

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 11 2008

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSEPH KAI CHENG, aka Kam Kai
Cheng,

Defendant - Appellant.

No. 07-50278

D.C. No. CR-05-00807-DSF-13

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Submitted May 5, 2008**
Pasadena, California

Before: FISHER and PAEZ, Circuit Judges, and CAMPBELL, District Judge.***

Defendant-appellant Joseph Kai Cheng appeals his 30-month sentence imposed pursuant to his plea of guilty to one count of conspiracy to traffic in

*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).

***The Honorable David G. Campbell, United States District Judge for the District of Arizona, sitting by designation.

counterfeit goods and contraband cigarettes in violation of 18 U.S.C. § 371 and to one count of trafficking in counterfeit goods in violation of 18 U.S.C. § 2320. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The district court properly calculated the Sentencing Guidelines range and did not abuse its discretion in applying Application Note 2 to U.S.S.G. § 2B5.3. *See United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006).

Because Cheng failed to object at sentencing to the standard of proof used to establish the infringement amount we review for plain error. *See United States v. Riley*, 335 F.3d 919, 925 (9th Cir. 2003); *see also* Fed. R. Crim. P. 52(b). The weight of the evidence would satisfy even the clear and convincing standard. The district court properly determined that the infringement amount was in excess of \$1 million.

The district court did not clearly err in declining to apply a four-level decrease for Cheng's role in the offense. *See Cantrell*, 433 F.3d at 1283.

AFFIRMED.