UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-10002

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARVIL ERWIN, and
JACKY LEE JACKSON,

Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Texas

(4:93-CR-108-A-1)

(January 12, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Arvil Erwin appeals his conviction for operation of a continuing criminal enterprise in violation of 21 U.S.C. § 848(c) (1988), alleging that the evidence was insufficient to support the jury's verdict. Jacky Lee Jackson appeals his 121-month sentence for conspiracy to manufacture, possess with intent to distribute, and distribute amphetamine on the grounds that his sentence was

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* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

incorrectly calculated under the guidelines and unconstitutionally disproportionate to his offense. Finding ample evidence to support Erwin's continuing criminal enterprise conviction and no reversible error in Jackson's sentence, we affirm.

Erwin and Jackson were convicted for their roles in an amphetamine manufacturing and distribution operation. The evidence at trial depicted an expansive drug operation that spanned several states, involved large quantities of amphetamine and money, and implicated numerous participants. Erwin was one of the two founding "partners" in the operation and played a central role throughout. Jackson's role was more limited; he helped with the manufacturing process, specializing in cleaning lab equipment and burying chemical containers.

A jury found Erwin guilty of (1) conspiracy to manufacture, distribute, and sell amphetamine; (2) four counts of possession with intent to distribute amphetamine; (3) three counts of manufacturing amphetamine; and (4) engaging in a continuing criminal enterprise. The court sentenced Erwin to seven 240-month terms of imprisonment and one 300-month term of imprisonment, all to run concurrently. The jury found Jackson guilty of conspiracy to manufacture, distribute and sell amphetamine, and the court sentenced him to a 121-month term of imprisonment.

Erwin argues that the record contains insufficient evidence to support his continuing criminal enterprise conviction. "The standard of review for sufficiency of evidence is whether *any* reasonable trier of fact could have found that the evidence

established guilt beyond a reasonable doubt." *United States v. Martinez*, 975 F.2d 159, 160-61 (5th Cir. 1992) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979)), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1346, 122 L. Ed. 2d 728 (1993). We construe all inferences in favor of the jury verdict, and we will not supplant the jury's determination of credibility with our own. *Id.* at 161.

A person engages in a "continuing criminal enterprise" if:

> (1) he violates any provision of [Title 21, chapter 13],[1] the punishment for which is a felony, and (2) such violation is part of a continuing series of violations of [Title 21, chapter 13] (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(c) (1988). To prove a violation of § 848(c), the "[g]overnment need only prove . . . that the defendant organized, supervised, *or* managed at least five other persons; the section is disjunctive in that respect." *United States v. Phillips*, 664 F.2d 971, 1013 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136, 102 S. Ct. 2965, 73 L. Ed. 2d 1354 (1982), *superseded on other grounds as stated in United States v. Huntress*, 956 F.2d 1309, 1317 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2330, 124 L. Ed. 2d 243 (1993). Furthermore, "[s]uch relationships need not have existed at the same moment in time; it is sufficient if there exist separate, individual relations of control with at least five

[1] Title 21, chapter 13 includes provisions concerning federal narcotics offenses.

persons." *Id.*

Erwin argues that the record contains insufficient evidence that he occupied a managerial role with respect to five other participants in the operation. He argues that his co-conspirators were not "employees," but rather "partners" or "independent contractors" (depending on their role). There is ample evidence in the record, however, to support a finding that Erwin supervised and directed the activities of at least the following five of the numerous participants in the operation: Laura Moore, Jacky Lee Jackson, Yvonne Jamison, Charles Lee Tolliver, and Richard Leija.

Moore testified that she delivered amphetamines for Erwin, and that she helped Erwin manufacture amphetamine, doing "whatever [Erwin] told [her] to do." The evidence at trial also shows that Erwin supervised Jackson. Moore specifically testified that Erwin directed Jackson in the manufacture of amphetamine. Jamison testified that Erwin instructed her to obtain chemical ingredients used in the manufacture of amphetamine, and that she later learned the manufacturing process and spent two or three months at Erwin's lab. Finally, Tolliver testified that Erwin told him and Leija what to do when they moved an amphetamine lab from Texas to Washington. Tolliver also testified that Erwin directed him and Leija when they assembled the lab in Washington.

While the record contains additional evidence to support a finding that Erwin supervised other participants in the operation, § 848(c) requires that he supervise, manage, or organize only five. Viewed in the light most favorable to the prosecution, the evidence

was more than sufficient to support the jury's guilty verdict on the continuing criminal enterprise count.

