IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40570
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

KENNETH WAYNE DUCKWORTH
RONALD D. BATES, and
JAMES BURDETTE NEWTON,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
(4:93 CR 66 7)

March 28, 1995

Before KING, JOLLY, and DEMOSS, Circuit Judges.

PER CURIAM:*

Kenneth Duckworth, Ronald Bates, and James Newton appeal from the district court's judgment convicting them of conspiracy to manufacture and possess marijuana with intent to distribute. Bates

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

also appeals his conviction for possession of marijuana with intent to distribute. We affirm the judgment of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

Between 1990 and 1993, the defendants and various other parties allegedly participated in a large-scale marijuana growing and distribution operation. On September 24, 1993, Bates was arrested, and on October 14, 1993, a grand jury indicted Bates for possession of marijuana with intent to distribute. On December 8, 1993, a superseding indictment was filed against Bates, Newton, Duckworth, and seven other co-defendants. Count one charged all ten defendants with conspiring to manufacture and possess with intent to distribute 1,000 or more marijuana plants. Count three charged Bates with the same offense as in the first indictment.[1]

On February 7, 1994, Bates, Duckworth, Newton, Woolsey, Allan Guisinger, and Allen Tramble appeared in court for jury selection. Trial was set for March 14, 1994, and Duckworth, Newton, and Bates appeared for trial on that date. Woolsey and Guisinger, however, failed to appear, and the district court entered bench warrants for their arrest.[2]

On March 14, 1994, Bates also filed a motion requesting that Woolsey and Guisinger be tried in absentia, or, alternatively,

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[1] Count two charged co-defendants Jimmie Foley, Eric Woolsey, and Dale Barker with conspiring to launder monetary instruments. Count four was a criminal forfeiture charge against all of the defendants.

[2] Pursuant to a plea agreement, Tramble entered a guilty plea on March 11, 1994.

requesting a severance for himself or a mistrial. Newton and Duckworth made similar requests. The court refused to grant severances to these defendants, and on March 15, 1994, Bates, Newton, and Duckworth moved for a mistrial. The court denied the motions, and instead severed Woolsey and Guisinger from the trial.

Following a seven-day trial, the jury found all three defendants guilty of conspiring to manufacture and possess marijuana with intent to distribute. Bates was also found guilty of possessing marijuana with intent to distribute. Newton and Duckworth were each sentenced to 151-month terms of imprisonment and to five-year terms of supervised release. Bates was sentenced to concurrent 121-month terms of imprisonment and to a five-year term of supervised release.

Bates appeals his conviction, arguing that his indictment should have been dismissed because of Speedy Trial Act violations, and contending that the evidence was insufficient to support his conspiracy and possession convictions. Similarly, Duckworth contends that there was insufficient evidence to support his conspiracy conviction. All three defendants argue that the court erred in not granting their motions for severance or a mistrial, as the defendants claim that the jury's awareness of Woolsey's and Guisinger's absence incurably prejudiced the joint trial. Finally, Newton and Duckworth contest the district court's determination of the amount of marijuana attributable to them at sentencing.

II. ANALYSIS AND DISCUSSION

A. Speedy Trial Act

Bates argues that the district court should have dismissed his indictment because more than 70 non-excludable days elapsed from the time of his indictment to the time of trial. He also contends that the government violated the Speedy Trial Act by failing to indict Bates for conspiracy within thirty days of his arrest. According to Bates, double jeopardy principles require his conspiracy offense to be joined with his possession offense. We review the facts supporting a Speedy Trial Act ruling using the clearly erroneous standard, and we review the legal conclusions de novo. See United States v. Bermea, 30 F.2d 1539, 1566 (5th Cir. 1994).

The Speedy Trial Act ("the Act") is designed to insure a federal criminal defendant's Sixth Amendment right to a speedy trial and to reduce the danger to the public from prolonged periods of the defendant's release on bail. See United States v. Gonzales, 897 F.2d 1312, 1315 (5th Cir. 1990). The Act requires that a federal defendant be tried within 70 days of his indictment or first appearance before a judicial officer, whichever is later. See 18 U.S.C. § 3161(c)(1). If this requirement is not met, the indictment must be dismissed if the defendant moves for dismissal before trial. See id. § 3162(a)(2).

