountable only for his own conduct of off-loading and storing 400 kilograms of cocaine. Longoria provided a place to store the cocaine until it could be distributed, and he gave the money to the delivery person. Under these facts, Longoria cannot show that he was a minor participant.

B. Acceptance of Responsibility

Longoria argues that he was entitled to an additional one-level reduction for acceptance of responsibility because he gave consent to search his property and he timely indicated his intent to plead guilty. He alleges that the government refused to move for the additional reduction based on an unconstitutional motive, specifically his refusal to waive his right to appeal.

Section 3E1.1 of the U.S. Sentencing Guidelines provides, "[U]pon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty," the district court may award a defendant an additional one-level reduction for acceptance of responsibility under § 3E1.1(b) . . . ." U.S.S.G. § 3E1.1(b). "[A]n adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing." U.S.S.G. § 3E1.1, comment. (n.6). The guidelines require a motion from the government "[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial." *Id.* In addition, the "timeliness of [a] defendant's acceptance of responsibility is a consideration under" both subsections (a) and (b), and it is "context specific." *Id.*

Here, the government explained that it did not believe Longoria had been completely candid during his cooperation. The government further explained that Longoria did not notify it of his intent to plead guilty until about one week before the trial was scheduled to begin. Because the additional one-point reduction must be based on a motion by the government, the district court lacked authority to apply the reduction in the absence of the government's motion. Accordingly, the

district court did not clearly err.

To the extent that Longoria contends the government acted with ill will, we apply the same standard as we would to a review of the government's decision not to file a § 5K1.1 motion based on substantial assistance. *United States v. Nealy*, 232 F.3d 825, 831 (11th Cir. 2000) (citing *Wade v. United States*, 504 U.S. 181 (1992)); *see also United States v. Lapsins*, 570 F.3d 758, 769 (6th Cir. 2009) (applying *Wade* to the § 3E1.1(b) context and citing cases from other circuits doing the same).

An unconstitutional motive includes the government's refusal to make a motion based on suspect reasons such as race or religion. *Wade*, 504 U.S. at 186. Here, Longoria alleged that the government refused to make the motion after he chose not to waive his right to appeal as part of his plea agreement. We have never held that such conduct would qualify as an improper motive. In the absence of an allegation of improper motive and a substantial showing that the government acted based on that unconstitutional motive, we will not review the government's decision. *United States v. Forney*, 9 F.3d 1492, 1502-03 (11th Cir. 1993).

Because Longoria cannot make a substantial showing of an unconstitutional motive, the district court lacked the authority to review the government's decision not to move for an additional one-point reduction.

C. Safety-Valve Provision

The safety-valve provision in the Sentencing Guidelines, U.S.S.G. § 5C1.2, allows a court to impose a sentence without regard to any statutory minimum if the defendant satisfies the five criteria in 18 U.S.C. § 3553(f)(1)-(5).[4]

Here, the parties agree that Longoria met the first four criteria. The only issue here is whether Longoria "has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." 18 U.S.C. § 3553(f)(5); U.S.S.G. § 5C1.2(a)(5). To establish the fifth requirement,

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[4] The five criteria are:

> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
> (3) the offense did not result in death or serious bodily injury to any person;
> (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in [§ 408 of the Controlled Substances Act]; and
> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

U.S.S.G. § 5C1.2.

"[t]he burden is on the defendant to come forward and to supply truthfully to the government all the information that he possesses about his involvement in the offense, including information relating to the involvement of others and to the chain of the narcotics distribution." *United States v. Cruz*, 106 F.3d 1553, 1557 (11th Cir. 1997). A district court cannot apply the safety valve if it determines the defendant "withheld or misrepresented information." *United States v. Figueroa*, 199 F.3d 1281, 1282-83 (11th Cir. 2000).

Here, Longoria permitted authorities to search his business and he cooperated with the investigation into his conduct. When asked about others involved, however, Longoria identified other participants by nickname only and denied any knowledge of the larger conspiracy. He claimed he had met the co-conspirators in a bar and did not know the contents of the trucks.

Longoria's statements were inconsistent with the degree of his participation in the scheme. Longoria played an integral role of the conspiracy; he off-loaded 400 kilograms of cocaine, housed the drugs until delivery, and handled over three million dollars in payment for the cocaine. Given this level of responsibility and involvement, it is unlikely that Longoria knew nothing about the conspiracy.

Accordingly, Longoria has not met his burden.[5]

IV. Conclusion

For the foregoing reasons, we AFFIRM.

[5] Longoria also filed a *pro se* appellate brief, raising ineffective-assistance-of-counsel claims. Although we granted leave to file the *pro se* brief, we decline to address the claim because the record is not sufficiently developed for us to consider it on direct appeal. United States v. Bender, 290 F.3d 1279, 1284 (11th Cir. 2002).