Jackson challenges his sentence on two grounds, both of which are frivolous. First, Jackson argues that his ten-year sentence for conspiracy to manufacture, possess with intent to distribute, and distribute amphetamine was so disproportionate to the seriousness of his offense as to violate the Eighth Amendment's prohibition on cruel and unusual punishment. In determining whether the proportionality of Jackson's sentence violates the Eighth Amendment, we follow the approach explained in *McGruder v. Puckett*, 954 F.2d 313 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 146, 121 L. Ed. 2d 98 (1992). As a threshold matter, we compare the gravity of Jackson's offense to the severity of his sentence. *See id.* at 316. "Only if we [conclude] that the sentence is grossly disproportionate to the offense will we then . . . compare the sentence received to (1) sentences for similar crimes in the same jurisdiction and (2) sentences for the same crime in other jurisdictions." *Id.*

The district court sentenced Jackson at the bottom of the range dictated by the United States Sentencing Commission Guidelines Manual ("Sentencing Guidelines"). In *United States v. Sullivan*, 895 F.2d 1030 (5th Cir. 1990), *cert. denied*, 498 U.S. 877, 111 S. Ct. 207, 112 L. Ed. 2d 168 (1990), we deferred to a court's sentence that fell within the applicable guideline range and explained that the Sentencing Guidelines, "[d]eveloped from empirical research with the goal of making the punishment fit the

crime, . . . are a convincing objective indicator of proportionality." *Id.* at 1032.[2] Jackson cites no cases, and we have found none, in which a court held a sentence *within*, let alone at the bottom of, the guideline range to be unconstitutionally disproportionate. Jackson played a role, even if minor, in a large-scale amphetamine manufacturing operation, and we cannot conclude that his ten-year prison sentence is "grossly disproportionate to the offense." *McGruder*, 954 F.2d at 316.

Jackson also argues that the court should have reduced his offense level by four levels to account for what Jackson calls the court's "finding" that he was a "minimal participant." Jackson's presentence report ("PSR") recommended a decrease of two levels based on a determination that Jackson was a "minor participant" in the drug operation.[3] Jackson did not object to this recommendation at his sentencing hearing, and his counsel informed the court that all of Jackson's concerns with the PSR had been resolved. The district court then adopted the PSR's findings as its own.

After adopting the findings contained in the PSR, including the determination that Jackson was a minor participant, and after

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[2] *See also United States v. Prudhome*, 13 F.3d 147, 150 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1866, 128 L. Ed. 2d 487 (1994) (rejecting Eighth Amendment challenge to sentence imposed under the Sentencing Guidelines); *United States v. Cardenas-Alvarez*, 987 F.2d 1129, 1134 (5th Cir. 1993) (same); *United States v. Francies*, 945 F.2d 851, 853 (5th Cir. 1991) (same).

[3] Section 3B1.2 of the Sentencing Guidelines provides: "Based on the defendant's role in the offense, decrease the offense level as follows: (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels. (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels. In cases falling between (a) and (b), decrease by 3 levels." United States Sentencing Commission, *Guidelines Manual*, § 3B1.2 (Nov. 1994).

defense counsel had made a statement on Jackson's behalf, the Court explained:

> I don't think this defendant had a real significant role in the overall offense conduct, and it occurs to me even the bottom of the guideline might be a little too much, but I don't really think there's a basis for a departure in this case. But I am going to the very bottom of the guideline.
>
> The Court orders and adjudges that the defendant be committed to the custody of the Bureau of Prisons to serve a term of imprisonment of 121 months. The Court further orders and adjudges that the defendant serve a term))and I might add to what I just said, there do not appear to be any aggravating factors that would cause in determining where to go in the guideline, for me to go above the bottom, as far as I'm concerned, and *it's the minimal participation that has caused me to go to the bottom*.

Supplemental Record on Appeal, vol. 1, at 6 (emphasis added). Jackson seizes on the emphasized portion of the above-quoted passage to argue that the Court determined that he was a "minimal participant" under § 3B1.2(a) and consequently should have reduced his offense level by four instead of two levels. This argument is frivolous. The context of the court's remarks, combined with the court's express adoption of the PSR's findings of fact and offense level recommendation, makes clear that it was not making an independent determination that Jackson was a minimal participant.

For the foregoing reasons, we **AFFIRM**.