

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-13209
Non-Argument Calendar

D.C. Docket No. 1:10-cr-20581-JLK-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FERNANDO HERNANDEZ,
a.k.a. Cafe,
a.k.a. Bustelo,

Defendant-Appellant.

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

(October 24, 2012)

Before TJOFLAT, BARKETT and FAY, Circuit Judges.

PER CURIAM:

On May 17, 2011, after a one-day trial, a jury convicted Fernando Hernandez of conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 846, and possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 841(a)(1). On July 7, 2011, the District Court sentenced Hernandez to concurrent prison terms of 202 months. He now appeals his convictions and sentences.

I.

Hernandez appeals his convictions on the grounds that the District Court failed adequately to instruct the jury on the definition of “possession” and to respond to a jury question asking for a definition of possession. We find no merit in either ground. The definition of possession in the court’s instructions to the jury conformed substantially to the Eleventh Circuit’s Pattern Jury Instructions.

Here is what the court said:

Possession, there are four kinds of possession I guess. A person [has] actual possession, constructive possession, sole possession or joint possession. A person can have all of those. Actual possession of a thing occurs when a person knowingly has direct, physical control over that item.

Constructive possession is a thing when a person does not have actual possession of it but both has the power and the intention to take control of it at a later time.

Sole possession occurs if a person is the only person to possess it.

Joint possession of a thing occurs when two or more persons share possession.

The term possession includes as we have used it in the instructions means [sic] actual[,] constructive[,] sole[,] and joint.

When the jury sent out a note during deliberations asking for the definition of possession, the court referred them to page 13 of the written instructions, which had been given to the jury prior to deliberations. Hernandez's argument regarding the court's handling of the jury's request is meritless.

II.

Hernandez challenges his sentences as procedurally unreasonable because the District Court erred both in estimating the amount of cocaine attributable to him and in finding that he destroyed material evidence for purposes of a U.S.S.G. § 3C1.1 obstruction-of-justice enhancement. The sentences are not procedurally unreasonable because, in estimating the drug quantity attributable to Hernandez, the court relied on uncontested evidence. As for the § 3C1.1 enhancement, the evidence that Hernandez destroyed material evidence was compelling.

We find no merit in Hernandez's argument that the sentences are substantively unreasonable because the court properly took into account the purposes of a criminal sentence, as set out in 18 U.S.C. § 3553(a), and, in

sentencing Hernandez to concurrent terms of 202 months, varied downward from the sentence range prescribed by the Guidelines—292 to 365 months.

AFFIRMED.