IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8556

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JACK DONALD BAXTER, WANDA PEARL BAXTER, and CHARLENE F. NUNLEY,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas

October 15, 1993

Before HIGGINBOTHAM, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Jack Donald Baxter, Wanda Pearl Baxter, and Charlene F. Nunley appeal their convictions of one count of conspiracy to possess amphetamine with intent to distribute. Finding no error in the convictions or sentences of Jack Baxter or Nunley, we affirm as to them. Finding that the evidence was insufficient to support Wanda

[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Baxter's conviction, we reverse her conviction.

I.

Cade Warner, an unindicted co-conspirator, was arrested on or about October 22, 1991. A search of his residence revealed a small stock of amphetamine, some marihuana, and $18,000 in cash. After questioning by the Texas Department of Public Safety ("DPS"), Warner agreed to cooperate with Texas authorities in the investigation of his source of amphetamine. He named Jack Baxter as his source and stated that amphetamine from Baxter sometimes was delivered to Warner by Nunley.

Around December 13, 1991, Warner called Jack Baxter's residence several times to arrange for the purchase of amphetamine. Authorities recorded a total of six of these conversations between Warner and Jack Baxter and between Warner and Nunley. Jack Baxter told Warner that when the amphetamine was ready, "Charlene" would make the delivery.

DPS officers then set up a surveillance operation and followed Nunley. On December 13, 1991, they stopped her four to five miles away from where she was to meet Warner and, with her consent, searched her car. In the trunk, they found a paper sack on which Warner's initials had been written. Inside the sack they found four heat-sealed plastic packages, each of which contained approximately twenty-seven grams of amphetamine. They also found a thermos containing $440 in cash and a memo book containing Warner's phone number. The DPS officers arrested Nunley.

The officers then went to Jack Baxter's residence and requested his consent to a search. Baxter consented and signed a written consent form. In a workshop building located at the rear of the property, the officers observed several pieces of glassware, bottles, and chemical containers. The building contained a strong odor of amphetamine. In a separate room inside the workshop, they found the bulk of Jack Baxter's amphetamine production equipment.

While the officers were searching the workshop, Jack Baxter indicated that he wanted to call his attorney. He did so, then informed the officers that, on the advice of his attorney, he was withdrawing consent to their search. The investigating officers discontinued their search and left to obtain a warrant. They returned a short time later with a warrant and continued the search.

The officers recovered $2,400 in cash from the residence; three plastic bags containing amphetamine from the master bedroom; one plastic bag containing less than a gram of amphetamine from Wanda Baxter's purse; eight plastic bags containing amphetamine from the workshop area; a paper sack containing amphetamine from inside a red pickup truck parked on the premises; and trace amounts of amphetamine from a plastic bowl and spatula in the workshop area. In total, the officers recovered 1,570.72 grams of amphetamine from the Baxter property, the pickup truck, and Nunley's vehicle.

Jack Baxter, Wanda Baxter, and Nunley were all charged with, and convicted of, conspiracy to possess amphetamine with intent to

distribute. They were sentenced, respectively, to 240 months', 121 months', and 78 months' imprisonment.

II.

Jack Baxter raises four points of error. He asserts that his trial was barred by double jeopardy because of previous forfeiture proceedings; that he was denied his right to a speedy trial; that his consent to the search was not voluntarily given; and that the search warrant was not supported by probable cause.

A.

This court reviews de novo Jack Baxter's contention that his trial constituted double jeopardy. United States v. Botello, 991 F.2d 189, 192 (5th Cir.), petition for cert. filed (U.S. Sept. 2, 1993) (No. 93-5835). Jack Baxter's double jeopardy challenge is based upon two prior proceedings against him. First, Jack Baxter was subjected to a federal civil forfeiture proceeding. And second, he was the defendant in a lawsuit brought by the State of Texas for failure to pay controlled substances taxes.

