IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8263

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SHARLA ALLENE FLOURNOY,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A 91 CR 109 02)

(December 23, 1992)

Before KING, DAVIS and WEINER, Circuit Judges.

PER CURIAM:[*]

Sharla Flournoy was convicted of one count of conspiracy to distribute MDMA, a schedule II controlled substance, and one count of attempted distribution of MDMA. The district court sentenced her to two concurrent thirty-three month terms of imprisonment and three years of supervised release. The court also imposed a fine of $2000. On appeal, Flournoy challenges the

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

district court's sentence. We affirm in all respects.

I.

Flournoy's arrest was the result of a 1991 sting operation conducted jointly by state and federal authorities in Texas. Flournoy was arrested after she and her boyfriend, Brian Seideman, provided a sample of MDMA, commonly known as "ecstasy," to an undercover agent. During the arrest, officers found a loaded semi-automatic handgun and 200 capsules of MDMA on Seideman. Flournoy admitted ownership of the drugs. She later consented to a search of her apartment. Police officers there discovered approximately 175 capsules of MDMA and 23 dosage units of LSD. According to trial testimony of DEA Special Agent Kyle Williamson, during the search of Flournoy's apartment he witnessed Flournoy write something on a piece of paper and attempt to pass the paper to one of her roommates. Williamson, however, intercepted and inspected the note, which stated, "say nothing."

Flournoy pled guilty to one count of conspiracy to distribute MDMA and one count of attempted distribution of MDMA. At sentencing, the court calculated Flournoy's offense level under the Sentencing Guidelines. The court assessed a two-point upward adjustment pursuant to § 3C1.1 of the Guidelines based on a finding that Flournoy had obstructed justice by attempting to pass the note to her roommates during the police's search of her apartment. Flournoy objected to this finding. She claimed that

her note simply intended to convey the message that her roommates should "say nothing" to Flournoy's parents. The district court discredited her explanation, noting that Agent Williamson testified that, at the time Flournoy attempted to pass the note, Flournoy had already instructed her roommates not to inform her parents of the arrest.

The district court also increased Flournoy's base offense level for two other reasons. First, the district court considered the LSD seized at Flournoy's apartment to be "relevant conduct" under the Guidelines. Second, the court found Flournoy criminally responsible for her co-defendant's possession of a loaded semi-automatic pistol at the time of arrest. Flournoy objected to both increases. Flournoy also objected to the district court's refusal to decrease her base offense level on account of what Flournoy claimed was her acceptance of responsibility.

II.

If a defendant willfully obstructs or impedes the administration of justice during an investigation, or if the defendant attempts to do so, the offense level is to be increased by two levels. U.S.S.G. § 3C1.1. The district court found that Flournoy attempted to obstruct justice by attempting to pass a note to her roommates, admonishing them to "say nothing" to police. This Court must determine whether that finding was clearly erroneous. United States v. Pierce, 893 F.2d 669, 677

(5th Cir. 1990).

As an initial matter, we observe that we are not at liberty under the clearly erroneous standard to disturb the district court's decision to discredit Flournoy's claim that her note simply concerned her parents rather than police; such a finding was based on a credibility determination and was "plausible in light of the record." Anderson v. City of Bessemer, 470 U.S. 564, 574 (1985). Flournoy further argues that the district court erred as a matter of law in finding a § 3C1.1 violation. Relying on the commentary to the relevant section, see U.S.S.G. § 3C1.1, comment., n.3(d), Flournoy contends that the Government failed to meet the requirements of § 3C1.1 by failing to demonstrate that Flournoy was attempting to conceal some type of "material evidence." "Material evidence" is evidence tending to "influence or affect the issue under determination." Id. § 3C1.1, comment., n.5. Even though the Government did not explicitly explain what "material evidence" Flournoy's roommates would have or could have provided, the record reflects that the roommates were prospective Government witnesses. This court may infer, therefore, that the roommates had material evidence Flournoy was attempting to conceal.

Moreover, Flournoy errs by assuming that her obstruction specifically had to effect a concealment of "material evidence." The commentary to section 3C1.1 provides that obstructive conduct can vary widely in nature, degree of planning, and seriousness. U.S.S.G. § 3C1.1, comment., n.2. Concealment or attempted

concealment of material evidence is only one example given in § 3C1.1's "non-exhaustive list" of what qualifies as obstruction. See United States v. Valdiosera-Godinez, 932 F.2d 1093, 1100 (5th Cir. 1991). In addition to concealing or attempting to conceal material evidence, attempting to influence or intimidate a witness, directly or indirectly, amounts to obstructing justice. Id. § 3C1.1, comment., n. 3(a). Accordingly, the district court's finding was not "clearly erroneous" and was in accordance with § 3C1.1's purposes.

