

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-2258

UNITED STATES OF AMERICA

v.

JOSE LUIS TAVAREZ,

Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 02-cr-00095-7)
District Judge: Honorable Thomas I. Vanaskie

Submitted Under Third Circuit LAR 34.1(a)
October 25, 2007

Before: FISHER, STAPLETON and COWEN, *Circuit Judges*.

(Filed: October 25, 2007)

OPINION OF THE COURT

FISHER, *Circuit Judge*.

Following his guilty pleas to several counts of conspiracy, distribution, and possession with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846, Jose Luis Tavarez was sentenced to 145 months' imprisonment.

Tavarez appeals from that sentence, arguing that the District Court improperly relied on the stipulated amount of cocaine base as a sentencing factor. For the reasons that follow, we will affirm the sentence.

I.

Because we write only for the parties who are familiar with the factual context and procedural history of the case, we set forth only those facts necessary to our analysis. An investigation revealed that Tavarez acted as a street-level dealer of cocaine base since 1998. Throughout 2001 and 2002, investigators made controlled purchases from the drug distribution network in which Tavarez was a member. A superseding indictment charged Tavarez with conspiracy, distribution, and possession with intent to distribute cocaine and cocaine base. On the day he was scheduled to go to trial, Tavarez pleaded guilty to all counts and expressly agreed that the Government could prove the facts underlying those counts beyond a reasonable doubt.

According to the Presentence Investigation Report (PSR), the offenses to which Tavarez pleaded guilty involved a drug quantity of at least 500 grams of cocaine base. The PSR accordingly calculated Tavarez's Guidelines range at 262 to 327 months, based on a total offense level of 39 and a criminal history category of I. Upon reviewing his PSR, Tavarez sent a letter to the District Court, noting the discrepancy between the amount of cocaine base to which he admitted (at least 50 grams) versus the amount indicated in the PSR (at least 500 grams). Partially as a result of this letter, during the

sentencing hearing on February 17, 2004, the parties agreed to a compromise drug quantity of 150 to 500 grams of cocaine base, which resulted in a total offense level of 34, a criminal history of I, and a Guidelines range of 151 to 188 months. The District Court sentenced Tavaréz to 151 months' imprisonment.

Tavaréz filed a notice of appeal from that sentence. During the pendency of that appeal, the United States Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005), which held that the Sentencing Guidelines were advisory. *Id.* at 266. Therefore, we vacated the pre-*Booker* sentence and remanded for resentencing in accordance with *United States v. Davis*, 407 F.3d 162, 165 (3d Cir. 2005) (en banc).

During the March 31, 2006 resentencing hearing, Tavaréz did not challenge the stipulated Guidelines calculation ("Judge, we're not here really here to dispute those calculations . . . after various agreements and stipulations, my client had an offense level of 34"). The District Court agreed ("The defense notes that there is no objection or dispute to the calculation, and I would reiterate that the Guideline range in this case was really determined by agreement of the parties . . . as to the amount of drugs attributable to the defendant"), so proceeded to consider whether to exercise its discretion under 18 U.S.C. § 3553(a) to vary from the Guidelines range. It noted that because Tavaréz will be deported, he would not be eligible for placement in a halfway house for the last six months of his sentence, so to avoid any unwarranted disparities, it imposed a sentence of

145 months' imprisonment, which is six months less than the bottom of the applicable Guidelines range. The instant appeal followed.

II.

We have jurisdiction to review the sentence under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). *United States v. Cooper*, 437 F.3d 324, 327 n.4 (3d Cir. 2006). We review any factual findings underlying the sentence, such as the drug quantity attributable to the defendant, for clear error, *see United States v. Grier*, 475 F.3d 556, 569-70 (3d Cir. 2007) (en banc), but the sentence itself for reasonableness. *United States v. Tomko*, 498 F.3d 157, 163 (3d Cir. 2007).

