

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5054

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BARNEY HOLT, III, a/k/a TREY HOLT,

Defendant-Appellant.

No. 92-5055

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

STEVEN W. ARNOLD,

Defendant-Appellant.

No. 92-5266

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

PATRICK M. O'LEARY,
CANDACE JOHNSON O'LEARY,
and PAUL W. BEAL

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Louisiana
(92 50017)

(October 26, 1993)

Before WISDOM, HIGGINBOTHAM, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Barney Holt, III, Steven Arnold, Patrick O'Leary, Candace O'Leary, and Paul Beal appeal their convictions and sentences of one count of conspiracy to manufacture methamphetamine with intent to distribute. Finding no error in the convictions or sentences of Holt and Arnold, we affirm as to them. Finding a misapplication of

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 Pursuant to that rule, the court has determined that this opinion should not be published.

the Sentencing Guidelines (the "Guidelines"), we remand as to Patrick and Candace O'Leary for resentencing. Since Beal's notice of appeal was not timely filed, we remand for a determination of excusable neglect.

I.

A.

The conspiracy to manufacture methamphetamine consisted of seven key individuals: S. Patrick Phillips, an attorney and leader of the conspiracy; Candace O'Leary, Phillips's friend and legal secretary; Patrick O'Leary, Candace's husband; Arnold, a friend of Patrick O'Leary's; Holt, a friend of Beal's and acquaintance of Reggie Atkins's; Beal, a friend of Holt's and Atkins's; and Reggie Atkins, an unindicted friend of Beal's. Other individuals were involved in the manufacture of methamphetamine on various occasions, but played minor roles.

There were several attempts to produce methamphetamine from phenylacetic acid ("PA") during 1989 and 1990. These attempts are known as "cooks." Each of the defendants at one time or another supplied chemicals, glassware, or equipment for the cook, supplied a location for the laboratory and/or for the storage of chemicals and equipment, transported chemicals and apparatus, or supplied skill and knowledge of the process.

The conspiracy began with the O'Learys and Phillips attempting a cook in March 1989. Phillips later supplied chemicals to Atkins and attempted two cooks in the summer of 1990. After Phillips was

arrested, Beal and Holt attempted a cook with the leftover ingredients. During Phillips's arrest, various supplies and glassware were seized from his shed, including a hand-written formula in Candace O'Leary's handwriting. Arnold and Patrick O'Leary moved a garbage can containing PA from the O'Learys' home to Arnold's, where it was seized by police.

A search of Holt's residence turned up various glassware and some methamphetamine residue. Beal's fingerprint was found on one of the pieces of glassware seized from Holt's residence; Patrick O'Leary's fingerprint was found on glassware in Arnold's residence. Apparently, chemicals were supplied by Phillips to Atkins who, with Beal and Holt, attempted at least two cooks at Phillips's residence and elsewhere. According to the government, the O'Learys acted as go-fers, users, transporters, and helpers with the cooks. Furthermore, Candace O'Leary and Arnold distributed the completed methamphetamine. Various physical evidence (e.g., a cooker, glassware, residue, fingerprints, and equipment) linked all seven individuals to the various cooks.

B.

Six individuals, Phillips, Candace O'Leary, Patrick O'Leary, Arnold, Holt, and Beal, were charged in a five-count indictment with conspiracy to manufacture methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Phillips was charged with one count of attempting to manufacture methamphetamine. Phillips, Candace O'Leary, Patrick O'Leary, and Arnold were charged with one

count of possession of PA with intent to manufacture methamphetamine. Beal and Holt were charged with one count of attempting to manufacture methamphetamine. The fifth count was a count of forfeiture of property used to facilitate the commission of a criminal offense.

Holt and Arnold pled guilty to the conspiracy count and testified against the other four defendants, who were tried and convicted of conspiracy to manufacture methamphetamine. Only Phillips was convicted of possessing PA. The other defendants were acquitted of the other substantive offenses. All defendants filed motions for judgment of acquittal and for new trial. All of the motions were denied, except that Phillips's motion for new trial was granted (and hence he is not one of the appellants here).

C.

Arnold was sentenced to 96 months' imprisonment, a downward departure from his guideline range of 210 to 262 months. Holt was sentenced to 60 months' imprisonment, a downward departure from his guideline range of 135 to 168 months. Holt and Arnold filed timely appeals claiming that the court miscalculated their "relevant conduct" under the Guidelines.

