

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 06-4251

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UNITED STATES OF AMERICA

v.

DANTE NACHO,

Appellant

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On Appeal from the United States District Court  
for the Middle District of Pennsylvania  
(D.C. Crim. No. 06-00036-2)  
Honorable William W. Caldwell, District Judge

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Submitted under Third Circuit LAR 34.1(a)  
October 23, 2007

BEFORE: FISHER, ALDISERT, and GREENBERG, Circuit Judges

(Filed: October 26, 2007)

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OPINION OF THE COURT

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GREENBERG, Circuit Judge.

This matter comes on before the court on Dante Nacho's appeal from the sentencing aspect of a judgment of conviction and sentence entered on September 22, 2006, predicated on his plea of guilty pursuant to a plea agreement to a count of an

indictment charging him with distribution and possession with intent to distribute crack cocaine and heroin in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The sentence provided for a custodial term of 108 months to be followed by a three-year term of supervised release but Nacho challenges only the length of the custodial term. The appeal is unusual because even though Nacho challenges the court's calculation of his total offense level and argues that the court should have used a lower total offense level that would have yielded a lower guideline range, the court imposed a sentence below the bottom of the range that Nacho contends should have been used. The explanation for this reduced sentence is the not unusual circumstance that the court granted the government's motion for a downward departure pursuant to U.S.S.G. § 5K1.1. Notwithstanding Nacho's favorable treatment, the government does not contend that the plea agreement precludes this sentencing appeal.

The presentence report appropriately included calculations predicated on the weight of the drugs for which Nacho was responsible. In particular, the base offense level was calculated at 28 pursuant to U.S.S.G. § 2D1.1(c)(6). The presentence report then added 2 levels pursuant to U.S.S.G. § 2D1.1(b)(1) because Nacho possessed firearms in connection with the drug offenses. Thus, the adjusted offense level was 30 from which 3 levels were deducted for acceptance of responsibility. There then was a career offender adjustment (a category that Nacho challenged in his objections to the presentence report but does not question here) leading to a total offense level of 29. This total offense level together with the criminal history category of VI provided for a career offender led to a

range of 151 to 188 months.

Nacho filed an objection to the base offense level as he argued that the probation office improperly calculated the level using the weight of drugs seized from other persons. Thus, in his view, the base level should have been 26 rather than 28. Ordinarily, if Nacho had been correct his guideline range would have been lower than that the presentence report specified but in this case inasmuch as his career offender status activated U.S.S.G. § 4B1.1(b)(C) because there was a 20-year maximum term for his offense under 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(c), his total offense level would have remained at 29 even after the acceptance of responsibility adjustment if the court had accepted his argument. Accordingly, acceptance of his argument would not have changed the guideline range.

In view of the foregoing circumstances, at the outset of the sentencing the following exchange took place between the court and counsel:

THE COURT: [A]re there any objections to the pre-sentence report that you wished to pursue?

[DEFENSE COUNSEL]: The objections that I had filed originally, Your Honor, had to do with weights and also an objection to the career offender status. As [the prosecutor] has correctly pointed out, regardless of what findings would be made with regard to weights, the fact that he has been designated as a career offender renders the amount, or the weights, I should say, moot for purposes of sentencing.

So I would just stand by the objections, but also note that the finding of career offender status renders those issues moot.

THE COURT: Okay. Then I think we're prepared to proceed with sentencing.

[DEFENSE COUNSEL]: Yes.

App. at 10-11 (emphasis added).

The court then sentenced Nacho to a 108-month custodial term, granting the government's motion for a downward departure pursuant to U.S.S.G. § 5K1.1 from the 151-188 month custodial guideline range. Nacho then appealed.

Nacho states that the issue on this appeal is “did the [district] court erroneously ignore [his] objections to the findings of drug weight, and, consequently, apply the wrong guidelines before downwardly departing pursuant to the [government's] motion under U.S.S.G. § 5K1?” Appellant's br. at 2. He then goes on in his summary of argument to contend that the district court “erred in failing to consider [his] individual circumstances because they were rendered moot by the career offender guidelines” and that the error of the United States Sentencing Commission “and the subsequent error of the judge in imposing a sentence . . . for [a] career offender, prevented [him] from receiving a just and reasonable sentence.” Appellant's br. at 12. Moreover, even though he argues that “[i]n this case it is impossible to impose a sentence of more than 120 months,” *id.* at 15, he acknowledges that 21 U.S.C. § 841(a)(1) “requires a sentence of no more than 20 years” in this case. Appellant's br. at 15. Finally, he seems to argue that the Sentencing Commission set guideline ranges for his offense that are not authorized by 28 U.S.C. § 994(h).

We see no merit to this appeal. We do not doubt that in some cases the weight of the drugs involved might be a significant factor for a court to consider in sentencing even

though the calculation of the career offender guidelines range might not change if the defendant's calculations are accepted in a contested case. In this regard, we point out that a court's finding that a defendant is responsible for a lesser quantity of drugs than the presentence report attributed to him might encourage a court to sentence him to a lower sentence within a range than a finding that he is responsible for a greater quantity of drugs. Moreover, the quantity of drugs could impact on the degree of a departure from the guidelines range. Here, however, as the colloquy we quote above demonstrates, Nacho waived the right to have the court determine the weight of the drugs. In the circumstances, he is bound by his waiver and the court did not err in not making the weight determination. Government of the Virgin Islands v. Rosa, 399 F.3d 283, 290-91 (3d Cir. 2005).

Moreover, we see no error in the establishment of the guideline range in this case. While Nacho contends that "[t]he sentencing guidelines set forth sentencing ranges that are impossible to carry out" and that the sentences "are artificially high and incapable of application in a real life setting," appellant's br. at 15, we do not see why this is so. Finally, the court made it clear that it considered all of the factors in 18 U.S.C. § 3553(a)(2) in calculating the sentence. Even if we exercised plenary review of all issues on this appeal we could find no error here.

The judgment of conviction and sentence entered on September 22, 2006, will be affirmed.