IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10501

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEANENE PORTER TRICKETT,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-136-A-3)

(February 14, 1995)

Before KING, JOLLY and DEMOSS, Circuit Judges.

PER CURIAM:[*]

Jeanene Porter Trickett pleaded guilty to one count of conspiracy to distribute and to possess with intent to distribute more than one kilogram of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(viii). The district court accepted her plea and sentenced Trickett to the minimum applicable sentencing guideline punishment of 235 months'

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

imprisonment, five years' supervised release, and a $50.00 special assessment. Trickett appeals her sentence, contending that the district court erred by: (1) miscalculating the relevant quantity of drugs; (2) granting an upward adjustment for obstruction of justice; and (3) refusing to grant a downward adjustment for acceptance of responsibility. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A federal grand jury in Texas indicted Trickett, along with Debbie Campbell and John Morales, of one count of conspiracy to distribute and possess with an intent to distribute greater than one kilogram of methamphetamine, and one count of possession with intent to distribute greater than one kilogram of methamphetamine. Pursuant to a plea agreement, each of the defendants pleaded guilty to the conspiracy count, and the government agreed to dismiss the substantive count of possession.

A stipulation of facts signed by Trickett indicated the following. On October 15, 1993, a package containing 1,827 grams of methamphetamine was delivered via United Parcel Service to Phillip Allen, 7445 Van Natta, in Forth Worth, Texas. The package had been opened en route by a Drug Enforcement Agency agent pursuant to a valid search warrant. Agents made a controlled delivery to Debra Sue Allen, at the address specified on the package. Immediately following Allen's acceptance of the package, Allen was arrested.

Subsequent to her arrest, Allen agreed to cooperate with the authorities. Allen stated that she received methamphetamine from Trickett and Campbell, both of whom resided near Los Angeles, California. Upon receipt of the drugs, Allen would sell them to her customers in Texas, then send the money via mail or wire to addresses provided by Trickett and Campbell. Once Trickett and Campbell had received their money for a shipment, they would send Allen additional drugs.

In addition to these stipulated facts, the evidence adduced at Trickett's sentencing hearing indicated that Trickett had informed DEA agents during a debriefing session that Trickett had befriended Allen while Allen was living in California. Trickett stated that she provided methamphetamine to Allen during their friendship in California, as well as after Allen moved to Fort Worth, Texas in October 1992. Trickett further stated that she received her methamphetamine from Campbell and Lawrence Robbins, Trickett being the "middle man" between Campbell and Allen. The methamphetamine shipments from Trickett to Allen varied from a "couple of ounces" to a "couple of pounds." The money that Allen received from her sale of the drugs was then sent back to Trickett and Campbell at addresses specified by Trickett or Campbell.

Based upon interviews with Allen, the presentence investigation report ("PSR") calculated that the conspiracy had involved at least 23 kilograms (approximately 51 pounds) of methamphetamine. In making his calculation, the probation

officer relied upon Allen's statements that she had received from Trickett and Campbell: (1) "three to five ounces a week" for a "couple of months" after October 7, 1992 (the date Allen moved to Texas); followed by (2) "approximately eight ounces to a pound" per week until the summer of 1993; followed by (3) "at least two pounds a package" per week until the arrest (October 15, 1993). Using the minimum amount specified by Allen for these three time periods, the probation officer estimated that the conspiracy involved at least 51 pounds, 9 ounces (23 kilograms) of methamphetamine.

The PSR also recommended an upward adjustment for obstruction of justice pursuant to U.S.S.G. § 3C1.1[1] based upon a letter written by Trickett to Allen on March 14, 1994, as well as testimony given by Trickett at her rearraignment on February 18, 1994. Specifically, the PSR noted that Trickett's letter to Allen contained threatening remarks regarding Allen's boyfriend, Gary McDonald. The letter read, in relevant part:

> What does [Gary] think about you being a snitch? Or is he the one that snitched on you? That's what we hear!!! We hear he's been a payed [sic] informant for years. Or did

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[1] Section 3C1.1 states:

> Obstructing or Impeding the Administration of Justice
>
> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1.