In some circumstances, however, even though a defendant has been indicted or has appeared before a judicial officer, the speedy trial clock is tolled, or relevant periods of time are excluded from the speedy trial calculation. Section 3161(h)(7) of the Act states that excludable time includes "[a] reasonable period of

delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." Cases interpreting this section have stated that it provides that "all defendants who are joined for trial generally fall within the speedy trial computation of the latest codefendant." Henderson v. United States, 476 U.S. 321, 323 n.2 (1986); accord Bermea, 30 F.3d at 1567; United States v. Neal, 27 F.3d 1035, 1042 (5th Cir. 1994); United States v. Welch, 810 F.2d 485, 488 n.1 (5th Cir. 1987); see also United States v. Harmon, No. 93-1906, slip op. at 9 (5th Cir. Jan. 13, 1995) (unpublished opinion) ("[I]n multi-defendant cases . . . the seventy-day clock does not start ticking until the last co-defendant has been arraigned.") (internal quotation omitted).

Bates maintains that the speedy trial clock commenced with the filing of the October 14, 1993 indictment for possession. After adding nine days of excludable time for the government's discovery and continuance motions, Bates contends that he should have been brought to trial no later than January 2, 1994. Trial did not begin in his case, however, until February 7, 1994. See United States v. Howell, 719 F.2d 1258, 1262 (5th Cir. 1984) (agreeing, at least implicitly, that trial commences under the Act on the date of voir dire). Furthermore, according to Bates, the December 8, 1993 filing of the superseding indictment does not affect the speedy trial timetable. Bates cites our opinion in Gonzales, where we made the following observation:

> The filing of a superseding indictment does not affect the speedy-trial clock for offenses charged in the

> original indictment or any offense required under double jeopardy principles to be joined with the original offenses. The seventy-day speedy trial period continues to run from the date of the original indictment or arraignment, whichever was later, and all speedy-trial exclusions apply as if no superseding indictment had been returned.

897 F.2d at 1316. According to Bates, the speedy trial clock began to run for his possession offense on October 14, 1993. Bates further argues that double jeopardy principles require his conspiracy charge to be joined with his possession charge, and therefore, Bates contends that the speedy trial clock for the conspiracy charge also began to run with the October 14, 1993 filing of the possession indictment.

We disagree with Bates's position. First of all, we also noted in Gonzales that the purpose of the above-mentioned superseding indictment rule is to "prevent[] the government from circumventing the speedy-trial guarantee by restarting the speedy-trial clock by obtaining superseding indictments ***with minor corrections***." Id. at 1316 (emphasis added). Such is not the case here, as the December 8, 1993 superseding indictment included nine additional defendants and three additional crimes. Thus, the justification behind the superseding indictment rule is not compelling in this case. Moreover, a substantive crime, and a conspiracy to commit that crime, are separate offenses for double jeopardy purposes, and they are not required to be joined together. See United States v. Felix, 112 S. Ct. 1377, 1384-85 (1992) (adhering to "the distinction between conspiracy to commit an offense and the offense itself," and noting that "[t]hese are

separate offenses for double jeopardy purposes"). To the extent that Bates tries to evade this fundamental distinction by noting that his alleged possession is the only overt act charged in his conspiracy count, we remind Bates that "defendants need not commit an overt act in drug conspiracy cases." United States v. Onick, 889 F.2d 1425, 1432 (5th Cir. 1989) (citing United States v. Mollier, 853 F.2d 1169, 1172 (5th Cir. 1988)); accord United States v. Shabani, 115 S. Ct. 382, 385 (1994). Thus, any overt act attributable to Bates is simply irrelevant to the double jeopardy analysis, and we merely note that an agreement to do the act is distinct from the act itself. See Felix, 112 S. Ct. at 1384.