In United States v. Halper, 490 U.S. 435, 448-49 (1989), the Court held that a criminal conviction can bar a subsequent civil penalty for the same act when the amount of the civil fine bears no rational relation to the government's loss and is therefore a second "punishment." We have recognized that the Halper principle also applies when, as here, the civil penalty precedes the criminal conviction. United States v. Sanchez-Escareno, 950 F.2d 193, 200

(5th Cir. 1991), cert. denied, 113 S. Ct. 123 (1992). Therefore, Jack Baxter argues, his prior civil forfeiture liability bars his criminal conviction for the same acts.

This argument must be rejected on two grounds. First, in United States v. McCaslin, 959 F.2d 786 (9th Cir.), cert. denied, 113 S. Ct. 382 (1992), the court held that the Halper principle does not apply to civil forfeitures of the instrumentalities of crime. "The forfeiture of such instrumentalities," the Ninth Circuit explained, "is `independent of, and wholly unaffected by any criminal proceeding in personam.'" Id. at 788. This authority, while not binding on us, is persuasive.

Second, the recent holding in United States v. Dixon, 113 S. Ct. 2849 (1993),[1] has modified the double jeopardy standard. In Dixon, the Court overruled its prior holding in Grady v. Corbin, 495 U.S. 508 (1990), to the effect that double jeopardy bars any subsequent prosecution in which the government would have to prove the same conduct as was the basis for the earlier conviction. In rejecting Grady's "same conduct" test, the Dixon Court emphasized that the "same elements" test of Blockburger v. United States, 284 U.S. 299 (1932), was the only hurdle the prosecution had to overcome to escape a double jeopardy bar.

Under the Blockburger/Dixon "same elements" test, the central inquiry is whether "each charge requires proof of a fact not

[1] The Dixon Court was badly fragmented and produced five separate opinions. Nevertheless, we follow Justice Scalia's opinion abandoning the "same conduct" test, as it received support from a majority. See generally Mark A. Thurmon, Note, When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions, 42 DUKE L.J. 419 (1992).

required for the other." United States v. Liller, 999 F.2d 61, 63 (2d Cir. 1993). Under that standard, since the federal civil forfeiture proceeding and the criminal conspiracy charge had some different elements, Jack Baxter faced no double jeopardy when prosecuted for both offenses. In addition, his double jeopardy allegation based upon the Texas tax proceeding is barred by the "dual sovereignty" exception to double jeopardy. See, e.g., Heath v. Alabama, 474 U.S. 82 (1985); United States v. Harrison, 918 F.2d 469, 474-75 (5th Cir. 1990).

B.

With respect to Jack Baxter's allegation of a Speedy Trial Act violation, we review the district court's factual findings under the clearly erroneous standard and its legal conclusions de novo. United States v. Holley, 986 F.2d 100, 103 (5th Cir.), cert. denied, 1993 U.S. LEXIS 5042 (U.S. Oct. 4, 1993). Jack Baxter contends that his federal criminal prosecution is barred by the Speedy Trial Act, 18 U.S.C. § 3161(b), because the federal charges were filed more than thirty days after his arrest. This argument is frivolous. It is well settled, as even Jack Baxter concedes in his brief, that an arrest by state authorities does not trigger the Speedy Trial Act's thirty-day clock for filing federal charges. United States v. Charles, 883 F.2d 355, 356 (5th Cir. 1989), cert. denied, 493 U.S. 1033 (1990).

Jack Baxter attempts to invoke a purported exception to that rule when there is "intentional prosecutorial manipulation" of the

state arrest and federal indictment in order to circumvent the Speedy Trial Act. He cites no authority binding in this circuit for the existence of such an exception. Even if we recognized that exception, though, there is no evidence of "intentional prosecutorial manipulation" here)) indeed, federal authorities had no idea who Jack Baxter was until well after his arrest by Texas authorities.

C.

