

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

April 7, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCO ANTONIO ZAVALA-
CERVANTES,

Defendant - Appellant.

No. 21-5039
(D.C. No. 4:20-CR-00081-JFH-1)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **HARTZ**, **BALDOCK**, and **McHUGH**, Circuit Judges.

Marco Antonio Zavala-Cervantes pleaded guilty without the benefit of a plea agreement to one count of possession with intent to distribute methamphetamine. In calculating the United States Sentencing Commission, *Guidelines Manual* (Nov. 2018) (the “Guidelines”) sentencing range, the Presentence Investigation Report (“PSR”) suggested Mr. Zavala-Cervantes was only a minor participant in the crime and recommended a lower base offense level and a downward adjustment. The

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

Government objected to the lower base offense level and the minor participant adjustment, arguing that Mr. Zavala-Cervantes was more than a minor participant. The district court sustained that objection, and Mr. Zavala-Cervantes appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the sentence.

I. BACKGROUND

As part of a Drug Enforcement Agency (“DEA”) investigation, law enforcement stopped a car Mr. Zavala-Cervantes was driving and found approximately thirteen pounds of methamphetamine in the vehicle. The methamphetamine was 95% pure, and a DEA agent estimated it would have been worth around \$78,000 at the time. A grand jury indicted Mr. Zavala-Cervantes of knowingly and intentionally possessing with the intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii).¹ Mr. Zavala-Cervantes pleaded guilty to this count without the benefit of a plea agreement.

¹ A few weeks after the Government obtained the initial indictment, the Government obtained a superseding indictment that included the count of possession with intent to distribute 500 grams or more of methamphetamine and a new count of being an alien who was found in the United States after having been deported and removed without obtaining consent to reapply for admission to the United States, in violation of 8 U.S.C. § 1326. Mr. Zavala-Cervantes pleaded guilty to the illegal reentry count, and the district court sentenced him on that count. Mr. Zavala-Cervantes does not challenge that sentence, so we do not address it on appeal.

The PSR calculated a base offense level of thirty-eight based on the amount of methamphetamine Mr. Zavala-Cervantes possessed with intent to distribute. The PSR then decreased the base offense level by four levels because of Mr. Zavala-Cervantes's minor role as a courier and his high base offense level, resulting in a base offense level of thirty-four. *See* USSG §2D1.1(a)(1)(iii). The PSR also included a two-level downward adjustment for being a minor participant, *see id.* §3B1.2, and a three-level downward adjustment for Mr. Zavala-Cervantes's acceptance of responsibility, *see id.* §3E1.1. Thus, the PSR recommended assigning Mr. Zavala-Cervantes a total offense level of twenty-nine. The PSR also concluded that Mr. Zavala-Cervantes's criminal history fell into category I. The statutory term of imprisonment for the offense was ten years to life. 21 U.S.C. § 841(b)(1)(A)(viii). Based on the total offense level and criminal history category, the PSR determined Mr. Zavala-Cervantes's sentencing range under the Guidelines was 87 to 108 months.

The Government objected to the PSR's finding that Mr. Zavala-Cervantes was a minor participant and the associated decreased base offense level and downward adjustment. In support of the objection, DEA Special Agent Taylor Wilson testified the amount of methamphetamine Mr. Zavala-Cervantes had in his possession was larger than the amount with which the average transporter would be entrusted, so Mr. Zavala-Cervantes was likely "a trusted individual within the organization." ROA Vol. II at 15. The Government also produced text messages retrieved from a cell phone that Mr. Zavala-Cervantes had in his possession, and Special Agent Wilson testified they showed Mr. Zavala-Cervantes was negotiating the price of the

methamphetamine with customers. According to Special Agent Wilson, these messages show Mr. Zavala-Cervantes had “a higher level of involvement” because he was trusted with traveling to get the methamphetamine, negotiating the price for the methamphetamine, and handling the cash he would receive from customers. *Id.* at 17.

Mr. Zavala-Cervantes did not proffer any evidence to support the offense level adjustment for being a minor participant. Rather, Mr. Zavala-Cervantes’s counsel argued, without evidence, that Mr. Zavala-Cervantes “got paid a specific fee to deliver this, and that’s his involvement.” *Id.* at 21.

The district court concluded the evidence “demonstrates that the defendant was more than a minor participant,” *id.* at 23, and sustained the Government’s objection. Alternatively, the district court reasoned that even if it were to disregard the Government’s evidence, Mr. Zavala-Cervantes had not met his burden to prove he was a minor participant. Thus, the district court concluded that Mr. Zavala-Cervantes’s base offense level was thirty-eight, and after adjusting for acceptance of responsibility, the total offense level was thirty-five. The court also adopted the criminal history category of I as calculated in the PSR. With this offense level and criminal history category, the court computed the applicable Guidelines range to be 168 to 210 months of imprisonment.

The court then considered the applicable factors under 18 U.S.C. § 3553 and sentenced Mr. Zavala-Cervantes to 210 months of imprisonment. Mr. Zavala-Cervantes appeals his sentence.

