UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-20281

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTOPHER HANLEY,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR H 93 91 15)

August 29, 1995

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

PER CURIAM:[*]

Christopher Hanley pled guilty to conspiring to possess with the intent to distribute a controlled substance under 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846 (1988 & West Supp. 1995). He appeals the district court's calculation of the quantity of drugs attributable to him for sentencing purposes. We affirm.

I

Hanley was convicted of conspiring to possess with the intent

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to distribute cocaine base. Douglas McMurry was the leader of the conspiracy, which involved fourteen conspirators. An undercover investigation established that McMurry bought powder cocaine and processed it into cocaine base at 1012 Dansby Street ("Dansby") in Bryan, Texas. At 803 Weaver Street ("Weaver"), other conspirators, including Hanley, distributed and sold sixty percent of the crack manufactured at Dansby. When the authorities executed a search warrant at Dansby, McMurry was in the process of manufacturing cocaine base, and the officers confiscated a 9mm pistol with ammunition and other items including a substantial amount of cocaine base and cocaine powder. When officers executed a warrant at Weaver, they found more cocaine base. After searching the cars and residences of the co-conspirators, the police found drug paraphernalia, cash, and additional firearms.

At Hanley's sentencing, the district court expressly adopted the findings contained in the presentence investigation report ("PSR"). Hanley presented written and oral objections to the court's adoption of the findings, arguing that (1) in calculating his base offense level, the court should disregard the drugs and pistol found at Dansby and the firearms found in co-conspirators' cars and residences, and (2) the court should reduce his base offense level because he was a minor participant in the conspiracy. The court overruled Hanley's objections, but reduced his base offense level because of his minor participation in the conspiracy. Hanley appeals the district court's sentence, arguing that the district court (1) improperly determined his relevant conduct for

sentencing under sections 1B1.3(a)(1)(B) and 2D1.1(a)(3) of the United States Sentencing Commission, *Guidelines Manual* (Nov. 1993); and (2) improperly enhanced his base offense level under section 2D1.1(b)(1) of the Sentencing Guidelines.

II

"`A sentence imposed under the Federal Sentencing Guidelines will be upheld unless a defendant can demonstrate that it was imposed in violation of the law, was imposed because of a incorrect application of the guidelines, or was outside the range of applicable guidelines, and is unreasonable.'" *United States v. McKinney*, 53 F.3d 664, 677 (5th Cir. 1995) (quoting *United States v. Castaneda-Cantu*, 20 F.3d 1325, 1335 (5th Cir. 1994)). "We review the application of the sentencing guidelines *de novo* and the district court's findings of fact for clear error." *Id*.

A

Hanley challenges the district court's determination of the amount of drugs attributable to him under section 1B1.3(a)(1)(B) of the Sentencing Guidelines in calculating his base offense level under section 2D1.1(a)(3). We review the district court's determination of the quantity of drugs attributable to Hanley for clear error. *United States v. Tremelling*, 43 F.3d 148, 150 (5th Cir. 1995). "Under section 2D1.1(a)(3) of the Guidelines, the offense level of the defendant convicted of a drug trafficking offense is determined by the quantity of drugs involved." *United States v. Puig-Infante*, 19 F.3d 929, 942 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 180, 130 L. Ed. 2d 115 (1994). "[T]he

applicable drug quantity includes not only drugs with which the defendant was directly involved, but also drugs that can be attributed to him as part of his `relevant conduct.'" *United States v. Foy*, 28 F.3d 464, 476 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 610, 130 L. Ed. 2d. 520 (1994). In defining relevant conduct, "U.S.S.G. § 1B1.3(a)(1)(B) provides that, for sentencing purposes, a defendant is responsible for the reasonably foreseeable acts of their [sic] partners taken in furtherance of a jointly undertaken criminal activity." *United States v. Scurlock*, 52 F.3d 531, 539 (5th Cir. 1995); *accord United States v. Hernandez-Coronado*, 39 F.3d 573, 574 (5th Cir. 1994).