> you already know that? Two peas in a pod!!! You deserve each other. But just in case we've heard wrong, he <u>will</u> be involved, if we have anything to do with it. So if you don't want him involved, you had better tell them you lied. We <u>will</u> make sure he's involved, you can believe that.

In addition to this letter, the PSR determined that Trickett's sworn testimony at her rearraignment was perjurious, and therefore independently warranted an upward adjustment for obstruction. Specifically, the PSR noted that Trickett had testified at her rearraignment that Campbell "did not have anything to do with [the conspiracy]" and that, although Campbell had called Allen to ask for money, Campbell "had no idea what [the money] was for." The PSR noted that "[i]nformation obtained from Debra Allen indicates otherwise . . . . " and that the debriefing memorandum prepared by the DEA agent was also to the contrary. Because Trickett's rearraignment testimony painted Campbell as an innocent pawn, and because this testimony was contrary to both Allen's testimony and Trickett's own version of events as recounted during her debriefing, the PSR concluded that Trickett had committed perjury and obstructed justice.

The PSR also recommended that Trickett not receive a downward adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1[2] because she had attempted to obstruct justice

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[2] Section 3E1.1 states, in relevant part:

> <u>Acceptance of Responsibility</u>
>
> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels. . . .

U.S.S.G. § 3E1.1(a).

and "her behavior since and during her guilty plea negate any statement now claiming an acceptance of responsibility."

The PSR calculated Trickett's base offense level to be 36. An upward adjustment of two levels was recommended for obstruction of justice, bringing Trickett's total offense level to 38. Combined with a criminal history category of I, the applicable sentencing guidelines yielded a punishment range of 235 to 293 months imprisonment, at least five years supervised release, a fine of $25,000 to $4,000,000, and a mandatory $50.00 special assessment. The district court imposed the minimum applicable term of imprisonment (235 months), plus the minimum period of supervised release (five years), plus the mandatory $50.00 special assessment.

II. STANDARD OF REVIEW

A sentencing court's factual findings must be supported by a preponderance of the evidence, United States v. McCaskey, 9 F.3d 368, 372 (5th Cir. 1993), cert. denied, 114 S. Ct. 1565 (1994), and we review such findings under the clearly erroneous standard. United States v. Palmer, 31 F.3d 259, 261 (5th Cir. 1994). A factual finding is clearly erroneous if it is not plausible in light of the record taken as a whole. See Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985). Whether the district court correctly applied the Guidelines is a question of law

subject to de novo review. United States v. Diaz, 39 F.3d 568, 571 (5th Cir. 1994).

A presentence investigation report generally bears sufficient indicia of reliability to be considered by the trial court as evidence in making the factual determinations required by the sentencing guidelines. United States v. Gracia, 983 F.2d 625, 629 (5th Cir. 1993); United States v. Robins, 978 F.2d 881, 889 (5th Cir. 1992). A district court may rely on the PSR's construction of the evidence to resolve a factual dispute rather than rely on the defendant's version of the facts. Robins, 978 F.2d at 889. A defendant challenging the accuracy of the PSR therefore bears the burden of proving that the information relied upon by the district court in sentencing is materially untrue. United States v. Young, 981 F.2d 180, 185 (5th Cir. 1992), cert. denied, 113 S. Ct. 2454 (1993).

The sentencing court's determination of whether a defendant obstructed justice is a factual finding which may be reversed on appeal only for clear error. United States v. Ainsworth, 932 F.2d 358, 362 (5th Cir.), cert. denied, 502 U.S. 918 (1991). To receive a downward adjustment for acceptance of responsibility under the Guidelines, the defendant bears the burden of demonstrating to the sentencing court that he is entitled to such an adjustment, and we review the sentencing court's determination in this regard with even more deference than under the pure clearly erroneous standard. Diaz, 39 F.3d at 571; United States

v. Watson, 988 F.2d 544, 551 (5th Cir. 1993), cert. denied, 114 S. Ct. 698 (1994).

