**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

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No. 94-20224 & 94-20280
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WILLIE JOE MCMURRY and GWENDOLYN MCMURRY,

Defendants-Appellants.

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

(CR H-93-91-3)

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(February 21, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Defendants-Appellants Gwendolyn McMurry ("Gwendolyn") and Willie Joe McMurry ("Willie") pleaded guilty to conspiracy to possess with intent to distribute over 50 grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846, and 853. On

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeal, they argue that the district court erred in its application of the United States Sentencing Guidelines ("Guidelines"). Finding no reversible error, we AFFIRM.

FACTS AND PROCEDURAL HISTORY

Six members of the McMurry family and three of the family's friends operated a crack cocaine manufacturing and distribution ring in Bryan-College Station, Texas. Douglas McMurry ("Douglas"), the appellants' brother, was the leader of the conspiracy. Douglas obtained powder cocaine from sources in Houston, Texas and processed the powder into crack cocaine at either of two locations in Bryan: 1012 Dansby Street or 911 F Cole Street. The crack was then brought to a house at 803 Weaver Street in Bryan to be sold.

From July 1992 to February 1993, Government agents made numerous purchases of crack cocaine at the Weaver house from Willie. Government agents also purchased crack cocaine at the Weaver house from Gwendolyn on at least two occasions. Willie was often present during transactions consummated with his co-conspirators. Further, in addition to his role as a salesman, Willie acted as a drug courier from the Dansby and Cole houses to the Weaver house, a distribution point only. Government agents also intercepted phone calls among the conspirators. In February 1993, agents listened to a call during which Ruthie McMurry ("Ruthie"), a co-conspirator and appellants' sister, told Gwendolyn that she wanted Willie to remove his "9mm" from Ruthie's residence, which was the Dansby house.

When a search warrant was executed at the Dansby house, Douglas was found "cooking" crack cocaine, and officers confiscated crack cocaine, powder cocaine, a 9mm semi-automatic pistol, a 9mm pistol clip containing four live bullets, and other items. During a search of Douglas's truck parked outside of the Dansby house, officers seized a handgun and a .38 special revolver with a two-inch barrel containing six live rounds of ammunition. Also recovered from the residence of conspirator Betty Jean Gillum was a .25 caliber semi-automatic handgun.

When a search warrant was executed at the Weaver house, officers seized, among other items, crack cocaine rocks with a net weight of 18.46 grams, razor blades, a crack pipe, and two beaker tubes. The Weaver house was later discovered to be rented to Gwendolyn, who paid the rent and the utilities for the residence.

Pursuant to separate plea agreements, Gwendolyn and Willie pleaded guilty to the conspiracy count. In accordance with § 2D1.1 of the Guidelines, the probation officer determined both Willie and Gwendolyn's base offense level to be 36. In calculating the offense level, the probation officer took into account the crack cocaine deliveries from the Weaver house beginning in July of 1992, all the crack cocaine at the Weaver house, sixty percent of the crack cocaine at the Dansby house, and sixty percent of the powder cocaine at the Dansby house. Because a dangerous weapon was possessed by a co-conspirator during the commission of the offense, the probation officer determined that a two-level upward adjustment under § 2D1.1(b)(1) was appropriate for both appellants. The

district court adopted these findings in sentencing Willie to 180 months in prison and Gwendolyn to 168 months in prison. Willie and Gwendolyn jointly appeal their sentences.

I. Did The District Court Clearly Err In Determining The Amount Of Drugs Attributable To Appellants Under U.S.S.G. § 1B1.3(a)(1)?

Citing U.S. v. Maseratti, 1 F.3d 330 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1096 (1994), the appellants challenge the district court's determination of the applicable quantity of drugs for sentencing purposes and contend that they should not be held accountable for sixty percent[1] of the drugs seized at the Dansby house and for the large amounts of cocaine that they were not directly involved in selling because those drugs were not foreseeable to them or within the scope of their agreement, which was to sell "street-level, user amounts." The Maseratti court held that a conspirator should be held responsible only for conduct that is part of his agreement and reasonably foreseeable activity in furtherance of his jointly undertaken criminal activity. Id. at 340.