Flournoy next argues that the sentencing court should have given her offense level a two-point reduction based on acceptance of responsibility. Such a reduction is appropriate only if the defendant "clearly demonstrates a recognition and affirmative acceptance of responsibility" for the criminal behavior. U.S.S.G. § 3E1.1(a). Whether the defendant has accepted full responsibility for her criminal conduct is a question of fact. United States v. Perez, 915 F.2d 947, 950 (5th Cir. 1990). That finding is for the district court, and this Court will not disturb it unless it is without foundation.

Flournoy gave conflicting statements regarding why she was involved in the offense. At the initial interview with the probation officer, Flournoy stated that the money from the sale leading to her arrest was for paying bills or her personal drug use. At a later interview, she stated that she had quit using drugs two weeks before the arrest and that the MDMA sale leading to her arrest was an attempt to rid herself of all the drugs she

still had. Furthermore, the record reveals that Flournoy refused to provide the DEA with further information concerning the LSD found in her apartment. Finally, telephone conversations between Flournoy and her co-defendant, Seideman, which were monitored by police, revealed discussions of future sales of MDMA.

Although we recognize that Flournoy cooperated with the police officers in some ways -- even consenting to a search of her apartment -- there is sufficient evidence showing that she did not clearly demonstrate a recognition and affirmative acceptance of personal responsibility for her criminal behavior. Accordingly, we believe that the sentencing court's decision not to allow a two-level reduction for acceptance of responsibility is not without foundation.

Flournoy next challenges the district court's decision to consider the LSD seized at her apartment as "relevant conduct," see U.S.S.G. § 1B1.3(a)(2), which led the court to increase her base offense level. In determining the base offense level, the sentencing court may consider quantities of drugs not specified in the count of conviction if the drugs are part of the "same course of conduct or common scheme or plan as the offense of conviction." See id.; see also United States v. Ponce, 917 F.2d 841, 843-44 (5th Cir. 1990), cert. denied, 111 S. Ct. 1398 (1991). This Court must therefore determine whether the district court clearly erred in finding that the LSD was part of "the same course of conduct or common scheme or plan" as the offense of conviction, which involved only MDMA.

To qualify as relevant conduct, the conduct must pass the test of similarity, regularity, and temporal proximity. United States v. Bethley, 973 F.2d 396, 401 (5th Cir. 1992). In other words, there must be sufficient similarity and temporal proximity to reasonably suggest that repeated instances of criminal behavior constitute a pattern of criminal conduct. Id. In this case the LSD and the MDMA were seized on the very same day. Additionally, the police had information that Flournoy was a distributor of both MDMA and LSD. The quantity of LSD found in the apartment, moreover, was a distributable amount. The record also reflects that the Government's informant and Seideman, Flournoy's coconspirator, had negotiated for both MDMA and LSD. We believe that there is sufficient evidence in the record to support the district court's finding that the LSD constituted part of the same course of conduct or part of a common scheme or plan as the offense of conviction.

Finally, on appeal, Flournoy challenges the district court's decision to increase her base offense level based on the court's finding that Flournoy was criminally responsible for her co-defendant's possession of a loaded semi-automatic pistol at the time of arrest. We note that, under the Guidelines, a defendant is criminally responsible for any conduct for which she would be "otherwise accountable." See U.S.S.G. § 1B1.3(a)(1). Such conduct includes the "conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant." Id. § 1B1.3, comment.,

n.1.

Flournoy objected to this increase on the grounds that she did not know Seideman had a weapon and that she could not have reasonably foreseen that he would have a weapon. She now argues that this court must remand the case for a determination whether she had actual knowledge that Seideman had a gun or whether the gun possession was reasonably foreseeable. We observe that the probation officer's pre-sentence investigation report's addendum explicitly discussed the issue of Flournoy's knowledge of the weapon. The district court adopted the probation officer's report and its addendum. Pre-sentence investigation reports "generally bear[] sufficient indicia of reliability to be considered as evidence in making factual determinations required by the sentencing guidelines." United States v. Birch, 873 F.2d 765, 767 (5th Cir. 1989). We see no need to remand for further fact-finding.

Even if the district court had not adopted the addendum, sufficient evidence on the record supports its decision to increase Flournoy's offense level because of Seideman's gun possession. The record reflects that the informant told the police officers that Seideman would be carrying a firearm during the sale that led to Flournoy's arrest. Furthermore, Flournoy indicated to Agent Williamson when she was arrested that she knew Seideman had a gun. Flournoy claimed that Seideman was carrying it "for protection." The evidence supports the district court's finding that Flournoy knew Seideman had a gun.

III.

For the foregoing reasons, the judgment of the district court is affirmed.