

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 04 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HECTOR JAVIER MACIAS-
VALENCIA,

Defendant - Appellant.

No. 07-10350

D.C. No. CR-06-00010-RMW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted February 11, 2009
San Francisco, California

Before: SCHROEDER, CANBY and HAWKINS, Circuit Judges.

Hector Javier Macias-Valencia (“Macias”) appeals his sentence for conspiring to possess and attempting to possess methamphetamine, claiming error in the denial of a mitigating role reduction and in the district court’s methodology for determining

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

the relevant quantity of methamphetamine to be used in applying the Sentencing Guidelines.

A district court's refusal to grant a minor or minimal role adjustment is overturned only where the refusal was clearly erroneous. *United States v. Awad*, 371 F.3d 585, 591 (2004). A defendant may qualify for a downward role adjustment only when he is "substantially less culpable than the average participant." U.S.S.G. § 3B1.2 cmt. n.3(A).

The trial court's conclusion that a mitigating role reduction was not merited was a permissible interpretation of conflicting evidence. Although the evidence demonstrates Macias's brother made all of the arrangements to purchase the drugs and held the money intended to be used in the purchase, Macias did substantially participate in the meeting at which the drugs would actually be bought. He drove his brother to the meeting and assuaged the seller's concerns that he and his brother might be cooperating with the police. Although the district court could have found that his participation was limited and rendered him substantially less culpable than his co-defendant, the alternative view is also permissible. Where, as here, "there are two permissible views of the evidence, the factfinder's choice between them can not be clearly erroneous." *Awad*, 371 F.3d at 591 (quoting *Hernandez v. New York*, 500 U.S. 352, 369 (1991)).

Whether a district court's method of approximating the relevant drug quantity conforms to the guidelines is reviewed de novo. *United States v. Rosacker*, 314 F.3d 422, 425 (9th Cir. 2002). District courts resolve factual disputes at sentencing, including drug quantity approximations, by applying the preponderance of the evidence standard. *Id.* at 425, 430.

Application Note 12 to U.S.S.G. § 2D1.1 advises that the quantity of the controlled substance in a case where no actual drugs were seized shall be approximated. In a reverse sting, “the agreed-upon quantity of the controlled substance” is used “because the amount actually delivered is controlled by the government, not by the defendant.” *Id.* An exception arises, however, where the defendant “establishes [he] did not intend to . . . purchase, or was not reasonably capable of . . . purchasing, the agreed-upon quantity,” in which case that additional amount is excluded. *Id.* The application note therefore requires two steps: first determining whether the government has met the burden of establishing the “agreed-upon quantity” and then determining whether the defendant has met the burden of establishing by a preponderance of the evidence that he did not intend to purchase or was not capable of purchasing that quantity. *United States v. Barnes*, 993 F.2d 680, 683-84 (9th Cir. 1993).

Here, the district court conflated these two determinations and viewed the defendants' lack of sufficient funds only as evidence to weigh in determining the agreed-upon quantity.¹ Although the district court did not clearly err by determining that the agreement was for at least one pound of drugs, it did not determine whether Macias met his burden to show that he was not capable of purchasing that amount. Because of the district court's finding that the \$4,689 Macias's brother possessed "if counted would show that he could not buy a pound at that time," it is at least possible that Macias qualified for the exception.

The government argues that Macias and his brother could still have purchased two-thirds of a pound of methamphetamine of 60% purity for \$4,689, because they had originally agreed to purchase one pound for \$7,000. For them to have intended to purchase this amount, they must have expected the seller to give them the same volume discount that was negotiated for a full pound. Although the district court speculated that Macias and his brother might have obtained the full pound through subterfuge or an offer of future payment, it has not determined by a preponderance of the evidence that they intended to obtain the larger quantity through either method or

¹ The district court found that \$4,689, "certainly, if counted would show that he could not buy a pound at that time" and that the undercover DEA agent "indicated that he felt [the defendant] was only intending to buy half a pound at that time," but concluded that a full pound was involved because those factual findings did "not mean that the conspiracy or agreement was not to sell one or possibly two pounds."

would have been capable of doing so. We therefore remand to the district court so that it may determine, by a preponderance of the evidence, whether Macias met his burden to establish either that he was not capable of purchasing or did not intend to purchase the agreed-upon amount of drugs.

AFFIRMED IN PART; REVERSED IN PART.