Jack Baxter's assertion that he never voluntarily consented to the search of his property is a question of fact reviewed under a clearly erroneous standard. United States v. Gonzales, 842 F.2d 748, 754-55 (5th Cir. 1988). Jack Baxter is no stranger to the criminal justice system. He was no doubt aware of his right to refuse consent even if the officers had not repeatedly told him he had the right to refuse. Jack Baxter knew he was not in custody at the time the request was made. Under the standard for voluntariness stated in United States v. Phillips, 664 F.2d 971, 1023-24 (5th Cir. Unit B Dec. 1981), cert. denied, 457 U.S. 1136 (1982), the district court did not err in holding that Baxter had voluntarily consented to the search.

D.

As to Jack Baxter's assertion that there was no probable cause to support the search warrant for his property, we review the district court's factual findings for clear error, and its

conclusion that those facts were sufficient to constitute probable cause de novo. United States v. 1988 Oldsmobile Cutlass Supreme 2 Door, 983 F.2d 670, 673 (5th Cir. 1993); United States v. Muniz-Melchor, 894 F.2d 1430, 1439 n.9 (5th Cir.), cert. denied, 495 U.S. 923 (1990).

After Jack Baxter, on the advice of his attorney, withdrew his consent to the search, the officers obtained a warrant. Jack Baxter contends that the warrant was unsupported by probable cause because the supporting affidavit was based upon information collected during an involuntary search of his property.

Since we have concluded that the search of Jack Baxter's property was voluntary, the objection is without merit. Under the standard that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause," United States v. Brown, 941 F.2d 1300, 1302 (5th Cir.) (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)), cert. denied, 112 S. Ct. 648 (1991), the officers had more than sufficient evidence to support a warrant.

III.

Wanda Baxter challenges her conviction and sentence on four grounds. She claims that the evidence was insufficient to support a conviction; that taped conversations were improperly admitted into evidence; that the prosecution made improper closing arguments; and that the sentencing court failed to make the requisite factual findings.

A.

Since Wanda Baxter filed a motion for judgment of acquittal after the close of the prosecution's case in chief, we review her challenge to the sufficiency of the evidence using the standard of whether a reasonable jury could have found her guilty beyond a reasonable doubt. United States v. Vaquero, 997 F.2d 78, 88 (5th Cir. 1993); United States v. Mergerson, 995 F.2d 1285, 1289 (5th Cir. 1993). The crime of conspiracy, 21 U.S.C. § 846, to possess amphetamine with the intent to distribute has three elements: (1) A conspiracy existed; (2) the defendant knew about the conspiracy; and (3) with that knowledge, the defendant voluntarily became a part of the conspiracy. United States v. Featherson, 949 F.2d 770, 774 (5th Cir. 1991), cert. denied, 112 S. Ct. 1771 (1992). The government must prove each element beyond a reasonable doubt. We find the evidence lacking regarding Wanda Baxter's voluntary participation in the conspiracy.

The government asks us to infer Wanda Baxter's knowledge that the conspiracy existed from the facts that she lived with Jack Baxter and that a small quantity (less than one gram) of amphetamine was found in her purse. To infer her knowledge from those facts does not seem unreasonable, and the government is entitled to that inference in support of the verdict.

The government also asks us to infer, from those same facts, Wanda Baxter's voluntary participation in the conspiracy. That inference is not supported by the evidence. "The government must show beyond a reasonable doubt that the deliber-

ate, knowing, and specific intent to join the conspiracy, and this court will not `lightly infer a defendant's knowledge and acquiescence in a conspiracy.'" United States v. Gordon, 712 F.2d 110, 114 (5th Cir. 1983) (citations omitted). The government must prove intent to participate in the illegal objectives of the conspiracy. "A showing that the defendant merely associated with those participating in a conspiracy is insufficient." United States v. Jackson, 700 F.2d 181, 185 (5th Cir.), cert. denied, 464 U.S. 842 (1983).

The government offered no proof that Wanda Baxter involved herself in the conspiracy in any way. She is never heard speaking on any of the taped conversations the government recorded between Warner and both Nunley and Jack Baxter. There is no evidence that she was involved in the manufacture of amphetamine, nor that she ever served as a courier or handled the proceeds of the illicit drug sales. Her presence in the same house as Jack Baxter is not sufficient to establish participation in a conspiracy, see, e.g., United States v. Onick, 889 F.2d 1425, 1432 (5th Cir. 1989), and the government's informant, Cade Warner, testified that he believed Wanda Baxter was uninvolved in the conspiracy.