Tavarez frames the appellate issues presented as: (1) the District Court erred “in simply looking at the stipulated amount of cocaine base (150 to 500 grams) rather than the other appropriate sentencing factors”; and (2) the District Court erred in giving insufficient consideration to the § 3553(a) factors. Yet, in the actual argument section of his brief, the two issues are collapsed into one entirely different argument, *viz.*, there was insufficient evidence at sentencing to establish that any drug quantity in excess of 50 grams of cocaine base may be attributed to Tavarez. We therefore address only this argument.¹

¹Even giving Tavarez every benefit of the doubt in addressing arguments he frames but never ends up pursuing, we find that the statement of reasons given by the District Court at resentencing is replete with references to the § 3553(a) factors: (1) “The history and characteristics of the Defendant are taken into account by the criminal history score”; (2) “The sentence must reflect the seriousness of the offense and, indeed,

Initially, we observe that it is misleading to argue that the only drug quantity attributable to Tavaréz must be limited to the 50 grams of cocaine base for which he expressly acknowledged responsibility at his plea hearing. Tavaréz pleaded guilty to only 50 grams because the pertinent statute, 21 U.S.C. § 841(b)(1)(A)(iii), sets the applicable penalties to begin at 50 grams. This statutory threshold quantity does not change the well-established practice that the actual drug quantity is determined at sentencing by a preponderance of the evidence. *See* U.S.S.G. § 2D1.1(c); *United States v. Ricks*, 494 F.3d 394, 401-02 (3d Cir. 2007); *United States v. Swinton*, 333 F.3d 481, 489 (3d Cir. 2003).

Tavaréz's only remaining argument, then, is that the District Court's actual drug quantity finding at sentencing is clearly erroneous.² But the correctness of its finding is confirmed on no fewer than three separate occasions. First, at Tavaréz's plea hearing, after the District Court found Tavaréz to be fully competent to offer a plea, the

distribution of crack cocaine is a very serious matter"; (3) "The sentence must promote respect for the law and to provide just punishment for the offense"; (4) "I have to consider a sentence that affords adequate deterrence to further criminal conduct and protection of the public from crimes of this Defendant"; (5) "The sentence I have imposed . . . varies slightly from the sentence called for by the Guidelines. I have done so in an effort to provide parity of treatment between criminal aliens and non-criminal aliens"; and (6) "[I] conclude that the sentence that I imposed in this matter, originally . . . is a reasonable sentence under the circumstances." This series of statements defeats any argument that the District Court either neglected its duty to consider the § 3553(a) factors or that it overweighed the stipulated drug quantity over all other factors.

²Because this argument was never raised in any of the District Court proceedings, we ordinarily would apply the plain error standard. *See, e.g., United States v. Watson*, 482 F.3d 269, 274 (3d Cir. 2007). We need not do so in this case, however, because we conclude that Tavaréz fails to establish any error in the first instance.

Government informed the District Court that at least two witnesses were prepared to testify that they purchased cocaine base from Tavaréz on hundreds of occasions in half-gram quantities, suggesting an aggregate of 200 grams as an underestimate. When asked by the District Court whether he agreed that the Government would be able to “prove those facts beyond a reasonable doubt,” Tavaréz through an interpreter answered “Yes.”

Second, as alluded to in his own brief, Tavaréz stipulated to at least 150 grams during his original sentencing hearing. The record does not reveal any indication that Tavaréz’s stipulation was not knowing, voluntary, or intelligent. Indeed, the following exchange transpired between the District Court and Tavaréz at the hearing:

“THE COURT: And do you recall that we went over objections to the Pre-sentence Report?

THE INTERPRETER: Yes.

THE COURT: And you recall that we resolved all the objections?

THE INTERPRETER: Yes.

THE COURT: And that, as a result of that proceeding, we determined that your guideline range would be 151 to 188 months. Do you remember that?

THE INTERPRETER: Yeah.”

Third, Tavaréz did not challenge the stipulation at resentencing, as revealed in the colloquy between the District Court and Tavaréz’s counsel. *See* section I, *supra*.

Combining the admission at the plea hearing, the stipulation at the first sentencing hearing, and the reaffirmation of the stipulation at the resentencing hearing, we conclude that the District Court did not commit clear error in finding that the drug quantity attributable to Tavaréz is at least 150 grams of cocaine base.

III.

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