

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 93 - 8027

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

VERSUS

J. W. MYERS, MICHAEL MERRILL GREENWOOD  
and LUCY MASON CRAIN

Defendants - Appellants.

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Appeal from the United States District Court  
for the Western District of Texas  
(EP-90-CR-82-6)

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(March 24, 1994)

Before HIGGINBOTHAM AND DUHE', Circuit Judges and STAGG<sup>1</sup>, District  
Judge.

PER CURIAM:<sup>2</sup>

Defendants object to the district court's calculation of the amount of drugs attributable to them as relevant conduct under the Sentencing Guidelines. Defendant Crain also objects to the district court's failure to make a specific factual finding with respect to an objection to her presentence report. We affirm the judgment of the district court with respect to defendants Greenwood and Crain. With respect to defendant Myers, we reverse and remand

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<sup>1</sup>District Judge of the Western District of Louisiana, sitting by designation.

<sup>2</sup>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 Pursuant to that rule, the court has determined that this opinion should not be published.

for resentencing.

FACTS.

Defendants were convicted of participating in a conspiracy to distribute methamphetamine. On appeal, this court remanded for resentencing because the district court erroneously classified methamphetamine as a schedule III controlled substance. On remand, the court attributed 950 grams of methamphetamine seized from the home of a co-defendant, Doyle Oliver, to each of the three defendants as relevant conduct under the Sentencing Guidelines. All three defendants appeal that ruling. Crain further contends that the district court violated Federal Rule of Criminal Procedure 32 by failing to make a factual finding regarding whether Doyle Oliver delivered 112 grams of methamphetamine to Crain and co-defendant Michael Greenwood.

The methamphetamine conspiracy began around May 1, 1989 and involved Crain, Greenwood, Myers, and a fourth co-defendant, Doyle Oliver. Greenwood and Donald Stone, who was a key witness for the government at trial, worked as truck drivers for the J.W. Myers Trucking Company, which was owned by defendant Myers. Myers supplied his drivers with methamphetamine to help them stay awake on long trips. He also instructed at least one of his drivers, Stone, to stop at Miss Lucy's Truck Stop in Pyote, Texas, even though the gasoline prices there were more expensive than at other stops. Lucy Crain managed the truck stop, and she supplied methamphetamine to truck drivers who frequented her stop by putting the drug in their coffee.

Gayla Koehler was Greenwood's girlfriend and lived with him from November 1988 through July 1989. At trial, she testified that she had observed Greenwood use methamphetamine. She also stated that Myers would bring methamphetamine to Greenwood's home and that the three would share the drugs. She further testified that Greenwood and Crain would discuss methamphetamine on the telephone in coded language. She witnessed a transfer of one ounce of methamphetamine from Myers to Greenwood in May or June 1989. She also witnessed Crain receive three and one-half grams of methamphetamine from Greenwood.

Donald Stone was involved in a separate marijuana conspiracy in which Greenwood and Crain participated. He served as a key witness for the government in the trial of the methamphetamine conspiracy. Stone observed Crain transfer methamphetamine to Greenwood at her truck stop, and Greenwood admitted to Stone in September 1989 that he and Crain had sold ten ounces of methamphetamine. Stone also stated that Greenwood had complained to him that Crain was "ripping him off" with respect to their methamphetamine sales.

Doyle Oliver acted as a methamphetamine supplier to Greenwood and Crain. One witness testified to overhearing a discussion in November, 1989 during which Greenwood and Crain discussed placing a telephone call to Oliver; they also revealed that they would be receiving "four ounces of crank" from him. The same witness overheard the two defendants place a telephone call to Oliver and ask him "if everything was still set." Greenwood and Crain later

traveled to Louisiana soon after Thanksgiving, 1989 to visit Oliver. At that time they purchased in excess of 110 grams of methamphetamine from Oliver.

On March 21, 1990, the West Monroe division of the Louisiana State Police conducted a search of Oliver's residence. Oliver led the officers to a metal box which contained over 950 grams of methamphetamine. Also seized was Oliver's address book, which contained the telephone numbers of Myers and Crain. Telephone toll records revealed that long distance phone calls were placed between Myers, Oliver, and Crain during the period between May 1, 1989 and May 4, 1990.

Before the resentencing hearing of the three defendants, the probation officer revised the presentence reports. The reports attributed the 950 grams seized from Oliver's apartment to each defendant as relevant conduct, and Greenwood, Myers, and Crain were each sentenced based on their involvement with 1,419 grams of methamphetamine.

ANALYSIS.