Candace O'Leary was sentenced to 151 months' imprisonment, plus three years' supervised release. She filed a timely notice of appeal, claiming that (1) the evidence was insufficient to support the conviction; (2) exculpatory evidence was withheld by the government, violating her rights under Brady v. Maryland and

requiring a new trial; (3) the trial court erred in refusing to let her put on evidence concerning her financial condition and the temperature of her attic; (4) the improper testimony by Culberhouse that prejudiced Phillips also prejudiced her, and therefore she should be granted a new trial; and (5) the court misapplied the Guidelines' equivalency tables and miscalculated her relevant conduct.

Patrick O'Leary was sentenced to 151 months' imprisonment, plus three years' supervised release. He filed a timely notice of appeal, claiming that (1) the evidence was insufficient to support the conviction; (2) exculpatory evidence was withheld by the government, violating his Brady rights and requiring a new trial; and (3) the court misapplied the Guidelines' equivalency tables and miscalculated his relevant conduct.

Paul Beal was sentenced to 235 months' imprisonment, plus six years' supervised release. He filed an oral notice of appeal at sentencing and later filed a written notice of appeal thirty-four days after the final order. He claims that (1) his notice of appeal was timely filed; (2) the evidence was insufficient to support the conviction; (3) his Brady rights were violated, requiring a new trial; and (4) the court misapplied the Guidelines' equivalency tables and miscalculated his relevant conduct.

Thus, in summary, defendants Holt and Arnold challenge only the application of the Guidelines to their relevant conduct. The three defendants who stood trial raise sufficiency claims, Brady claims, and Guidelines claims. Candace O'Leary additionally raises

various evidentiary issues. The appeals were consolidated.

III.

Four of the five defendants filed a timely notice of appeal. Beal, however, made an oral notice of appeal in court and filed a written notice of appeal thirty-four days after the final order.

A timely notice of appeal is a prerequisite to our exercise of jurisdiction. United States v. Winn, 948 F.2d 145, 153 (5th Cir. 1991), cert. denied, 112 S. Ct. 1599 (1992). Federal Rule of Appellate Procedure 4(b) governs when a notice of appeal is timely in a criminal case and requires that the notice of appeal be filed in the district court within ten days of the entry of judgment or order from which the defendant appeals. This circuit has held in O'Neal v. United States, 264 F.2d 809, 812 (5th Cir.), modified, 272 F.2d 412 (5th Cir. 1959); and Durel v. United States, 299 F.2d 583 (5th Cir. 1961), that oral notice of appeal is no substitute for the filing of written notice.

The fact that the district court apparently "granted" the oral notice of appeal cannot transform the ineffective oral notice into a written one. Thus, the oral notice did not satisfy rule 4(b).

Rule 4(b) allows the district court to extend the time for filing for an additional thirty days for excusable neglect. The filing of an untimely notice of appeal within the additional thirty-day period is treated as a motion for a determination as to whether excusable neglect entitled the defendant to an extension of time to appeal. United States v. Awalt, 728 F.2d 704, 705 (5th

Cir. 1984). Beal's notice was filed within the additional period for excusable neglect. We do not presume the absence or presence of excusable neglect but must remand to the district court for the determination. United States v. Golding, 739 F.2d 183, 184 (5th Cir. 1984). There is nothing in the record indicating that the district court already has considered this issue. Thus, we remand to the district court as to Beal for a determination of excusable neglect. We retain jurisdiction over the matter, however, and will determine the status of Beal's appeal following the district court's decision on remand.

IV.

The three defendants who were convicted at trial contest their convictions, claiming that the evidence was insufficient for a rational jury to have concluded beyond a reasonable doubt that they were guilty. They appeal the district court's denial of their motions for judgment of acquittal.

We review the district court's denial of a motion for judgment of acquittal de novo. United States v. Sanchez, 961 F.2d 1169 (5th Cir.), cert. denied, 113 S. Ct. 330 (1992). Although the evidence is reviewed in the light most favorable to the government, drawing all reasonable inferences in support of the verdict, the conviction should be reversed if a rational jury could not have found that the evidence established each essential element of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

To establish a conspiracy under 21 U.S.C. § 846, the govern-

ment must prove beyond a reasonable doubt (1) an agreement between two or more persons to violate the narcotics laws, (2) that each alleged conspirator knew of the conspiracy and intended to join it, and (3) that each alleged conspirator did participate voluntarily in the conspiracy. United States v. Leed, 981 F.2d 202, 204-05 (5th Cir.), cert. denied, 113 S. Ct. 2971 (1993).

A.