The rules pertaining to the joinder of multiple defendants, however, are still applicable. All of the defendants, including Bates, were charged with conspiracy, and the district court granted a continuance on December 16, 1993 to allow the government to join all of the defendants for trial.[3] Under § 3161(h)(7) of the Act, the time from December 20, 1993 (the original trial setting) to February 7, 1994 was properly excludable as a reasonable period of delay to accommodate the joinder of the defendants.[4] In addition,

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[3] The government's motion for continuance requested that Bates's trial on the possession charge be continued and merged with the trial date of the co-defendants "[i]n order to preserve judicial economy and so that RONALD D. BATES ***may be properly joined*** with the co-conspirators charged in the Superseding Indictment" (emphasis added). The district court's order granting the continuance stated that the trial should be continued "for the reasons set forth in the [government's] motion."

[4] Bates cites § 3161(h)(8)(A) for the proposition that "[t]he granting of a continuance by the trial court, standing alone, does not exclude the period of continuance from the 70 day

as one defendant joined for trial in a multi-defendant case, Bates falls within the speedy trial computation of the latest codefendant -- in this case, Duckworth and Newton, whose speedy trial clock began with their arraignments on December 21, 1993. Under either method, because less than 70 non-excludable days passed before Bates's trial, the Act was not violated.[5]

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period. For a continuance delay to stop the speedy trial clock, the court must find that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial." Bates argues that the district court made no such finding in this case, and that "judicial economy" is not one of the factors listed by the Act under § 3161(h)(8).

Bates's contentions are correct for continuances granted under § 3161(h)(8) of the Act, but, as mentioned, the district court in this case granted the continuance under § 3161(h)(7) -- "[a] reasonable period of delay when the defendant is joined for trial with a codefendant . . . . " The court granted the continuance "for the reasons set forth in the [government's] motion" -- the need to properly join Bates with the other co-conspirators. Thus, the court actually granted a "reasonable period of delay" continuance under § 3167(h)(7), which, unlike § 3161(h)(8)(a), does not require an "ends of justice" analysis.

[5] Bates argues that "`proper joinder' was a ruse" because if the government and the court truly wanted to preserve judicial economy, the conspiracy trial should not have commenced until all defendants had been arrested. According to Bates, some of the alleged co-conspirators did not appear before a judicial officer until well after Bates's trial had begun.

We are not persuaded by Bates's argument. The district court joined five of the co-conspirators for trial because they had already been arrested and it was unclear when the other parties would eventually be found and arrested. Joining the five arrested parties is still consistent with judicial economy and proper joinder. Moreover, even if we credit Bates's position, it would not help his speedy trial claim. Indeed, as mentioned, in multi-defendant cases, the speedy trial clock generally begins when the last defendant appears. Waiting for the other parties to make an appearance would have tolled Bates's speedy trial clock for a ***longer*** period of time, and his alleged speedy trial violations would be even more dubious.

Bates also contends that the government violated the Act when the superseding indictment was not filed within 30 days of the date of his arrest. Section 3161(b) of the Act states that an "indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges." Bates was arrested on September 24, 1993, and the indictment charging him with possession was returned on October 14, 1993. The conspiracy indictment, however, was not returned until December 8, 1993. According to Bates, the 30-day clock for the conspiracy charge commenced with his September 24 arrest because "where the only overt act underlying the conspiracy charge is the suspect's participation (or supposed participation) in the underlying substantive offense, when the suspect is arrested for the substantive offense, he is arrested for conspiracy."

