

FILED

UNITED STATES COURT OF APPEALS United States Court of Appeals
FOR THE TENTH CIRCUIT Tenth Circuit

NOV 21 1990

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL DARNELL HOLDEN,
Defendant-Appellant.

ROBERT L. HOECKER
Clerk

No. 89-3048
(D. C. No. 88-20105-01)
(D. Kansas)

ORDER AND JUDGMENT*

Before HOLLOWAY, Chief Judge, SEYMOUR and MOORE, Circuit Judges.

Pursuant to a plea agreement with the United States, defendant Michall D. Holden, a/k/a Michael D. Holden, pleaded guilty to possession of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The district court sentenced Holden to 78 months' imprisonment, which was the low end of the range of 78-97 months indicated by the Sentencing Guidelines¹ promulgated under the Sentencing Reform Act of 1984, 18 U.S.C. §§ 551, et seq.

Defendant appeals his sentence, contending that the district court committed two errors which warrant reversal of the court's

*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.

Guidelines application and a remand for resentencing. It is asserted that the trial court erred by (1) determining that defendant did not qualify for a two level offense level reduction for affirmative acceptance of personal responsibility for his crime, pursuant to § 3E1.1 of the Guidelines, and (2) determining that it could not find defendant to be a minor or minimal participant in the criminal activity, and he therefore did not qualify for an offense level reduction under § 3B1.2. We affirm.

I

Defendant argues that the trial court inappropriately denied his request for an offense level reduction for "acceptance of responsibility," pursuant to U.S.S.G. § 3E1.1. When Holden was arrested he falsely identified himself to law enforcement officers as Darnell Woods. II R. at 3. Later that day, during an interview with a U.S. Pretrial Service Officer, Holden continued to make both oral and written assertions that his name was Darnell Woods. II R. at 5. The following day a detention hearing was held and "an individual identified as the defendant's cousin testified that the defendant's name was Darnell Woods." II R. at 5.

Holden made no effort to reveal his true identity until after Drug Enforcement Agents presented substantial evidence that defendant's name was not Darnell Woods. The Agents' evidence indicated, first, that defendant had given his name as Michael L. Holden when he was stopped at Kansas City International Airport, one day prior to the arrest in the instant case for possession of a small quantity of marijuana. Second, they said that fingerprint analysis of defendant had also indicated that his name was Michael

Holden. II R. at 3, 5. Defendant finally identified himself as Michall Darnell Holden, which is believed to be his true name.

Defendant contends that the trial court incorrectly relied upon application note 4 of § 3E1.1 of the Guidelines concerning the effect of a defendant's obstruction of justice in the determination of the defendant's acceptance of responsibility. He also contends that the court erred in its reliance upon note 1(g) concerning the "timeliness of the defendant's conduct in manifesting the acceptance of responsibility." IV R. at 14, 15.

Defendant's first contention concerning the court's incorrect reliance on application note 4 focuses on the contrast between the language of application note 4 and the language of § 3C1.1, both dealing with obstruction of justice. Application note 4 states that "[a]n adjustment under this section is not warranted where a defendant perjures himself, suborns perjury, or otherwise obstructs the trial or the administration of justice (see § 3C1.1), regardless of other factors." U.S.S.G §3E1.1, comment. (n.4). On the other hand, Section 3C1.1 provides for a two level increase in the offense level "[i]f the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution." U.S.S.G. §3C1.1 (emphasis added).²

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Defendant received a two level increase for obstruction of justice under §3C1.1 due to the "reasons outlined in the presentence, regarding his [Holden's] furnishing false information to the United States Pretrial Services officer, [and a] Los Angeles officer, and finally lying under oath at the detention hearing before the magistrate." IV R. at 15. This increase is not being appealed.

Defendant argues that the presence of the attempt language in § 3C1.1 and its absence from application note 4 of § 3E1.1, supra, clearly indicates an intent to preclude the use of any mere attempt to obstruct justice as a basis for refusal of a two level reduction for acceptance of responsibility.³

Defendant's argument leads to a nonsensical construction of § 3E1.1 whereby a defendant is encouraged to attempt obstruction of justice through deception or outright falsehood. If defendant's argument were accepted, a defendant would have no disincentive for lying. If the lie is believed, damaging information may remain hidden. Should the defendant's deception be discovered, it was only an unsuccessful "attempt" to obstruct justice and, as such, is to be ignored when assessing the defendant's acceptance of responsibility.