II. DISCUSSION

Mr. Zavala-Cervantes challenges the procedural reasonableness of his sentence, arguing that the district court erred by declining to reduce his offense level under USSG §§3B1.2 and 2D1.1 for being a minor participant in the crime. A district court's finding that a defendant was or was not a minor participant is a factual finding we review for clear error. *United States v. Nkome*, 987 F.3d 1262, 1268 (10th Cir. 2021). And we review all legal conclusions regarding the Guidelines de novo. *Id.*

Section 3B1.2 of the Guidelines provides that a defendant's offense level is decreased by two levels "[i]f the defendant was a minor participant in any criminal activity." According to the Sentencing Commission's commentary,² a minor participant is a defendant who is "less culpable than the average participant in the criminal activity, but whose role could not be described as minimal." USSG §3B1.2, comment. (n.5).

The determination of whether a defendant was a minor participant "is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case." USSG §3B1.2, comment. (n.3(C)). To make this determination, a court should consider the degree to which the defendant (1) understood the scope and structure of the criminal activity, (2) planned

² The commentary to the Guidelines is controlling unless it is plainly erroneous or inconsistent with the Guidelines. *United States v. Nkome*, 987 F.3d 1262, 1269 (10th Cir. 2021).

or organized the criminal activity, (3) held a decision-making role, (4) participated and possessed discretion and responsibility, and (5) stood to benefit from the criminal activity. *Id.* If a defendant qualifies for an adjustment under USSG §3B1.2 and the base offense level is thirty-eight, USSG §2D1.1(a)(5) provides that the defendant's base offense level is also decreased by four levels. It is well-settled that a "defendant bears the burden of proving by a preponderance of the evidence that he was a minor participant in the crime." *United States v. Adams*, 751 F.3d 1175, 1179 (10th Cir. 2014).

Mr. Zavala-Cervantes argues the district court applied an incorrect legal standard to find that he was not a minor participant. He contends the district court erred because it relied solely on the importance of Mr. Zavala-Cervantes's role in the criminal operation, which is "'not determinative' of eligibility" for the minor role adjustment. *United States v. Yurek*, 925 F.3d 423, 446 (10th Cir. 2019) (quoting USSG §3B1.2 comment. (n.3(C))). Mr. Zavala-Cervantes also argues the district court legally erred "[b]y failing to consider [his] relative culpability" to another individual in the criminal scheme. *Id.* We review the district court's legal conclusions de novo, but we also "presume, absent some indication in the record suggesting otherwise, that trial judges know the law and apply it in making their decisions." *Nkome*, 987 F.3d at 1273 (quotation marks omitted).³

³ Mr. Zavala-Cervantes waived both of these legal arguments because he did not raise either of them before the district court, and he did not argue that they would result in a plain error. *See United States v. Leffler*, 942 F.3d 1192, 1198 (10th Cir. 2019). The Government failed to argue waiver on appeal, so it has "waived the

First, there is no indication that the district court relied solely on the importance or necessity of Mr. Zavala-Cervantes's role in the criminal scheme. Indeed, the district court did not mention the importance or necessity of Mr. Zavala-Cervantes's role. Moreover, the Government's evidence suggests that Mr. Zavala-Cervantes transported an unusually large quantity of drugs and negotiated the sale price of those drugs. This evidence shows that Mr. Zavala-Cervantes had discretion and decision-making authority when negotiating prices with buyers. And it belies Mr. Zavala-Cervantes's argument that the court relied only on the importance of his role to support the court's finding.

Second, despite Mr. Zavala-Cervantes's contentions otherwise, the court did not fail to consider his relative culpability. Rather, the court explicitly stated there was not "sufficient information to fully assess the defendant's role in the instant offense relative to that of any other participant." ROA Vol. II at 23. There was no evidence in the PSR or at the sentencing hearing about the roles of other participants. Special Agent Wilson mentioned another individual when describing the background circumstances of the investigation, but he did not testify about that individual's role or culpability. Although given the opportunity, Mr. Zavala-Cervantes declined to question Special Agent Wilson further. Thus, the court did not commit a legal error,

waiver," *id.* at 1199 (quotation marks omitted), and we exercise our discretion to consider these unpreserved arguments, *see United States v. Ansberry*, 976 F.3d 1108, 1120 n.6 (10th Cir. 2020) (exercising discretion to consider a waived argument when the Government had waived the waiver).

and its finding that there was no evidence of another participant with whom to compare Mr. Zavala-Cervantes's culpability was not clearly erroneous.

Outside of these legal arguments, the district court's determination that Mr. Zavala-Cervantes was not a minor participant is a factual conclusion we review for clear error. We find none. The district court considered the evidence before it, which included testimony from a DEA agent and text messages showing that Mr. Zavala-Cervantes was (1) transporting a large quantity of drugs, (2) negotiating prices for them, and (3) entrusted with the cash from the drug sales. This evidence supports the district court's finding that Mr. Zavala-Cervantes was not a minor participant. *See Nkome*, 987 F.3d at 1273 (stating that a district court is not required "to make detailed findings, or explain why a particular adjustment under the guidelines is or is not appropriate" (quotation marks omitted)). Therefore, the district court did not err in applying a total offense level of thirty-five and calculating the Guidelines sentencing range accordingly.⁴

⁴ Mr. Zavala-Cervantes also argues (1) the district court made a legal error in its alternative reasoning by concluding that Mr. Zavala-Cervantes had not met his burden to show that he qualified for a minor role adjustment and (2) the district court's statement that it would have applied the same sentence regardless of these findings did not save the sentence from remand. We need not consider either of these arguments because the district court did not err in its primary reasoning.

III. CONCLUSION

Because the district court did not apply the wrong legal standard and its factual findings were not clearly erroneous, we AFFIRM the sentence.

Entered for the Court

Carolyn B. McHugh
Circuit Judge