As mentioned, however, Bates's contention is misplaced, as conspiracy and the underlying substantive crime are wholly separate offenses. A conspiracy charge targets the agreement to commit the criminal act, while the underlying substantive charge targets the commission of the criminal act itself. Moreover, a drug conspiracy conviction can occur without proof of any overt act -- once again highlighting the distinction between conspiracy and the act itself. Finally, despite Bates's contentions, the government did not prove an agreement for its conspiracy case based solely on Bates's alleged possession. The jury could have inferred an agreement from the fact that Joe Wayne Collvins, the government's key witness, had

met Bates, and from the evidence of Bates's fingerprint on a piece of duct tape wrapped around one of the marijuana plants. Thus, the arrest for possession was not the functional equivalent of an arrest for conspiracy, and because Bates's indictment for possession was returned within 30 days of his arrest for that offense, the Speedy Trial Act was not violated.[6]

B. The Motions for Severance

When Woolsey and Guisinger failed to appear for trial, the district court severed them from the March 14 setting rather than trying them in absentia. All three defendants maintain that the court should have granted their motions to sever or for a mistrial because the jury's awareness of Woolsey's and Guisinger's flight incurably prejudiced the joint trial. Severing a codefendant from trial and declaring a mistrial is within the discretion of the district court, and we review such a determination under an abuse of discretion standard. See United States v. Coveney, 995 F.2d 578, 584 (5th Cir. 1993); United States v. Romanello, 726 F.2d 173, 177 (5th Cir. 1984).

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[6] Bates's reliance on United States v. Velasquez, 890 F.2d 717 (5th Cir. 1989) is misplaced. In Velasquez, an indictment charging the defendant with one count of possession of marijuana with intent to distribute and one count of conspiracy for the same offense was not returned until 63 days after the defendant's arrest. See id. at 719. In Bates's case, however, the initial possession indictment was returned within thirty days of his arrest for that offense. Even if the thirty-day rule had been violated, which is not the situation in the instant case, the Speedy Trial Act only requires dismissal of offenses charged in the original complaint. See id. at 719-20. The criminal complaint filed three days after Bates's arrest only charged possession; a conspiracy charge was not present in the complaint. Thus, Bates still could have been properly prosecuted on the conspiracy charge.

In general, "persons who are charged together generally should be tried together, particularly where they are charged with the same conspiracy." United States v. Cavin, 39 F.3d 1299, 1311 (5th Cir. 1994). A severance is an appropriate remedy for a disparity in the evidence only in the most extreme cases, and the defendant must demonstrate "specific and compelling prejudice" that the trial court cannot protect against. United States v. McCord, 33 F.3d 1434, 1452 (5th Cir. 1994) (internal quotations omitted); see also Cavin, 39 F.3d at 1611 ("Severance is in order only when a defendant suffers compelling prejudice against which the trial court cannot protect."). The mere presence of a spillover effect does not ordinarily warrant severance. See United States v. Faulkner, 17 F.3d 745, 759 (5th Cir. 1994).

Although the defendants make generalized assertions of prejudice from the joint trial, they fail to identify any specific instances of prejudice. Moreover, before and during the trial, the district court minimized the possibility of prejudice through cautionary instructions. Recognizing the dangers of prejudice, the court instructed the jury prior to trial in the following manner:

> [T]he absence of the Defendants Woolsey and Guisinger, should not be considered in any way as evidence of the guilt of any other Defendant, and their absence should not be considered by you as affect[ing] in any way your determination of the guilt or innocence of any other Defendant.

The jury was reminded of this admonition the next day during opening instructions. The court instructed the jury in the same manner at the conclusion of the trial:

> As you will remember, Defendants Eric Wade Woolsey and Allen Darrell Guisinger who were present at the time you were selected as jurors voluntarily absented themselves from this trial and are presently fugitives. You are instructed that their absence should not be considered by you as affect[ing] in any way your determination of the guilt or innocence of any remaining Defendant.

The court also instructed the jury that:

> [a] separate crime is charged against one or more of the Defendants in each count of the indictment. Each count and the evidence pertaining to it, should be considered separately. Also the case of each Defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime or any other Defendant. You must give separate consideration to the evidence as to each Defendant.

