

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-2269

UNITED STATES OF AMERICA

v.

MAURICIO AZCARATE,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 00-cr-00661)
District Judge: Hon. John C. Lifland

Submitted Under Third Circuit LAR 34.1(a)
February 4, 2002

Before: SLOVITER, AMBRO, Circuit Judges, and POLLAK, District Judge*

(Filed: February 7, 2002)

MEMORANDUM OPINION OF THE COURT

* Hon. Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation. SLOVITER, Circuit Judge.

Mauricio Azcarate appeals from the judgment of sentence. After indictment in the United States District Court for the District of New Jersey, Azcarate pleaded guilty to exporting monetary instruments of more than \$10,000 in violation of 31 U.S.C. 5316 and 5324. His appeal challenges the District Court's two level sentencing enhancement under 2S1.3(b)(1) of the U.S. Sentencing Guidelines. We will affirm.

The District Court had jurisdiction under 18 U.S.C. 3231. This court enjoys jurisdiction pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3742(a).

I.

Azcarate argues that the District Court erred by enhancing his sentence under U.S.S.G. 2S1.3(b)(1), which provides for a two level enhancement for a failure to report monetary transactions where the defendant "knew or believed that the funds were proceeds of unlawful activity." According to Azcarate, the government did not prove by a preponderance of the evidence that he "knew or believed that the funds were proceeds of unlawful activity."

Facts upon which sentencing determinations are made must be proven by a preponderance of the evidence. *United States v. Dorsey*, 174 F.3d 331, 332 (3d Cir. 1999). This court reviews a District Court's factual findings for clear error. *United States v. Jarvis*, 258 F.3d 235, 239 (3d Cir. 2001). "'Under the clearly erroneous standard, a finding of fact may be reversed on appeal only if it is completely devoid of a credible evidentiary basis or bears no rational relationship to the supporting data.'" *United States v. Haut*, 107 F.3d 213, 218 (3d Cir. 1997) (quoting *American Home*

Products Corp. v. Barr Laboratories, Inc., 834 F.2d 368, 370-71 (3d Cir. 1987)).

On March 5, 1998, Azcarate attempted to board a non-stop flight from Newark Airport to Panama City, Panama with \$133,576 in United States currency and \$9,984 in unendorsed money orders hidden in his computer bag and shoes. Following his arrest, United States Customs officials repeatedly questioned him where the money he was transporting came from. At his sentencing hearing, Azcarate testified that in response to these inquiries he ultimately replied, "It probably came from drugs, it probably came from something illegal." App. at 25. The District Court found that, "Mr. Azcarate's testimony supports a belief that the funds were proceeds of illegal activity." App. at 29.

Azcarate argues that his testimony is insufficient to support a determination that he knew or believed the money came from unlawful activity. According to Azcarate, he was speculating about the money's origin at the behest of Customs agents. Thus, at the sentencing hearing, Azcarate testified, "I do not know where [the money] actually came from. I could not prove it." App. at 23.

At the outset, we note that our clearly erroneous review is "'more deferential with respect to determinations about the credibility of witnesses.'" Newark Branch, NAACP v. City of Bayonne, 134 F.3d 113, 120 (3d Cir. 1998) (quoting United States v. Igbonwa, 120 F.3d 437, 441 (3d Cir. 1997)). To the extent the District Court's finding was based on Azcarate's testimony at the sentencing hearing, the District Court may simply have disbelieved Azcarate because of his demeanor or tone of voice.

A sentencing court may also consider evidence contained in a noticed pre-sentence report. See, e.g., United States v. Hart, 273 F.3d 363, 379 (3d Cir. 2001). According to the pre-sentence report, which Azcarate reviewed, App. at 23, upon his arrest Azcarate stated that he "knew the confiscated cash/money orders represented proceeds from drug-trafficking activity." Pre-sentence Report, 11. Azcarate also admitted that he was commissioned to transport the money in exchange for \$10,000. Pre-sentence Report, 11. Furthermore, the currency Azcarate transported was in small denominations, Pre-sentence Report, 17, and his activity was commissioned by a contact he made while traveling in Colombia.

All of these facts support the trial court's determination that Azcarate believed the money he carried was from unlawful activity. Courts have considered large amounts of small denomination bills in connection with travel to Colombia to support a determination that the defendant believed the money was derived from an illicit source. See, e.g., United States v. Berrio, 77 F.3d 206, 209 (7th Cir. 1996). That Azcarate's "employer" was willing to reward him so generously for his efforts despite the availability of considerably more economical and secure means of transferring funds internationally further bolsters the District Court's determination.

Based on the evidence before the sentencing court, and the deferential stance we adopt in applying the clearly erroneous standard of review, we cannot say the District Court's finding was reversible error.

II.

For the foregoing reasons, we will affirm the District Court's judgment of sentence.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Delores K. Sloviter
Circuit Judge