The only evidence is the small quantity of amphetamine taken from Wanda Baxter's purse. This fact merely establishes that she may have used the drug; it does not establish her knowing participation in a conspiracy to possess the drug with intent to distribute it. On these facts, it is difficult to see on what basis a reasonable jury could have reached the conclusion, beyond a

reasonable doubt, that Wanda Baxter "voluntarily became a part of" the conspiracy. Because the evidence does not support the verdict, Wanda Baxter's conviction must be reversed and, as she may not be retried, her indictment must be dismissed. Consequently, we do not address her other claims.

IV.

Nunley challenges her conviction on the ground that the evidence was insufficient to support her conviction. She also contends that the district court erred in setting her base offense level and not giving her a downward adjustment for her minor role in the conspiracy.

A.

Because she filed no motion for acquittal, this court reviews Charlene Nunley's challenge to the sufficiency of the evidence to support her conviction for plain error, with the conviction to be upheld unless doing so would result in a manifest miscarriage of justice. United States v. Hernandez, 962 F.2d 1152, 1156 (5th Cir. 1992); United States v. Hall, 845 F.2d 1281, 1283 (5th Cir.), cert. denied, 488 U.S. 860 (1988). We find that ample evidence supports her knowing participation in the conspiracy. Nunley spoke with Warner when he was soliciting the purchase of amphetamine from Jack Baxter. She told Warner about Baxter's need to "do another cook," a reference the government relies upon to show her knowledge of the slang of the amphetamine trade. She also transported amphetamine

manufactured by Jack Baxter on at least two previous occasions, not including the incident of December 13, 1991, when she was stopped en route to make a delivery to Warner. A reasonable jury could have found that Nunley conspired to distribute amphetamine.

B.

Nunley challenges, on two grounds, the district court's setting of her base offense level. First, she contends that the court erred in adopting the presentence investigation report ("PSR"), which recommended that her liability be based upon the entire quantity of amphetamine involved in the conspiracy. Second, she contends that the district court erred in holding her liable for the entire amount of amphetamine involved in the conspiracy.

As to her first contention, the district court expressly adopted the factual findings from the PSR, as it was free to do without further explanation in the absence of contrary evidence or any objection from Nunley. United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990); United States v. Mueller, 902 F.2d 336, 346 (5th Cir. 1990). As to her second contention, it is apparent from the taped conversations and from her previous deliveries of amphetamine that Nunley knew Jack Baxter was involved in the production of the drug. The district court did not abuse its discretion, therefore, in concluding that the entire quantity involved in the conspiracy was foreseeable to Nunley and that her sentence therefore could be based upon the entire amount involved in the conspiracy.

C.

We review the district court's refusal to grant Nunley a downward adjustment under a clearly erroneous standard. United States v. Vaquero, 997 F.2d 78, 88 (5th Cir. 1993); United States v. Bethley, 973 F.2d 396, 401 (5th Cir. 1992), cert. denied, 113 S. Ct. 1323 (1993). Nunley challenges the district court's refusal to reduce her base sentence level for being a "minor participant" in the conspiracy. This court in United States v. Bethley, 973 F.2d 396, 401 (5th Cir. 1992), cert. denied, 113 S. Ct. 1323 (1993), indicated that a "`mule' or transporter of drugs may not be entitled to minor or minimal status" under the Sentencing Guidelines.

Nunley's role was not limited to a single delivery of drugs. The district court, accordingly, did not err in refusing to find her a "minor participant" in the conspiracy and adjust her sentence downward accordingly.

V.

For the foregoing reasons, we AFFIRM the convictions of Jack Baxter and Nunley. We REVERSE the conviction of Wanda Baxter and REMAND her case to the district court with instruction to enter a judgment of acquittal.

AFFIRMED IN PART and REVERSED and REMANDED in part.