In light of these repeated curative instructions, there is no abuse of discretion in the district court's decision to deny severance or mistrial based on Woolsey's and Guisinger's absence. See, e.g., Faulkner, 17 F.3d at 759 (noting that instructions to the jury to consider each offense separately and each defendant separately "have been held sufficient to cure any possibility of prejudice"); United States v. Ramirez, 963 F.2d 693, 699 (5th Cir. 1992) (noting that the district court was within its discretion not to declare a mistrial, in part because the court instructed the jury to disregard stricken testimony); United States v. Arzola-Amaya, 867 F.2d 1504, 1516 (5th Cir. 1989) (stating that the trial court's instruction to the jury to consider each offense separately and each defendant individually "sufficiently enabled the jury to `compartmentalize' such evidence and prevent any `spillover' from tainting another appellant's case").

Duckworth also asserts that he was prejudiced by Tramble's guilty plea. Once again, we disagree. During preliminary instructions, the jury was informed that Tramble was no longer in court because of a court ruling for reasons that "are not your concern." The court further admonished that Tramble's absence "should not be considered by you as affecting in any way your determination of the guilt or innocence of any other Defendant." Although Tramble later testified at trial, Duckworth chose not to cross-examine him. At the close of trial, the court gave the jury cautionary instructions regarding the plea agreement and the testimony of accomplices. Simply put, "[c]urative instructions are usually sufficient to protect remaining defendants from prejudice arising out of the guilty pleas of co-defendants." United States v. Ramirez, 963 F.2d 693, 700 (5th Cir. 1992). In this case, the repeated curative instructions were sufficient to combat any alleged prejudice from Tramble's guilty plea, and we find no abuse of discretion in the district court's refusal to grant a severance or mistrial. Cf. United States v. Almeida-Biffi, 825 F.2d 830, 833 (5th Cir. 1987) (agreeing that a severance was not required, in part because "the jury was clearly and strongly instructed not to speculate why [a codefendant] was dismissed from the case").

C. Sufficiency of the Evidence

Bates and Duckworth both contend that the evidence was insufficient to support their conspiracy convictions. Bates also argues that the evidence was insufficient to support his conviction for possession. In evaluating the sufficiency of the evidence, a

reviewing court must consider the evidence in the light most favorable to the verdict and determine whether a rational jury could have found the essential elements of the offense beyond a reasonable doubt. See United States v. Maltos, 985 F.2d 743, 746 (5th Cir. 1992). Our evaluation must give the government the benefit of all reasonable inferences and credibility choices. See id.

To establish guilt of a drug conspiracy under 21 U.S.C. § 846, the government must prove 1) the existence of an agreement to import or possess controlled substances with intent to distribute them; 2) the defendants' knowledge of the agreement; and 3) the defendants' voluntary participation in the agreement. See United States v. Skillern, 947 F.2d 1268, 1273 (5th Cir. 1991). The government need not prove the essential elements by direct evidence alone. The agreement, a defendant's guilty knowledge, and a defendant's participation in the conspiracy all may be inferred from the development and collocation of circumstances. See Maltos, 985 F.2d at 746; United States v. Cardenas, 9 F.3d 1139, 1157 (5th Cir. 1993) ("Direct evidence is not required; each element [of the drug conspiracy charge] may be inferred from circumstantial evidence."). "[P]roof of the defendant's knowledge of all the details of the drug conspiracy is not required, as long as knowledge of the essential details is established, and the defendant need neither have been present at the inception of the conspiracy, nor have played a major role therein." United States v. Parrish, 736 F.2d 152, 157 (5th Cir. 1984) (internal quotation

omitted). Finally, as mentioned, "[i]n order to establish a violation of 21 U.S.C. § 846, the Government need not prove the commission of any overt act in furtherance of the conspiracy." United States v. Shabani, 115 S. Ct. 382, 385 (1994).

Bates contends that the conspiracy count against him was based solely upon his residence in Foley's mobile home on the Cooke County property where 1,577 marijuana plants were seized. Bates testified at trial that he had been close friends with Foley since childhood. After learning in the spring of 1992 that Foley had cancer, Bates renewed his friendship with Foley. Foley offered to let Bates live in his mobile home rent-free if Bates would maintain the property. At first, Bates stayed on the Cooke County property only intermittently, but, as Bates testified, he began spending more time there after his payroll checks bounced and he resigned from his Dallas job. The telephone and electricity were placed in Bates's name in February of 1993.