The court's determination that defendant did not timely accept responsibility, under application note 1(g) of § 3E1.1, is also based upon Holden's presentation of false identification to the authorities. IV R. at 14. Questions concerning acceptance of responsibility are factual and are to be reviewed under a clearly erroneous standard. United States v. Whitehead, 912 F.2d 448, 451 (10th Cir. 1990); United States v. Wilson, 878 F.2d 921, 923

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The disposition of this argument will have limited precedential effect. Note 4 in the commentary to § 3E1.1 was amended, effective November 1, 1989, to read "Conduct resulting in an enhancement under §3E1.1 (Willfully Obstructing or Impeding Proceedings) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply." United States Sentencing Commission Guidelines Manual (Nov. 1989) § 3E1.1, note 4. The notes following the amendment state that one reason for the change is "to clarify the reference to obstructive conduct". Id., at C.135, n. 258.

(6th Cir. 1989); United States v. Thomas, 870 F.2d 174, 176 (5th Cir. 1989); United States v. White, 875 F.2d 427, 431 (4th Cir. 1989). Specifically, "[o]n the issue of timeliness [of acceptance of responsibility], the district court has substantial discretion." United States v. Trujillo, 906 F.2d 1456, 1461 (10th Cir. 1990); United States v. Perez-Franco, 873 F.2d 455, 464 (1st Cir. 1989).

The district court expressed deep concern over Holden's presentation of false information at his detention hearing. Such concern contributed to the decision to agree with the probation office recommendation to deny any level of reduction for acceptance of responsibility. IV R. at 14, 15. We are satisfied that the district court's finding that Holden had not timely accepted responsibility was not clearly erroneous. This finding was made notwithstanding defendant's plea of guilty,⁴ and his admission of sorts that he knew at the time of the offense that the package contained cocaine.⁵

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We have stated that a "guilty plea, standing alone does not entitle him [defendant] to a two-level sentence reduction under U.S.S.G. § 3E1.1." Trujillo, at 1462 (applying U.S.S.G. § 3E1.1 comment. (n.3) which states "A guilty plea may provide some evidence of the defendant's acceptance of responsibility. However, it does not, by itself, entitle a defendant to a reduced sentence under this section."

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"When asked if he [Holden] knew it was Cocaine [in the box] he replied, 'common sense would tell you there was something in there.'" IV R. at 5. Additionally, in Mr. Holden's "written statement he said 'I had no idea that it was two kilos in that box. I knew it was something but not that much of something.'" II R. at 5. From the record, these appear to be Mr. Holden's most specific admissions of knowledge of any nexus of illegality in his delivery services prior to arrest.

II

Defendant's second contention is that the district court erred in not finding him to be a minor or minimal participant under the § 3B1.2 mitigating role provision, thus denying him an offense level reduction. The Guidelines indicate that a mitigating role adjustment can be made when a defendant is "plainly among the least culpable of those involved in the conduct of a group" or is "any participant who is less culpable than most other participants." U.S.S.G. §3B1.2, comment. (n.1, 3). We feel, however, that there is little evidence in the record which suggests that defendant was less culpable than other participants or in fact, that there were any participants in the operation other than defendant.

Holden claims that he was a mere courier with no direct knowledge of what was in the package he was to pick up and deliver to another person in exchange for fifteen hundred dollars. IV R. at 4, 5. Upon signing for the package, however, Holden proceeded to open the package, an act which is patently inconsistent with the claimed role of mere courier. II R. at 2. Furthermore, the package bore a fictitious return address identical to defendant's address with the exception of the last digit of the house number. Id. This address serves as additional circumstantial evidence that Holden at least had a role in the sending as well as the receiving of the drug package.

The district court's decision regarding any reduction in the defendant's offense level for his mitigating role in the offense is a factual determination which will not be disturbed on appeal, absent a showing that it is clearly erroneous. United States v.

Lord, 907 F.2d 1028, 1031 (10th Cir. 1990); see United States v. Beaulieu, 893 F.2d 1177, 1181-82 (10th Cir.), cert. denied, _____ U.S. _____ (1990); United States v. Sanchez-Lopez, 879 F.2d 541, 557 (9th Cir. 1989) (citing United States v. Franco-Torres, 869 F.2d 797, 800 (5th Cir. 1989)). The district court stated that its decision was greatly influenced by "look[ing] at the overall presentence report" in which it appeared "almost as consistent that he [Holden] was a big drug operator as it is . . . that arguably he might have been a minor participant." IV R. at 15. We conclude that the denial of a mitigating offense level reduction was not clearly erroneous.

AFFIRMED.

Entered for the Court

William J. Holloway, Jr.
Chief Judge