

Not for Publication in West's Federal Reporter

United States Court of Appeals
For the First Circuit

No. 08-2131

UNITED STATES,

Appellee,

v.

MOISÉS CANDELARIA-SILVA,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. José Antonio Fusté, U.S. District Judge]

Before

Torruella, Selya and Boudin,
Circuit Judges.

Moisés Candelaria-Silva on brief pro se.
Thomas F. Klumper, Assistant U.S. Attorney, Nelson Pérez-Sosa,
Assistant U.S. Attorney, and Rosa Emilia Rodríguez-Vélez, United
States Attorney, on brief for appellee.

December 23, 2009

Per Curiam. After a thorough review of the parties' submissions and of the record in this case, including the original trial record, we vacate the district court's order denying defendant Moises Candelaria-Silva's motion for reduction of sentence and remand for further proceedings.

The district court denied Candelaria's motion on the ground that "[a]ny of the other narcotics [involved in this offense] standing alone substantiate the Offense Level of 42 for which defendant was sentenced." We have not been directed to any record support for this factual conclusion. The trial transcript does not appear to contain sufficient evidence with regard to the types and quantities of drugs involved in Candelaria's offense to support this conclusion. Likewise, the Pre-Sentence Report prepared in this matter does not provide any estimate of the types or quantities of drugs involved in the offense. While Candelaria was part of a larger conspiracy that may have handled a sufficient amount of powder cocaine, heroin, or some combination thereof to support the highest base offense level of 38, Candelaria may only be held responsible for those drugs he personally handled as well as those that were reasonably foreseeable to him. See U.S.S.G. § 1B1.3(a)(1). The district court's conclusions regarding the types and quantities of drugs involved in the offense must be based on something more than "hunch or intuition." United States v. Marrero-Ortiz, 160 F.3d 768, 780 (1st Cir. 1998). Because we have

not been directed to any record support for the court's factual conclusion, we vacate the order denying relief and remand for further proceedings. The sentence imposed may or may not be appropriate; but it cannot be sustained on the basis of a factual conclusion that has no evident record support.

The district court's order denying appellant Moises Candelaria-Silva's motion for reduction of sentence is vacated, and the matter is remanded.