Bates testified that Foley specifically instructed him not to enter the back portion of the property; thus, it was not until mid-August, when Bates decided to follow some suspicious footprints, that Bates discovered the marijuana field. Bates further testified that he told Foley about the marijuana discovery in person because he wanted to see the look on Foley's face when confronted with the information. According to Bates, Foley acted surprised and told Bates to keep his eyes open for strange vehicles. Foley also told Bates that he would construct a plan to deal with the situation.

Bates testified that he discovered more footprints, and Foley told him to keep checking the area. On one occasion, Bates saw a "pretty rough looking character" who asked Bates if he were "Shorty." Bates again told Foley, and Foley told him to return the following day to watch for anyone entering the field. Bates testified that he followed Foley's instructions because he felt that he was helping his friend. Later, Foley arrived and the two men went to look at the fields. Foley apparently told Bates that he was going to continue to work on his plan and that he would return in a few days to explain it to Bates. Bates testified that he believed Foley. When law enforcement officers raided the field on September 24, Bates testified that he ran back to the trailer expecting to see Foley with the authorities. A profusely sweating Bates arrived at the mobile home approximately 25-30 minutes after the arrival of the search team, and he was arrested shortly thereafter. A fingerprint of Bates's left thumb was later found on a piece of duct tape taken from one of the seized marijuana plants.

There was sufficient evidence for a rational jury to conclude that Bates joined the conspiracy in 1993, when he began living on the Cooke County property. Although Bates's mere presence at the scene of the crime or his close association with Foley cannot alone establish voluntary participation in a conspiracy, "presence or association is a factor that, along with other evidence, may be relied upon to find conspiratorial activity by the defendant." Cardenas, 9 F.3d at 1157. The jury was entitled to disbelieve Bates's trial testimony that he had lived on the property for

months without being aware of the marijuana field, and that he stayed on the property to watch for strangers, despite fearing for his personal safety, after he discovered the marijuana in mid-August. Cf. Cardenas, 9 F.3d at 1157 ("[E]rratic behavior is some evidence of guilty knowledge."). Moreover, aside from mere presence and association, a fingerprint of Bates's left thumb was found on a piece of duct tape removed from one of the marijuana plants -- arguably indicating that Bates was maintaining and assisting the marijuana harvest. Based upon this evidence, it was reasonable for the jury to find Bates guilty of conspiracy.

Duckworth contends that the evidence was insufficient to support his conviction for conspiracy because it "did little more than place [him] in the company of other conspirators." The evidence, however, establishes more than mere association. In 1991, Duckworth was living in a mobile home on the Cooke County property -- the same mobile home that Bates subsequently lived in. On one occasion, Newton drove Woolsey and Collvins to the Cooke County property, where the three men met Duckworth. Collvins testified that he gave advice on how to deal with worm infestation and the ravages of a severe storm that had blown down a large number of the marijuana plants. On September 22, 1993, Duckworth drove Woolsey from the Holiday Inn in Ardmore, Oklahoma to an airport in Lawton, Oklahoma. The next day, Woolsey and Duckworth were observed meeting at different times in the Holiday Inn parking lot and holding discussions in Duckworth's car. The motel receipt for September 22 in the name of Duckworth was found in Woolsey's

wallet. Woolsey was also seen driving with co-conspirator John McCarthy that day. Guisinger had arrived earlier and was observed walking towards Woolsey's room. The following day, Woolsey, Guisinger, and McCarthy were apprehended on the trail leading from the mobile home to the marijuana fields. Thus, Duckworth's actual participation in the 1991 marijuana crop combined with his presence and association with co-conspirators in 1993 provided sufficient evidence for a jury to convict him of conspiracy.

To prove the possession with intent to distribute charge against Bates, the government had to prove "knowing possession of the contraband with intent to distribute." Cardenas, 9 F.3d at 1158. The elements of the offense may be proven by circumstantial evidence alone. See id. Possession may be actual or constructive, and this court has defined constructive possession as "the knowing exercise of, or the knowing power or right to exercise dominion and control over the proscribed substance." Id. (internal quotation omitted).