Section 1B1.3(a) of the United States Sentencing Guidelines, entitled "Relevant Conduct," provides that the base offense level of a defendant shall be determined on the basis of:

- (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
- (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly

undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

U.S.S.G. § 1B1.3(a)(1). Thus, for the 950 grams of methamphetamine seized from Oliver to be included properly as relevant conduct in sentencing the defendants, Oliver's actions must have been 1) reasonably foreseeable to the defendants; and 2) undertaken in furtherance of the defendants' joint enterprise. U.S.S.G. §1B1.3, comment. (n.2); United States v. Mitchell, 964 F.2d 454 (5th Cir. 1992). We review the district court's factual determination of the quantity of drugs attributable to the defendants under a clearly erroneous standard. United States v. Windham, 991 F.2d 181, 182 (5th Cir.). cert. denied, 62 U.S.L.W. 3334 (1993). However, we review interpretation or application of the sentencing guidelines de novo. United State v. Thomas, 963 F.2d 63, 64 (5th Cir. 1992).  
A. Greenwood.

Greenwood's argument that the 950 grams of methamphetamine seized from Oliver are not attributable to him is based primarily on the fact that he had been in jail for approximately one month prior to the search of Oliver's residence. Greenwood therefore argues that Oliver's possession of the methamphetamine was not reasonably foreseeable to him.

However, the evidence at trial established that Greenwood had made substantial purchases of methamphetamine from Oliver. Therefore, Greenwood was aware that Oliver was distributing methamphetamine for profit, and it was reasonably foreseeable to

Greenwood that Oliver would be in the possession of a large amount of methamphetamine.

The more difficult question is whether Oliver's possession of the methamphetamine was in furtherance of the joint enterprise between Oliver and Greenwood. Greenwood's incarceration arguably terminated his participation in the joint enterprise. However, this court has previously held that withdrawal from a conspiracy is an affirmative defense that must be raised at trial. United States v. MMR Corp. (LA), 907 F.2d 489, 499-500 (5th Cir. 1990), cert. denied, 499 U.S. 936, 111 S.Ct. 1388 (1991); United States v. Arky, 938 F.2d 579, 581-82 (5th Cir. 1991), cert. denied, 112 S.Ct. 1268 (1992). Moreover, a conspirator's arrest does not create a presumption that his participation in the conspiracy is terminated. United States v. Branch, 850 F.2d 1080, 1082-83 (5th Cir. 1988), cert. denied, 488 U.S. 1018, 109 S.Ct. 816 (1989). "A defendant is presumed to continue involvement in a conspiracy unless that defendant makes a substantial affirmative showing of withdrawal, abandonment, or defeat of the conspiratorial purpose." United States v. Vaquero, 997 F.2d 78, 82 (5th Cir.), cert. denied, 62 U.S.L.W. 3394 (1993) (citing United States v. Branch, 850 F.2d 1080 (5th Cir. 1988), cert. denied, 488 U.S. 1018, 109 S.Ct. 816 (1989)). Because Greenwood introduced no evidence, other than his arrest, to suggest that he voluntarily withdrew from the conspiracy, his argument on this point is without merit.

#### B. Myers.

The evidence linking Myers to Oliver is more tenuous. Myers

clearly engaged in drug transactions with Greenwood and Crain. The presentence report indicates that Myers purchased methamphetamine from Greenwood on two occasions and sold methamphetamine to Greenwood on one occasion. However, the only evidence connecting Myers to Oliver is the presence of Myers' telephone number in Oliver's address book and the long distance phone calls placed between Oliver, Myers, and Crain. Moreover, the quantity of methamphetamine involved in the transactions in which Myers participated is de minimis when compared with the 950 grams seized from Oliver.

The evidence is insufficient to support a finding that the 950 grams of methamphetamine seized from Oliver were reasonably foreseeable to Myers. Myers' sentence is vacated, and his case is remanded to the district court for resentencing.

#### C. Crain.

Mrs. Crain contends that the 950 grams of methamphetamine seized from Oliver were improperly attributed to her because that amount was neither reasonably foreseeable as to her, nor was it part of any joint enterprise with Oliver. She argues that the district court erred in requiring only that the amount of methamphetamine seized from Oliver be reasonably foreseeable to Crain. According to Crain, Oliver was involved in a much larger drug enterprise than her's and Greenwood's. She argues that while she simply distributed small quantities of methamphetamine to truck drivers frequenting her business, Oliver supported himself by selling the drug. Crain testified at trial that she was unaware

that Oliver was in possession of the 950 grams of methamphetamine seized from his residence.