The appellants argue that there is no evidence or finding that they agreed to engage in a large-scale crack cocaine distribution scheme, nor was there evidence or findings that they could foresee the sale of large amounts of crack cocaine from the Weaver house. The appellants contend that the deals involving them were in

[1]During his debriefing, Douglas informed the probation officers that only sixty percent of the crack cocaine that he produced was distributed to the Weaver house.

street-level, user amounts that approached the level of only ounces, not kilograms, and that there is no evidence that the appellants agreed to distribute drugs in kilogram amounts. Further, the appellants argue that the district court's finding that sixty percent of the cocaine sold by Douglas went through the Weaver house is insufficient to prove the extent of the agreement between the appellants and Douglas. They argue that, even if Douglas used the Weaver house to distribute large amounts of cocaine, the amounts distributed by the appellants "pale" in comparison. Thus, the appellants conclude, the large amounts sold by Douglas was not reasonably foreseeable to the appellants because they were outside the scope of their agreement.

We review the relevant-quantity determination for clear error. U.S. v. Mergerson, 4 F.3d 337, 345 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1310 (1994). A defendant's base offense level for drug-trafficking offenses may be based on "both drugs with which the defendant was directly involved [under § 1B1.3(a)(1)(A)], and drugs that can be attributed to the defendant in a conspiracy as part of his `relevant conduct' under § 1B1.3(a)(1)(B)." U.S. v. Carreon, 11 F.3d 1225, 1230 (5th Cir. 1994). "Relevant conduct" includes "all reasonably foreseeable acts and omissions of others in furtherance of [the] jointly undertaken criminal activity." Id. at 1230 (quoting § 1B1.3(a)(1)(B)). Conduct may be relevant regardless of whether it occurred during the commission of the offense of conviction, in preparation for the offense, or during an attempt to avoid detection or responsibility for the offense. §

1B1.3(a)(1)(B). Factual findings concerning a defendant's relevant conduct for sentencing purposes are not clearly erroneous if they are "plausible in light of the record read as a whole." U.S. v. Puig-Infante, 19 F.3d 929, 942 (5th Cir.), *cert. denied*, 115 S. Ct. 180 (1994). The district court's application of the Guidelines, however, is reviewed *de novo*. U.S. v. Howard, 991 F.2d 195, 199 (5th Cir.), *cert. denied*, 114 S. Ct. 395 (1993).

In its sentencing decisions, a district court may consider any relevant evidence that "has sufficient indicia of reliability to support its probable accuracy." § 6A1.3(a). "[A] presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the sentencing guidelines." U.S. v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990) (footnote omitted). "If information is presented to the sentencing judge with which the defendant would take issue, the defendant bears the burden of demonstrating that the information cannot be relied upon because it is materially untrue, inaccurate or unreliable." U.S. v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991).

Contrary to the appellants' assertions, the district court made findings on the extent of the agreement between the appellants and Douglas. In making the relevant-conduct determination in the PSR, the probation officers determined that Willie, Gwendolyn, and co-conspirators Stanley Boyd McMurry, Sidney McMurry, Juree Shivers, Mark Mitchell, and Christopher Hanley "had an implicit agreement with Douglas McMurry and with each other to operate the

crack house at 803 Weaver Street, and to do what was necessary to further the operation of that crack distribution location." Although the appellants may have never individually sold cocaine in large amounts, the evidence is sufficient to show that they agreed to participate in a scheme which involved the sale of large amounts of cocaine. The probation officers, for example, based their determination on evidence showing that each of the individuals sold crack cocaine from the Weaver house; that several of the individuals were usually present during the sales; that the Weaver house was not used as a residence but only as a crack-distribution location; that each of the group contributed to the monthly payment of rent and the utility bill for the house which was rented to Gwendolyn; and that the members of the group "took turns" making crack cocaine sales. Thus, it is not clearly erroneous for the district court to have found that the scope of the appellants' agreement with Douglas encompassed a large-scale cocaine distribution scheme.

In support of their claims, the appellants cite to two illustrations in the Guidelines. First, they cite to Illustration (c)(7) of § 1B1.3:

> Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount . . . rather than the much larger quantity imported by Defendant R.

