IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10572

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEBBIE CAMPBELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-136-A-2)

(March 6, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Debbie Campbell 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), 841(b)(1)(A)(viii), and 846. The district court accepted her plea and sentenced Campbell to 235 months' imprisonment, five years' supervised release, and a $50.00

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

special assessment. Campbell 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 Campbell, along with Jeanene Trickett 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 Campbell 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 on

several occasions 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 Campbell's sentencing hearing indicated that during a debriefing session with DEA agents following her arrest, Trickett 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 calculated Campbell's base offense level to be 36. Combined with a criminal history category of I, the applicable sentencing guidelines yielded a punishment range, inter alia, of 188 to 235 months' imprisonment. After determining that Campbell had presented perjured testimony during her sentencing hearing, the district court granted an upward adjustment of two levels for obstructing justice pursuant to U.S.S.G. § 3C1.1, bringing Campbell's total offense level to 38. The district court then sentenced Campbell to the minimum applicable punishment within the Guidelines of 235 months' imprisonment, five years of supervised release, and a special assessment of $50.00.

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.

Campbell contends that the district court erred in calculating the relevant quantity of methamphetamine for which she should be held responsible in sentencing. Specifically, she argues that the quantity of methamphetamine that was reasonably foreseeable to Campbell was only nine and one-half pounds, the amount that Allen testified as coming directly from Campbell, and an amount which would yield a base offense of 34 rather than 36. Campbell also contends that any quantity above this amount lacks sufficient indicia of reliability to support its probable accuracy. We disagree.

Under the Guidelines, a 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). In addition, under the Guidelines, in calculating the sentence for a conspirator, the court should consider not only those acts which the conspirator committed himself, but also on "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity . . . ." U.S.S.G. § 1B1.3(a)(1)(B). However, the application notes to the Guidelines warn that "[a] defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the

conspiracy, even if the defendant knows of that conduct." U.S.S.G. § 1B1.3, applic. n.2(ii).

Allen testified that she could positively attribute only nine and one-half pounds of methamphetamine as coming directly from Campbell, without Trickett serving as a middleman. However, Allen also testified that Trickett had informed her, during the Christmas season of 1992, that the source of the drugs was Campbell. This testimony was consistent with Allen's earlier version of events as relayed to DEA agents during her debriefing. Furthermore, the PSR noted that a confidential informant assisting the Tustin, California Police Department had met with Campbell in July of 1993 to negotiate the purchase of two pounds of methamphetamine. During one of her meetings with the informant, Campbell told the informant that she sold methamphetamine to a customer in Texas.

The district court found that "the defendant Debbie Campbell actually participated in conspiratorial activities related to the conspiracy to which she pled guilty that involved the sale and distribution of methamphetamine in a quantity somewhat in excess of ten kilograms. There's no need for me to determine what that quantity is. I find that . . . she was part of a conspiracy for the distribution of . . . [m]ethamphetamine, starting no later than sometime in July 1993. . . ."

Campbell does not offer any evidence to refute the district court's determination that she joined the conspiracy, at the latest, in July 1993. As such, we defer to the district court's

factual finding in this regard. Assuming, arguendo, that Campbell's participation in the conspiracy did not begin until July 1993[1], we must determine the quantity of methamphetamine for which Campbell had actual knowledge or should have reasonably foreseen. Allen's unrebutted testimony indicated that during the summer of 1993, she received approximately two pounds per week of methamphetamine from California. Based upon the district court's conclusion that Campbell's participation in the conspiracy began, at the latest, in July 1993, this would yield eight weeks of sales (July and August) at two pounds per week, for a total of sixteen pounds. In addition, Allen testified that she received approximately nine and one-half pounds directly from Campbell during September and October 1993, following Trickett's arrest in California. Thus, the total amount of methamphetamine about which Campbell knew or should reasonably have foreseen from the time she entered the conspiracy was at least 25.5 pounds, or 11,566.596 grams (11.566 kilograms).

Allen's testimony at Campbell's sentencing hearing is consistent with the amount she provided to the probation officer who completed the PSR. The district court determined, based upon Allen's testimony and the PSR, that

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[1] We note that there is credible evidence that Campbell's participation began much earlier, which perhaps is why the district court concluded that Campbell's participation began in July 1993 "*at the latest*." Specifically, Allen testified that Trickett had informed her during the Christmas season of 1992 that Campbell was her supplier. This is consistent with Allen's earlier statement to DEA agents during her debriefing that she understood that Campbell was one of Trickett's suppliers of the drugs sent to Texas.

> [t]o whatever extent [Campbell] personally did not make the distribution, it was reasonably foreseeable to her that there would be more than ten kilograms distributed as part of the conspiracy and, in fact, there was more than ten kilograms as part of the conspiracy . . . during . . . the period of time when I've indicated is the very minimum period of time that [Campbell] was one of the conspirators . . . .

We agree. It is clear from Allen's testimony that the total amount of methamphetamine shipped to Allen after Campbell began participating in the conspiracy 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 Campbell's base offense level.

B. Obstruction of Justice.

Campbell challenges the district court's determination that an upward adjustment for obstruction of justice was warranted due to evidence that Campbell had committed perjury with regard to the extent of her knowledge of and involvement in the conspiracy. Specifically, Campbell contends that the testimony of DEA Agent Hardwick "does not provide the definite and firm testimony necessary to establish that perjury has been committed by Campbell."

The district court concluded that Campbell

> committed perjury in respect to her testimony concerning her relationship and dealings with Ms. Allen. She committed perjury in her testimony in her relation to her dealings with Ms. Trickett in connection with the methamphetamine operation. And she gave perjured testimony, in my judgment, with respect to her involvement as a source of the methamphetamine that Ms. Trickett, Defendant Trickett, was shipping to Allen.

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.").

At her sentencing hearing, Campbell repeatedly denied that she did anything more than make a few phone calls to help her friend Trickett collect some money. She stated that she did not know that Trickett was in the business of selling methamphetamine until Trickett was arrested in the summer of 1993.

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, in late 1992, Trickett told Allen that Campbell was her supplier. Faced with this conflict in evidence, the district court determined that Allen's testimony was credible and that Campbell's 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.") Campbell

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 Campbell had committed perjury.

C. Acceptance of Responsibility.

Campbell's final contention is that the district court erred in denying her a downward adjustment for acceptance of responsibility. The Guidelines state that "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels. . . ." U.S.S.G. § 3E1.1(a). Campbell claims that she is entitled to a two-level decrease for acceptance of responsibility because: (1) she pleaded guilty; and (2) she submitted a letter to the court which she claims "clearly demonstrated a recognition and affirmative acceptance of personal responsibility for her criminal conduct."

"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 did not recommend a downward adjustment for acceptance of responsibility because statements made to the probation officer during an interview on March 2, 1994 were inconsistent with the stipulation of facts which she had signed. In addition, the PSR noted that, "[w]hen reminded by this officer that she had pled guilty to Conspiracy to Possess with Intent to Distribute Methamphetamine, [Campbell] replied, `I pled guilty to conspiracy to make telephone calls.'" In light of these statements, the PSR recommended that Campbell not be granted an adjustment for acceptance of responsibility.

The district court agreed, stating that "from what I heard today, this defendant has not accepted responsibility, or at least has not convinced me. She has the burden to convince me she has accepted responsibility, and she has not convinced me that she has accepted responsibility." We agree.

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.").

Campbell 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.