However, the evidence introduced at trial indicated that Crain had an ongoing relationship with Oliver. There was testimony that prior to Crain and Greenwood's trip to visit Oliver in Louisiana, they disagreed over whether to continue doing business with him. Crain indicated that she desired to maintain the connection. Additionally, Crain and Greenwood purchased over 110 grams of methamphetamine from Oliver. In light of the evidence, this court can not say that the district court's inclusion of the 950 grams of methamphetamine as relevant conduct of Crain was clearly erroneous.

Crain's second argument is that the district court violated Federal Rule of Criminal Procedure 32 when it failed to make a specific factual finding at the sentencing hearing. Rule 32 provides that,

If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

Fed. R. Crim. P. 32(c)(3)(D). The presentence report indicated that Crain and Greenwood received 112 grams of methamphetamine from Oliver in November, 1989.<sup>3</sup> Crain objected to this statement in the

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<sup>3</sup>This transaction is the one discussed earlier in which Crain and Greenwood drove to Louisiana in 1989 to visit Oliver.



presentence report. She testified that she never received the methamphetamine, and she argued that there was insufficient evidence to prove otherwise. However, the district court failed to explicitly find that Crain did receive 112 grams of methamphetamine from Oliver. Instead, the court stated, "[b]ased on my findings in this case, I'll further find, as calculated in the presentence report, the total offense level is 32 . . .". Therefore the court never expressly ruled on Crain's objection.

Rule 32 fosters the "twin goals of obtaining a fair sentence based on accurate information and obtaining a clear record of the resolution of disputed facts." United States v. Hooten, 942 F.2d 878, 881 (5th Cir. 1991), quoting United States v. Smith, 844 F.2d 203, 206 (5th Cir. 1988). The district court may implicitly make a factual finding by adopting the presentence report. United States v. Carreon, 1994 WL 1738, 3 (5th Cir. 1994); United States v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992).

This case is factually similar to United States v. Sherbak, 950 F.2d 1095 (5th Cir. 1992). Defendant Salih's main objection was the probation officer's conclusion that he was less than completely cooperative and therefore undeserving of a reduction in his offense level. Salih testified that he did not receive a certain amount of marijuana that had been attributed to him in the presentence report. The court did not specifically address Salih's contention, but instead adopted the presentence report, which concluded that Salih had received the marijuana. In reviewing that decision, this court stated that, "[w]hen a defendant objects to

his PSR but offers no rebuttal evidence to refute the facts, the district court is free to adopt the facts in the PSR without further inquiry." United States v. Sherbak, 950 F.2d 1095, 1099-1100 (5th Cir. 1992).

In a somewhat similar situation, the district court in Carreon adopted the presentence investigation report and failed to resolve expressly defendant Melendez's claim that the drug quantities were not within the scope of the conspiracy and were not reasonably foreseeable to him. The Carreon court stated that the district court's adoption of the presentence report will satisfy Rule 32 "when the findings in the PSR are so clear that the reviewing court is not left to 'second-guess' the basis for the sentencing decision." United States v. Carreon, 1994 WL at 3, citing United States v. Hooten, 942 F.2d 878, 881 (5th Cir. 1991). In Carreon, the presentence report accepted all of the testimony regarding the quantities of drugs involved, and attributed the entire amount to the defendant. Although Melendez objected to the foreseeability of such amounts, the probation officer stated that he would allow the court to consider and resolve the matter. At sentencing, the court rejected the government's argument that Melendez was an organizer or leader in the conspiracy, but did find that he was a key member in the conspiracy. While this resolved the "jointness" prong of the relevant conduct test, it "appear[ed] to cloud the foreseeability issue under the government's theory of the case." United State v. Carreon, 1994 WL at 3. Therefore, the court remanded for further factual findings.

Crain's circumstances are distinguishable from Carreon. There is no need for this court to second guess the trial court's reasoning. Crain objected to the presentence report's finding that she received 112 grams of methamphetamine from Oliver. However, she offered absolutely no evidence to rebut this conclusion, except her own self-serving testimony. The district court listened to her testimony and apparently concluded that she indeed received the amount of methamphetamine listed in the report. This satisfied the Rule 32 requirement of clarity and accuracy of the trial court's decision, and Crain's claim is therefore without merit.

For the foregoing reasons, the judgment of the district court is **AFFIRMED** as to defendants Greenwood and Crain. The district court's judgment with respect to defendant Myer is **VACATED**, and the case is **REMANDED** for resentencing.