Prior to his September 1993 arrest, Bates had resided on the Cooke County property for over seven months. He admitted at trial that he had learned of the existence of the marijuana crop on the property. He provided a questionable explanation regarding his failure to leave the property and to notify the authorities. In addition, a fingerprint was found on a piece of duct tape taken from one of the marijuana plants. Thus, viewed in the light most favorable to the verdict, a rational jury could have found that Bates had the knowing power to exercise control over the marijuana

crop, and therefore, a rational jury could have convicted Bates on this possession count.

D. Sentencing

Newton and Duckworth both challenge the district court's determination of the quantity of marijuana attributed to them for sentencing purposes. They assert that they were unaware of the 1993 crop; thus, they contend that they should not be held accountable for the marijuana seized from the conspiracy that year. The amount of drugs for which an individual shall be held accountable represents a factual finding that must be upheld unless clearly erroneous. See Bermea, 30 F.3d at 1575. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though it is convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. See id.

A defendant's base offense level for drug trafficking offenses may be based on both "drugs with which the defendant was directly involved, and drugs that can be attributed to the defendant in a conspiracy as part of his `relevant conduct' under § 1B1.3(a)(1)(B) of the Guidelines." United States v. Carreon, 11 F.3d 1225, 1230 (5th Cir. 1994). Relevant conduct includes "all *reasonably foreseeable* acts and omissions of others in furtherance of jointly undertaken criminal activity." Id.

In calculating the quantity of drugs foreseeable to a defendant, the district court may consider any evidence that has "sufficient indicia of reliability to support its probable

accuracy." United States v. Puig-Infante, 19 F.3d 929, 942 (5th Cir. 1994) (internal quotation omitted). Because the Presentence Investigation Report ("PSR") is considered to be reliable, it may be considered as evidence. See United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992). In the instant case, the district court adopted the factual findings and guideline application in the PSR.

The PSR found that Duckworth had participated in the 1993 marijuana crop on Jefferson County property. The finding was based upon information linking Duckworth with other co-conspirators involved in the 1993 Jefferson County crop, and, as the PSR stated, upon Duckworth's statement "that he wished he had become involved in the marijuana cultivation efforts earlier in 1993." The PSR also found that in light of Duckworth's 1991 involvement with Foley in the Cooke County crop, Foley's 1993 cultivation efforts on the same land were reasonably foreseeable to Duckworth. The district court agreed with these findings, and we find no clear error.

The PSR and the district court both determined that Newton had acquired the Cooke County property on behalf of Foley for the 1991 marijuana harvest.[7] There is evidence that Newton participated in the cultivation of that crop. Based on this business arrangement, and because Newton had been a close friend of Foley for years, the

[7] The evidence indicated that Foley gave Newton money to purchase approximately 160 acres in Cooke County, Texas in 1991. Foley had Newton execute a handwritten quitclaim deed to the property, which Foley kept in a dictionary in his house. In May of 1992, a special warranty deed transferring the property from Newton to Foley was recorded.

PSR found that it was reasonably foreseeable that Newton was aware of the 1993 marijuana crop run by Foley on the same Cooke County property. The district court agreed with this assessment. Similarly, because of Newton's continued relationship with Duckworth, the PSR found it reasonably foreseeable that Newton was aware of Duckworth's involvement in the 1993 Jefferson County crop. The district court also agreed with this assessment. Finally, Newton's address was also found in Woolsey's wallet. Neither Newton nor Duckworth offered evidence at sentencing to dispute the accuracy of the PSR information. We find that the district court properly accepted the PSR's sufficiently reliable findings, and we conclude that these findings are not clearly erroneous. See United States v. Thomas, 963 F.2d 63, 65 (5th Cir. 1992) ("[A]n individual dealing in a sizable amount of controlled substances ordinarily would be presumed to recognize that the drug organization with which he deals extends beyond his universe of involvement.").

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.