The three defendants first claim that they could not have been part of the indicted conspiracy because they did not know each person in the conspiracy. There may have been several two- or three-person conspiracies, but no evidence suggests the existence of the five-person conspiracy alleged in the indictment. Holt knew only Beal, and neither knew the O'Learys. The O'Learys admit that there was evidence that they participated in cooks at their own home and at Phillips's, but not with the other co-conspirators, Beal and Holt. Beal contends that only a conspiracy between him and Holt could possibly be established. He contends that there was no conspiracy between Holt/Beal and the O'Learys/Arnold.

This court has held that "[i]t is not necessary that all the members of a conspiracy know each other or that they work together on every transaction." United States v. Elam, 678 F.2d 1234, 1247 (5th Cir. 1982); see also United States v. Brasseaux, 509 F.2d 157 (5th Cir. 1975) (holding that members of a single conspiracy need not be aware of the existence of the other members). If the totality of the evidence is sufficient to demonstrate a concert of

action unified by a common purpose, a single conspiracy exists. Elam, 678 F.2d at 1246. Thus, that the O'Learys and Arnold knew only Phillips, but not Holt and Beal, is irrelevant. The evidence shows that they all worked in various stages and locations for a common purpose: to produce methamphetamine. Furthermore, they were all to benefit from its production.

B.

Both O'Learys cite Kotteakos v. United States, 328 U.S. 750, 774-75 (1946), for the proposition that the guilt of Holt was transferred across the lines of the conspiracies. They claim that testimony about Holt's theft of his child's social security benefits to pay for drugs prejudiced both of the O'Learys because neither one knew Holt.

Kotteakos is relevant only when the allegedly prejudicial evidence concerns another conspiracy. But under Elam, the jury was entitled to view the conspiracy as a whole. Kotteakos does not apply to evidence impugning co-conspirators. Furthermore, it is unlikely that a reasonable jury would view the testimony against Holt as applying to the O'Learys. The physical and circumstantial evidence adduced at trial supports the convictions of all three defendants, and each conviction therefore is affirmed.

V.

The three defendants convicted after trial further claim that the government withheld exculpatory evidence in violation of their

rights under Brady v. Maryland, 373 U.S. 83 (1963). Under Brady, the government may not suppress material evidence favorable to the accused, irrespective of the good or bad faith of the prosecution. Id. at 87. But a defendant is entitled to a new trial only when there is a reasonable probability that the result would have been different. United States v. Nixon, 881 F.2d 1305, 1308 (5th Cir. 1989). Furthermore, whether Brady evidence is material depends upon its value in relationship to the other evidence presented at trial. Smith v. Black, 904 F.2d 950, 967 (5th Cir. 1990), vacated on other grounds, 112 S. Ct. 1463 (1992).

The three defendants who stood trial claim that the grand jury testimony of Atkins and subsequent affidavit were material because he claimed not to know of any cooks or illegal activities. Since Atkins was a key figure in the criminal activities, his testimony would be both exculpatory and impeaching. They demand reversal of their convictions and new trials.

The government claims that the Atkins affidavit is merely self-serving. Moreover, since Atkins was available to the defense counsel, they could have called him at trial; the government did not suppress his testimony or the knowledge of his existence.

Each of the defendants knew that Atkins played a pivotal role in the conspiracy. They could have called him to testify; their failure to call Atkins cannot be blamed on the government. When approached by defense counsel, Atkins's attorney stated that Atkins would plead the Fifth Amendment and refuse to testify. Whether Atkins's testimony would have been material, i.e., exculpatory and

credible, is another issue, but we can reject the defendants' argument on the ground that the government did not suppress the evidence.

The defense counsel knew Atkins's role but could not force him to testify. The government did not conceal his existence or the substance of his testimony. Thus, the defendants' argument must be rejected.

VI.

Only Candace O'Leary raises the argument that the Atkins testimony represents new evidence requiring a new trial. To get a new trial based upon new evidence, a defendant must show (1) the evidence was newly discovered and was unknown to the defendant at the time of the trial; (2) failure to detect the evidence was not a result of lack of due diligence by the defendant; (3) the evidence is material, not merely cumulative or impeaching; and (4) the evidence probably will produce an acquittal. United States v. Peña, 949 F.2d 751 (5th Cir. 1991). If any one factor is not satisfied, the motion for new trial should be denied. United States v. Lopez-Escobar, 920 F.2d 1241 (5th Cir. 1991). The appellate court reviews the denial of such a motion for clear abuse of discretion. United States v. Adi, 759 F.2d 404 (5th Cir. 1985).