"[R]easonable foreseeability . . . requires a finding separate from a finding that the defendant was a conspirator. . . . [because] the acts of co-conspirators may be unforeseeable." *United States v. Puma*, 937 F.2d 151, 160 (5th Cir. 1991), *cert. denied*, 502 U.S. 1092, 112 S. Ct. 1165, 117 L. Ed. 2d 412 (1992). Thus, we held in *Foy* that "`for a sentencing court to attribute to a defendant a certain quantity of drugs, the court must make two separate findings: (1) the quantity of drugs in the entire conspiracy, and (2) the amount which each defendant knew or should have known was involved in the conspiracy.'" *Foy*, 28 F.3d at 476 (quoting *Puig-Infante*, 19 F.3d at 942). Under Rule 32 of the Federal Rules of Criminal Procedure, a sentencing court may "accept the presentence report as its findings of fact." Fed. R. Crim. P. 32(b)(6)(D).

The district court adopted the PSR's finding that Hanley and

his co-conspirators had "an implicit agreement with Douglas McMurry and with each other to operate a crack house at 803 Weaver Street . . . which was not lived in, but used solely for crack distribution." The court also adopted the PSR's findings that "the scope of the agreement is supported by the evidence revealing that the individual defendants `took turns' selling crack at that location," and that several of the conspirators were "usually present during each delivery of crack cocaine." Hanley concedes that he is accountable for the drugs found at Weaver, but argues that he is not accountable for those found at Dansby, where the cocaine base was manufactured. The court adopted the PSR's findings that sixty percent of the drugs found at Dansby are attributable to the conspirators distributing drugs at Weaver, and that "[i]t was clearly reasonably foreseeable to those distributing crack at 803 Weaver Street that Douglas McMurry would obtain more powder cocaine, and that he would manufacture that into crack cocaine for distribution."

Because the findings contained in the PSR establish that at least sixty percent of the drugs found at Dansby were reasonably foreseeable to Hanley, and because Hanley presents no evidence to contradict those findings, we conclude that the court's determination of the amount of drugs attributable to Hanley at sentencing was not clearly erroneous. *See United States v. Rogers*, 1 F.3d 341, 345 (affirming district court's determination that drugs were attributable to defendant for sentencing purposes because defendant offered no evidence to contradict PSR's findings

on the matter).

B

Hanley also claims that the district court erroneously enhanced his base offense level, under section 2D1.1(b)(1) of the Sentencing Guidelines, based on the firearms found at Dansby and in his co-conspirators' residences and vehicles. Hanley challenges both the PSR's finding that "the handguns . . . are considered to have been clearly connected to the drug trafficking activity," and that "possession of the handguns is considered to [have been] reasonably foreseeable to . . . Hanley."

"Because the decision to apply § 2D1.1(b)(1) is a factual one, we review for clear error." *United States v. Eastland*, 989 F.2d 760, 769 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 246, 126 L. Ed. 2d 200 (1993). We have held that "one co-conspirator may ordinarily be assessed a § 2D1.1(b)(1) increase in view of another co-conspirator's possession of a firearm during the drug conspiracy so long as the use is reasonably foreseeable." *United States v. Mergerson*, 4 F.3d 337, 350 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1310, 127 L. Ed. 2d 660 (1994). Because firearms are the "tools of the trade" of those dealing drugs, *United States v. Martinez*, 808 F.2d 1050, 1057 (5th Cir.), *cert. denied*, 481 U.S. 1032, 107 S. Ct. 1962, 95 L. Ed. 2d 533 (1987), a co-conspirator's use or possession of a firearm in a drug conspiracy is generally foreseeable to the defendant whether or not the defendant knew of the firearm, *see United States v. Aguilera-Zapata*, 901 F.2d 1209, 1215-16 (5th Cir. 1990). Because Hanley

failed to present any evidence at sentencing to refute the PSR's finding that his co-conspirators' possession of firearms was reasonably foreseeable to him, we conclude that the district court's enhancement of Hanley's sentence on the basis of that finding was not clearly erroneous. *See United States v. Ortiz-Granados*, 12 F.3d 39, 41 (5th Cir. 1994) (holding that section 2D1.1(b)(1) adjustment should be applied unless clearly improbable that weapon was connected with offense).

III

For the foregoing reasons, we AFFIRM the district court's sentence.