

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-20278
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MARK ELBERT MITCHELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-93-91-12)

(March 7, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:¹

Mark Elbert Mitchell challenges the sentence imposed by the district court following his guilty plea to one count of conspiracy to possess with the intent to distribute crack cocaine. We affirm.

I.

Mitchell's prosecution and conviction followed an extensive undercover investigation of a crack cocaine distribution ring operated by Douglas McMurry and his family in Bryan and College

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Station, Texas. The government's undercover operations revealed that Mitchell, who is McMurry's cousin, shared the duty of running a crack house at 803 Weaver Street in Bryan. Mitchell and other members of the McMurry family contributed toward paying the house's rent and utilities. Mitchell also played a key role in selling cocaine to the crack house's regular customers. The government's undercover operation revealed that the McMurry family also used other Bryan-area houses to store and manufacture cocaine. The primary storage location for the operation was a house located at 1012 Dansby Street. Mitchell and other members of the McMurry family made frequent trips to the Dansby Street house to obtain additional cocaine for the Weaver Street operation.

Based on the government's undercover operation, Mitchell was indicted on one count of conspiracy to distribute cocaine and to possess with the intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846. Mitchell was also charged with two counts of aiding and abetting the distribution of cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Mitchell agreed to plead guilty to the conspiracy count in exchange for the government's agreement to drop the remaining charges.

The district court sentenced Mitchell to 151 months imprisonment and a five-year term of supervised release based on the recommendations in his presentence investigation report ("PSR"). In determining Mitchell's base offense level under the sentencing guidelines, the PSR attributed Mitchell with approximately 481.7 grams of crack cocaine and 856.8 grams of

powder cocaine. These amounts included 60% of the crack cocaine and cocaine powder seized by undercover officers when they arrested Douglas McMurry at the Dansby Street storage location. The PSR's calculations were based on the government's evidence that at least 60% of the cocaine stored at the Dansby Street house was eventually sold at the Weaver Street house.² The PSR also applied a two level upward adjustment under § 2D1.1(b)(1) based on the recovery of two pistols at the Dansby Street house. Mitchell timely appeals the district court's sentence.

II.

A.

Mitchell first challenges the district court's decision to include 60% of the cocaine seized at the Dansby Street location as relevant conduct under § 1B1.3 of the Sentencing Guidelines. Section 1B1.3 allows courts to consider as relevant conduct "all **reasonably foreseeable** acts and omissions of others in furtherance of ... jointly undertaken criminal activity." (emphasis added). The district court's determination of whether a given quantity of drugs attributed to a conspiracy is reasonably foreseeable is a question of fact subject to a "clearly erroneous" standard of review. **United States v. Mitchell**, 964 F.2d 454, 457 (5th Cir. 1992). A factual finding is not clearly erroneous as long as it is

² The quantity attributed to Mitchell by the PSR broke down as follows: 150.33 grams of crack cocaine delivered to confidential informants at the Weaver Street house; 18.46 grams of crack cocaine seized from the Weaver Street house; 312.87 grams of crack cocaine seized from the Dansby Street house; and 856.75 grams of powder cocaine seized from the Dansby Street house.

plausible in light of the record read as a whole. **United States v. Sanders**, 942 F.2d 894, 897 (5th Cir. 1991).

Mitchell contends that the district court should not have considered the cocaine seized from the Dansby Street house because it was outside the scope of his agreement with McMurry and was not reasonably foreseeable. Mitchell maintains that he was a "low level street dealer" for McMurry and never assisted McMurry in acquiring or manufacturing crack cocaine for the operation. Accordingly, Mitchell argues that he is only responsible for the 96.42 grams of cocaine he allegedly sold as a street dealer for McMurry.

Our review of the record persuades us that the district court did not clearly err in concluding that 60% of the cocaine seized from the Dansby Street house was within the scope of the conspiracy and was reasonably foreseeable. The record shows that Mitchell and his cousins jointly operated the Weaver Street crack house and that Mitchell played a key role in obtaining customers. Mitchell's claim that the drugs seized at the Dansby Street house were not reasonably foreseeable is unpersuasive given the government's evidence that he made frequent visits to the Dansby Street house to obtain additional drugs for the Weaver Street operation. We conclude, therefore, that the district court did not err in basing Mitchell's sentence on the cocaine seized from the Dansby Street house.

B.

Mitchell contends next that the government unfairly manipulated his base offense level under the Sentencing Guidelines by prolonging the undercover operation even though the government had sufficient evidence to arrest Mitchell and the other participants after the first undercover purchase. We rejected a similar argument, however, in **United States v. Richardson**, 925 F.2d 112, 117-18 (5th Cir.), **cert. denied**, 501 U.S. 1237 (1991). In **Richardson**, the defendant argued that the government unfairly increased the severity of his sentence for money laundering by increasing the amount of money offered the defendant during the undercover operation. We concluded that the Sentencing Guidelines provided the district court with sufficient discretion to determine whether acts charged as relevant conduct were "counselled, commanded, induced, procured, or willfully caused" by the defendant, and that this discretion limited the power of the government to unfairly increase the amount of money attributed to the defendant during sentencing. **See** U.S.S.G. § 1B1.3, commentary note 1.

Our reasoning in **Richardson** applies with equal force to the present case. The district court had the discretion to reduce the amount of drugs involved if the evidence persuaded him that the government attempted to unfairly increase the amount of drugs involved in the undercover operation. The district court was clearly entitled to conclude that the ongoing undercover investigation was necessary to determine the scope of McMurry's

distribution operation and to fully uncover the identity of all the participants. Thus, the district court did not err in rejecting Mitchell's claim that the government unfairly manipulated his base offense level.

C.

Finally, Mitchell argues that the district court erred by increasing his total offense level by two levels based on the two pistols recovered when McMurry was arrested at the Dansby Street house. Section 2D1.1(b)(1) of the Guidelines directs sentencing courts to increase the total offense level of a defendant convicted of certain drug related offenses-- including conspiracy to possess with intent to distribute crack cocaine --by two levels if "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." U.S.S.G. § 2D.1.1, commentary note 3. Moreover, under § 1B1.3 of the guidelines, a co-conspirator's possession of a deadly weapon is attributable to the other co-conspirators if reasonably foreseeable.

Mitchell contends that McMurry's possession of the two pistols was not reasonably foreseeable. We have observed repeatedly, however, that "firearms are 'tools of the trade' of those engaged in illegal drug activities." **United States v. Aguilera-Zapata**, 901 F.2d 1209, 1215 (5th Cir. 1990)(quoting **United States v. Martinez**, 808 F.2d 1050, 1057 (5th Cir. 1987)). Accordingly, once the government proves the existence of a drug distribution conspiracy,

a sentencing court may "ordinarily infer that a defendant should have foreseen a co-defendant's possession of a dangerous weapon." **United States v. Ortiz-Granados**, 12 F.3d 39, 43 (5th Cir. 1994). Mitchell fails to point to any evidence that undermines this inference in the present case. Accordingly, given Mitchell's role in the conspiracy and his frequent trips to the Dansby Street house where the weapons were seized, we conclude that the district court did not clearly err in finding that McMurry's possession of the weapons was reasonably foreseeable.

AFFIRMED.