

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

OCT - 2 1990

ROBERT L. HOECKER
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ELESEO SEPULVEDA-MARTINEZ,
Defendant-Appellant.

No. 89-2225
(D.C. No. 89-170JB-01)
(D. New Mexico)

ORDER AND JUDGMENT*

Before LOGAN and EBEL, Circuit Judges, and BROWN, District Judge.**

After examining the briefs and appellate record, this panel has agreed unanimously to honor both parties' request for a decision on the briefs. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Defendant Eleseo Sepulveda-Martinez appeals his sentence imposed following a plea of guilty to possession with intent to distribute more than fifty kilograms of marijuana in violation of

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** The Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas, sitting by designation.

21 U.S.C. § 841(a)(1) and 841(b)(1)(C). He contends that the district court erred in refusing to give him a two-point offense level reduction because he was a "minor participant" under section 3B1.2 of the Sentencing Guidelines.

Defendant contends that the facts of this case indicate that he was a "mere mule," warranting a two-point reduction in base offense level. He asserts that he was to be paid \$500 plus \$200 expense money for driving 159 pounds of marijuana from Mexico to the United States, and acted only as a courier for other individuals more culpable than him.

Defendant is correct in asserting that culpability rather than status or position is the key determination under U.S.S.G. § 3B1.2, see United States v. Calderon-Perros, No. 89-2170, slip op. at 5-6 (10th Cir. Aug. 21, 1990); United States v. Pelayo-Munoz, 905 F.2d 1429 (10th Cir. 1990); but we cannot hold that the district court erred in finding that he was not a minor participant. The culpability determination under § 3B1.2 is a finding of fact which we will reverse only if clearly erroneous. United States v. Lord, 907 F.2d 1028, 1031 (10th Cir. 1990). In the instant case, on the basis of the evidence, the district court could find, as it did, that defendant was not a minor participant. Defendant was the sole occupant of a vehicle carrying 159 pounds of marijuana; he was apprehended near the border between Mexico and the United States on a known smuggling route. Other than his own assertions, there was no evidence of any other participants. Reviewing these facts, we cannot say that the district court's findings were clearly erroneous.

AFFIRMED.

The mandate shall issue forthwith.

Entered for the Court

James K. Logan
Circuit Judge