III. ANALYSIS

A. Quantity of Drugs.

Trickett contends that the district court erred in calculating the relevant quantity of methamphetamine for which she should be held responsible in sentencing. Specifically, Trickett argues that the PSR quantity of 23 kilograms should instead be 23 *pounds* (approximately 10.43 kilograms),[3] the amount specified by Allen on cross-examination. Trickett contends that if the quantity elicited in Allen's testimony is used, her base offense level would be 34 rather than 36. We disagree. If, as Trickett suggests, the applicable quantity of drugs is 23 pounds, this would represent 10,423.616 grams, or 10.423 kilograms. Under the Guidelines, any quantity of methamphetamine of "at least 10 KG but less than 30 KG" requires a base offense level of 36. See U.S.S.G. § 2D1.1(c)(2). Thus, even assuming, arguendo, that the relevant quantity for sentencing purposes should have been 23 pounds rather than 23 kilograms, the error was harmless. See 28 U.S.C. § 2111; Fed. R. Crim. P. 52(a).

Even assuming the error was not harmless, however, we find Trickett's argument to be meritless. While it is true that one line in the sentencing hearing transcript indicates that Allen estimated the total quantity of drugs received from Trickett and

[3] One pound is equal to 453.592 grams.

Campbell to be "[p]robably around 22 pounds, 23 pounds . . . [,]" this appears to be a misstatement when taken in context with the rest of her testimony. Allen testified on direct that she received the following quantities of methamphetamine from Trickett and Campbell: (1) one ounce, which Allen acquired from Trickett in Las Vegas and sent to Gary McDonald in Texas; (2) an eighth of an ounce, which Allen brought with her when she returned to Texas; (3) one-half pound, which was acquired from Trickett in Flagstaff, Arizona; (4) one pound, which was acquired from Trickett in California over the 1992 holiday season; (5) one to two pounds per week from approximately January 1993 to May 1993 (20 weeks); (6) an unspecified quantity, which Allen estimated to have yielded $10,000 retail, most of which had to be refunded to customers because of the poor quality of the drug; (7) approximately two pounds per week during the summer of 1993 (twelve weeks); and (8) approximately nine and one-half pounds, received from Campbell during September and October 1993, following Trickett's arrest in California.

The district court determined, based upon Allen's testimony and the PSR, that the government had proffered evidence of "sufficient activities to cause [Trickett] to be accountable for ten kilograms of methamphetamine[,]" and that, "[f]or those reasons, I conclude that the 36-level used in the presentence investigation report as the base offense level is the proper level." We agree. The quantity calculated under the PSR is plausible in light of the record taken as a whole. In addition,

it is clear from Allen's testimony that the total amount of methamphetamine received from Trickett and Campbell was well over the 10 kilograms necessary to trigger a base offense level of 36 under the Guidelines. As such, the district court did not clearly err in calculating Trickett's sentence under the Guidelines.

B. Obstruction of Justice.

(1) The Letter from Trickett to Allen.

Trickett next argues that the district court erred in permitting the introduction of a letter written from Trickett to Allen to support an upward adjustment for obstruction of justice. See U.S.S.G. § 3C1.1, applic. n.3(a) (listing as an example of the type of conduct considered to be obstruction, any "threatening, intimidating, or otherwise unlawfully influencing a co-defendant . . . directly or indirectly, or attempting to do so . . . . "). Specifically, Trickett contends that her letter to Allen was constitutionally protected speech under the First Amendment and that introduction of the letter into evidence violated her constitutional right of privacy. We are not persuaded.

The constitutional right to freely express one's beliefs, as embodied in the First Amendment to our Constitution, does not include the right to threaten another. See Watts v. United States, 394 U.S. 705, 707 (1969) (stating that "[w]hat is a threat must be distinguished from what is constitutionally

protected speech."). Likewise, Trickett's privacy interest in the contents of her letter, if any, would not extend to threatening communications. As such, it was not constitutional error for the district court to consider the letter as relevant conduct for purposes of sentencing. See U.S.S.G. §§ 1B1.3, 1B1.4.

(2) Perjury.