Next, they cite to Illustration (c)(6) of § 1B1.3:

> Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.

The illustrations, however, are distinguishable from the facts of this case. Whereas the illustrations involve drug dealers working independently of others, here there is evidence indicating a group of drug dealers working together; each contributing to the drug marketing scheme to distribute cocaine from the Weaver house.

Accordingly, we affirm the district court's determination of the drugs attributable to the appellants.

II. Did The District Court Clearly Err In Finding That Appellants Possessed A Dangerous Weapon During The Course Of The Conspiracy?

Section 2D1.1(b)(1) directs sentencing courts to increase by two levels the base offense level of a defendant convicted of certain drug-related offenses (including conspiracy to possess with intent to distribute cocaine) "[i]f a dangerous weapon (including a firearm) was possessed." It should be applied "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." § 2D1.1, comment. (n.3). The

appellants assert that the district court erred in assessing two levels to their sentences under § 2D1.1(b)(1) because the adjustment was predicated on a "virtually automatic" determination that the defendants should have foreseen "the presence of firearms based on the nature of the business."

Pursuant to § 1B1.3(a)(1)(B), a defendant's offense level may be increased (in the case of jointly undertaken criminal activity) to reflect "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." "[T]his Court has repeatedly observed [that] firearms are `tools of the trade' of those engaged in illegal drug activities." U.S. v. Aguilera-Zapata, 901 F.2d 1209, 1215 (5th Cir. 1990) (internal quotation omitted). "Sentencing courts, therefore, may ordinarily infer that a defendant should have foreseen a co-defendant's possession of a dangerous weapon, such as a firearm," if the Government shows that another conspirator knowingly possessed a weapon during the joint commission of the offense. Id.; see also U.S. v. Ortiz-Granados, 12 F.3d 39, 43 (5th Cir. 1994) (stating that, when the Government proves the existence of a drug-distribution scheme, a sentencing court may "ordinarily infer that a defendant should have foreseen a co-defendant's possession of a dangerous weapon, such as a firearm," because "firearms are `tools of the trade' of drug traffickers"). Thus, even assuming that there was no evidence that Gwendolyn or Willie knew of the presence of weapons or that anyone would possess weapons, because of the appellants' role in the conspiracy and the absence of evidence

rebutting the inference of foreseeability allowed by our holdings, we hold that the district court's determination that the appellants should have reasonably foreseen that some of the conspirators might possess dangerous weapons is not clearly erroneous.

The appellants do not assert that it was "clearly improbable"[2] that the firearms were connected to the offense, but argue instead that the conspirators' possession was not reasonably foreseeable to them and that we should adopt the "objective-evidence" requirement espoused by the Sixth Circuit in U.S. v. Cochran, 14 F.3d 1128, 1133 (6th Cir. 1994) (requiring "that there be objective evidence that the defendant knew the weapon was present, or at least knew it was reasonably probable that his coconspirator would be armed"). The appellants argue that the Fifth Circuit's rulings on this matter have made it "almost automatic" that a co-conspirator's possession of a firearm was foreseeable. According to the appellants, our holdings have essentially amended the Guidelines so that the offense level of conspirators is raised by two levels if any conspirator knowingly possessed a firearm. They conclude by arguing that it is not enough to say that, because many drug dealers possess guns, then the possession of a gun by one of the conspirators is reasonably foreseeable to all.

Although it is true that the district court may infer foreseeability from the existence of a drug distribution scheme,

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[2]Willie does argue that it was clearly improbable that "his pistol was involved in the drug transactions" because it was found in a locked box at his sister's house. He does not address, however, the firearms seized from other conspirators.

"the sentencing court ultimately may decline to find reasonable foreseeability in light of special circumstances or contrary evidence presented by the defendant in rebuttal." Aguilera-Zapata, 901 F.2d at 1216. Thus, we disagree with the appellants' assertion that the determination on foreseeability is an "almost automatic" decision blindly made by the district court; rather, the existence of a drug conspiracy is one factor that may be taken into account by the district court.

## CONCLUSION

For the foregoing reasons, we AFFIRM the district court's application of the Guidelines.