Several of the factors have not been satisfied. First, there is no reason why the defendants did not obtain the Atkins affidavit before trial. They knew he existed and could have obtained an affidavit from him. That failure represents a certain lack of

diligence. Second, it is not obvious that Atkins's testimony would have helped the defendants. As an unindicted co-conspirator, his testimony would have been suspect. Furthermore, the testimony was unlikely to produce an acquittal, given the physical evidence connecting the defendants to the conspiracy.

Given the deference with which we review a denied motion for new trial, and the questionable value and prior unavailability of the new evidence, we reject Candace O'Leary's claim for a new trial based upon new evidence.

VII.

Candace O'Leary also appeals the district court's refusal to admit evidence concerning her financial condition and her attic temperature. The defendant contended that this evidence would have shown that she was unable to purchase the necessary chemicals and that the cook could not have been conducted in her attic. The district court refused to admit the evidence for lack of relevancy. We review evidentiary questions for abuse of discretion. Peña, 949 F.2d at 751.

The government contends that the testimony regarding her financial condition is irrelevant because it was never alleged that Candace O'Leary financed the operation. The chemicals came from either Phillips or unknown sources. Since it was not part of the government's case that Candace O'Leary financed the purchase of

chemicals, her financial condition was irrelevant.¹

As to her attic temperature, Candace O'Leary contends that a cook could not have taken place there in August. Yet the government alleged that two other cooks took place in Candace O'Leary's attic, one in March 1989 and the other between March and August 1989. Furthermore, not all of the activities involved in a "cook" are alleged to have occurred in the attic. Thus, the district court properly excluded this evidence as irrelevant. We conclude that the district court did not abuse its discretion in refusing to admit Candace O'Leary's evidence concerning her financial condition and her attic temperature.

VIII.

Candace O'Leary also contends that the improper admission of the Culberhouse testimony prejudiced her and necessitated a new trial. Shane Culberhouse testified at trial against Phillips. He attacked Phillips's character and testified about using drugs with Phillips at his law office and smelling drugs on Phillips at the Benton courthouse. The district court granted Phillips a new trial based upon the improper admission of character evidence. Candace O'Leary claims that because she was a close personal friend and legal secretary to Phillips, Culberhouse's testimony prejudiced

¹ She also argued that she was financially unable to pay Alton Thomas \$600 to buy chemicals, thus impeaching his testimony. However, her "financial condition" does not take into account the proceeds from illegal drug transactions. Her argument is meritless because her financial condition does not bear on whether she could have bought the chemicals. In addition, the government does not need to prove that she paid for the drugs to sustain its burden at trial.

her, too. She argues, essentially, that a jury would view her workplace as a drug den and her close friend and boss as a drug user.

The district court based its grant of a new trial for Phillips upon testimony by Culberhouse concerning the smell of PA at the Benton courthouse. Culberhouse was to rebut Phillips's testimony by giving testimony of "bad acts" by Phillips. Instead, Culberhouse's testimony also attacked Phillips's character, warranting a new trial. But no character attacks were made against Candace O'Leary.

We review the denial of a motion for new trial for abuse of discretion. United States v. Baytank, Inc., 934 F.2d 599, 617 (5th Cir. 1991). Since Candace O'Leary's character was not attacked by Culberhouse's testimony, her claim is meritless. Phillips was prejudiced by testimony concerning the smell of PA at the courthouse, not by the testimony concerning the drug use in Phillips's office. Furthermore, the court admitted that granting a new trial for Phillips was a "close call." Thus, the court did not abuse its discretion in denying Candace O'Leary's motion for new trial.

IX.

All five defendants challenge their sentences imposed under the Guidelines. We review the findings of fact under the "clearly erroneous" standard, but legal application of the guidelines is reviewed de novo. United States v. Barbontin, 907 F.2d 1494 (5th Cir. 1990). In the event that the district court misapplied the

Guidelines, a reviewing court must remand for resentencing. Id.

A.

All five defendants argue that the fifty-one pounds of PA seized from Arnold's residence should not have been included in their relevant conduct under U.S.S.G. § 1B1.3. The O'Learys additionally rely upon their acquittal on the possession of PA charges to demonstrate that the PA was not relevant conduct.

