

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 02 2009

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERNEST LEMAEFE TOFI,

Defendant - Appellant.

No. 08-10505

D.C. No. 1:08-CR-00060-HG

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Hawaii  
Helen Gillmor, District Judge, Presiding

Submitted August 20, 2009\*\*

Before: WALLACE, HAWKINS, and THOMAS, Circuit Judges.

Ernest Lemaefe Tofi appeals from the 108-month sentence imposed following his guilty-plea conviction for attempt to possess with intent to distribute

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

500 grams or more of cocaine and conspiracy to possess with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and 846. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Tofi contends that the district court erred by attributing quantities of cocaine to him based on money seized from a co-conspirator's safe. The district court did not clearly err in calculating the drug quantity for which Tofi was responsible. *See United States v. Alvarez*, 358 F.3d 1194, 1212-13 (9th Cir. 2004); *see also United States v. Kilby*, 443 F.3d 1135, 1142 (9th Cir. 2006). Tofi's contentions that the district court improperly shifted the burden of proof from the government, and violated Federal Rule of Criminal Procedure 32 by failing to resolve disputed issues as to drug quantity lack merit. *See United States v. Gutierrez-Hernandez*, 94 F.3d 582, 585 (9th Cir. 1996).

Tofi also contends that the district court erred by failing to reduce his offense level based on a third level point for acceptance of responsibility because the government's failure to move for the reduction was arbitrary, and that the government and district court misapprehended the law. This contention is without merit. *See United States v. Espinoza-Cano*, 456 F.3d 1126, 1136-38 (9th Cir. 2006).

Tofi's unopposed motion to strike specified portions of the supplemental excerpts of record is granted.

**AFFIRMED.**