Trickett also challenges the district court's determination that an upward adjustment for obstruction of justice was independently warranted due to evidence that Trickett had committed perjury with regard to Campbell's involvement in the conspiracy. Trickett states that the portions of her testimony believed to be perjurious were in fact "mere[] clarifi[cations]" which, in any event, were "rendered immaterial" by Campbell's own plea of guilty. We discern no clear error in the district court's determination.

Perjury occurs when "[a] witness testifying under oath or affirmation . . . gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." United States v. Dunnigan, 113 S. Ct. 1111, 1116 (1993). A matter is "material" if it is "designed to substantially affect the outcome of the case." Id. at 1117; see also U.S.S.G. § 3C1.1, applic. n.5 (stating that a "material" statement is one that "if believed, would tend to influence or affect the issue under determination.").

During her sentencing hearing, Trickett repeatedly denied that Campbell was a knowing participant in the conspiracy. She indicated that, although Campbell made some phone calls to Allen regarding money and that Campbell had, on at least one occasion, picked up a wire delivery of money for Trickett, Campbell did not know that Trickett was selling methamphetamine. In addition, at her rearraignment, Trickett stated that "Campbell didn't have anything to do with it . . . . I asked Campbell to make this phone call. She had no idea what it was for. I just feel that they're going down for something they didn't do."

In contrast to these statements, Trickett told DEA agents during her debriefing that she received most of her methamphetamine from Campbell. Furthermore, Allen testified that Campbell was a knowing participant in the conspiracy. Faced with this conflict in evidence, the district court determined that Allen's testimony was credible and that Trickett's inconsistent testimony was incredible. This credibility choice is entitled to great deference. See United States v. Alaniz-Alaniz, 38 F.3d 788, 791 (5th Cir. 1994) (noting that "we exercise great deference to a district court's credibility findings.") Trickett has not borne her burden of proving that the district court's credibility determination is not plausible in light of the record as a whole. Accordingly, it was not clearly erroneous for the district court to find to that Trickett had committed perjury.

Trickett's contention that her perjury was "immaterial" because Campbell pleaded guilty is likewise without merit. Her

perjurious statements were designed to alter the outcome of the case against Campbell; namely, Trickett's attempts at protecting Campbell were designed to persuade the court that Campbell was innocent of wrongdoing, or at a minimum, that Campbell should receive a lighter sentence for her minimal role in the conspiracy. As such, it is clear that Trickett's perjurious testimony was material.

C. Acceptance of Responsibility.

Trickett's final contention is that the district court erred in denying her a downward adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. Trickett supports her argument by pointing out that: (1) she pleaded guilty; and (2) she volunteered to assist the government with the apprehension of Lawrence Robbins, the man she identified as the main source of drugs for herself and Campbell.

"The mere entry of a guilty plea, however, does not entitle a defendant to a sentencing reduction for acceptance of responsibility as a matter of right." United States v. Shipley, 963 F.2d 56, 58 (5th Cir.) (per curiam), cert. denied, 113 S. Ct. 348 (1992). In addition, the Guidelines provide for a downward adjustment only if the defendant "clearly demonstrates" acceptance of responsibility. U.S.S.G. § 3E1.1(a). The application notes to § 3E1.1 state that "[c]onduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the

defendant has not accepted responsibility for his criminal conduct." U.S.S.G. § 3E1.1, applic. n.4.

In this case, the PSR concluded that, "[a]s the defendant has attempted to obstruct justice in this case, her behavior since and during her guilty plea negate any statement made now claiming an acceptance of responsibility. . . . Therefore . . . an adjustment is not warranted in this case." Likewise, the district court concluded that Trickett was "arrogant and unrepentative" and adopted the recommendation of the PSR.

The district court's determination as to whether a defendant has accepted responsibility so as to entitle her to a downward adjustment is entitled to even more deference than under the pure clearly erroneous standard. United States v. Watson, 988 F.2d 544, 551 (5th Cir. 1993), cert. denied, 114 S. Ct. 698 (1994); see also U.S.S.G. § 3E1.1, applic. n. 5 ("The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review."). Trickett has not carried her burden of proving that the district court's determination is unworthy of deference. Accordingly, her claim must fail.

IV. CONCLUSION

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