The district court adopted the presentence report ("PSR") as its findings of fact when sentencing each defendant. Thus, the court's findings must be reviewed for clear error. United States v. Ford, 996 F.2d 83, 85 (5th Cir. 1993). The district court made a specific factual finding with regard to Beal that the PA was "reasonably foreseeable" in his participation in the conspiracy.²

An individual dealing in large amounts of controlled substances is presumed to know that the drug organization with which he deals "extends beyond his universe of involvement." United States v. Thomas, 963 F.2d 63, 65 (5th Cir. 1992) (citing United States v. Devine, 934 F.2d 1325 (5th Cir. 1991), cert. denied, 112 S. Ct. 954 (1992)). There was evidence that the garbage can of PA was moved from the O'Learys' home to Phillips's office and taken by Atkins. Eventually, the PA was hidden at Arnold's. Atkins apparently informed Beal about the source of the chemicals and Beal informed Holt.

² Only Beal objected at sentencing to the specific finding that the 51 pounds of PA was relevant conduct.

Each defendant knew that PA was required to produce methamphetamine. Thus, it was reasonably foreseeable that someone would have to obtain the PA to manufacture the methamphetamine. There is credible evidence to link each of the defendants to the PA for the purposes of determining relevant conduct. The factual finding of the district court was not clearly erroneous.

B.

Both O'Learys further argue that the equivalency tables were incorrectly used. PA is an unlisted substance on the Drug Quantity Table, U.S.S.G. § 2D1.1(c), so the 51 pounds of PA was converted to 19.32 pounds of P₂P, which was converted to 3,645 kilograms of marihuana, resulting in a level 34 base offense. However, methamphetamine is listed on the Drug Quantity Table, and the defendants were convicted of conspiracy to manufacture methamphetamine. The probation officer apparently used the Drug Equivalency Table ("DET") to determine how much methamphetamine could be manufactured from 51 pounds of PA. Although the PSR does not explicitly reveal the formula used to convert PA to P₂P and then to marihuana, the DET numbers correspond to the stated conversions, indicating that the probation officer used the DET.

Under United States v. Salazar, 961 F.2d 62, 64 (5th Cir. 1992), a court may not use the DET to determine manufacturing conversion ratios. The DET is used only to convert unlisted substances or when more than one substance is in the conviction. Since the conviction was for conspiracy to manufacture methamphet-

amine, the use of the DET was error, and we must remand for resentencing. The recent case of United States v. Hoster, 988 F.2d 1374, 1380-83 (5th Cir. 1993), thoroughly explains this issue. See also United States v. Roberts, No. 92-8197, 1993 WL 368240 (5th Cir. Sept. 22, 1993) (following Hoster). The sentence should be determined according to the formula enumerated in Hoster.

Only Patrick O'Leary and Candace O'Leary raised this issue on appeal, although it obviously affects all five defendants. The government contends that the O'Learys did not properly object to the PSR or the use of the DET at sentencing. The record indicates, however, that Candace O'Leary's comments were treated as an objection by the court.³ Patrick O'Leary made no objection at sentencing to the PSR, but since he properly raised the issue on appeal, we review the drug quantity calculation for plain error. United States v. Martinez-Cortez, 988 F.2d 1408, 1410-11 (5th Cir. 1993), petition for cert. filed (U.S. July 12, 1993) (No. 93-5197). We conclude that the use of the DET in calculating the base level offense constitutes plain error.

Since only the O'Learys raise this issue on appeal and the determination of methamphetamine quantity involved an impermissible use of the DET, we remand as to these two defendants for resentencing consistent with United States v. Hoster. Under United States v. Smallwood, 920 F.2d 1231, 1238 (5th Cir.), cert. denied, 111 S. Ct. 2870 (1991), however, the defendants not challenging the

³ Mrs. O'Leary stated, "I don't understand the guidelines saying this amount of chemicals will make this amount of drugs" The court later asked, "Any other objections?"

basis for the calculation at sentencing or in their briefs are deemed to have waived their rights. Cf. United States v. Gray, 626 F.2d 494, 497 (5th Cir.) (defendant who did not object at trial or brief issue may adopt codefendant's arguments at oral argument only for good cause under FED. R. APP. P. 2), cert. denied, 449 U.S. 1038 (1980).

C.

Arnold also argues that his acceptance of responsibility entitled him to a three-level decrease instead of merely two levels. Great deference is afforded a sentencing court in determining the extent of acceptance of responsibility. Although Arnold could have received a maximum decrease of three levels, the court was not required to give him all three.

X.

The convictions and sentences of Holt and Arnold are AFFIRMED. Beal did not timely appeal, so his case must be REMANDED for a determination of excusable neglect. The judgments of sentence of Candace O'Leary and Patrick O'Leary are VACATED and REMANDED for resentencing.