# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
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No. 20-11046

UNITED STATES OF AMERICA,

*Plaintiff—Appellee*,

*versus*

DONALD RAY JOHNSON,

*Defendant—Appellant*.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:19-CR-15-1

Before SMITH, STEWART, and WILLETT, *Circuit Judges*.

CARL E. STEWART, *Circuit Judge*:

In November 2018, police officers executed a search warrant at a residence in Lubbock, Texas, where they found Defendant-Appellant Donald Ray Johnson sitting in the kitchen with cocaine base. They also discovered cash stashed throughout the home. Johnson pled guilty to possession with the intent to distribute cocaine base. At sentencing, the district court held Johnson responsible under the Sentencing Guidelines for all the currency located in the house. Johnson appealed and this court vacated the sentence and remanded for resentencing. The district court then

resentenced Johnson to the same term of imprisonment as before. This second appeal followed.

For the reasons that follow, we AFFIRM.

## I. FACTS & PROCEDURAL HISTORY

Between August and November 2018, officers of the Lubbock Police Department ("LPD") conducted several controlled buys of cocaine base from 2626 East 2nd Street. The ensuing investigation led officers to believe that multiple individuals were trafficking narcotics from the home. On November 30, 2018, LPD officers executed a search warrant on the 2nd Street residence, where they discovered Johnson sitting in the kitchen with cocaine base. Officers arrested Johnson, who ultimately pled guilty to possession with the intent to distribute cocaine base.

In a signed factual resume supporting the plea agreement, Johnson admitted that during the execution of the search warrant, LPD officers found him with 39.32 grams of cocaine base. The factual resume additionally explained that during the search, officers found the following quantities of money: $2,015 in Johnson's pants pocket, $831 on a kitchen table, $1,200 behind damaged dry wall in the kitchen, $259 on a table in the living room, and $3,504 in the southeast bedroom. Johnson also admitted that pieces of mail addressed to him at the 2nd Street residence were located inside the home.

For purposes of sentencing, the $7,809 in currency was initially converted by the presentence investigation report ("PSR") to a drug equivalency of 246.08 grams of cocaine base, the entirety of which was attributed to Johnson. When added to the 39.32 grams found in the kitchen, the PSR calculated a total of 285.40 grams of cocaine base. The PSR further observed that when questioned by police after his arrest, Johnson "claimed ownership of any property located inside the residence."

Johnson filed objections to the PSR, arguing that he should be held responsible only for the currency located in his pocket and in plain view on the kitchen table because the PSR and investigative materials did not provide any evidence that Johnson knew about the money located behind the drywall or in the bedroom. Regarding the $259 found in the living room, he noted that during the search, officers discovered and arrested a second individual in that part of the home. Johnson emphasized that his name was not listed in the search warrant and that mail seized from the home was addressed to two other individuals in addition to himself. Since, according to Johnson, multiple individuals were presumably residing in the residence, no showing had been made that he was responsible for any money other than the amount found on his person and on the kitchen table. Johnson also objected to the PSR's conversion rate of $900 per ounce of cocaine base, or $31.75 per gram, arguing that $100 per gram was a more accurate numerator. However, Johnson did not challenge the PSR's assertion that he had claimed ownership over all the property found within the home.

In an addendum to the PSR, a probation officer maintained that the accurate drug equivalency rate was $31.75 per gram. The officer also responded to Johnson's objection as to the drug-quantity calculation. Without making any particular findings, the officer noted in pertinent part that, in the case of jointly undertaken criminal activity per U.S.S.G. § 1B1.3(a)(1)(B), a defendant is responsible for "all quantities of [controlled substances] that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity and were reasonably foreseeable in connection with that criminal activity."

For its part, the Government agreed with Johnson that the conversion rate included in the PSR was incorrect, though it contended that the correct rate was $75 per gram. It disagreed with Johnson to the extent that he argued

lack of responsibility for all of the money discovered in the home. The Government concluded that with the proper conversion rate, Johnson would have a base offense level of 25 under the Sentencing Guidelines, which, given his criminal history category of IV, would equate to a sentence between 84 and 105 months of imprisonment.

At sentencing, the Government called Sergeant Tony Williams of the Lubbock County Sheriff's Office to clarify why Johnson should be held responsible for the additional currency found in the 2nd Street residence. Williams was not the investigator assigned to Johnson's case and was not given any specifics about the case. Nevertheless, Williams testified that he had been involved with hundreds of cocaine-base investigations over the course of his 16-year career in law enforcement. As to the substance of Williams's testimony, he stated that the residence was used for selling narcotics, also known as a "trap house." Williams further testified that the amount and various locations of currency found inside the house were consistent with narcotics trafficking. For instance, he testified that when an "exact number[]"of cash like $1,200 is found in a trap house, it is in "most cases" an amount intended to be paid back into the criminal venture. Williams explained that in situations where drugs are "fronted," i.e., given without payment, profits from their distribution are typically kept separate from the fronted amount, which needs to be repaid. According to Williams, this method of separating the cash ensures that repayment is made. He therefore opined that the $1,200 was consistent with drug sales. Moreover, Williams testified that money is typically kept in separate locations in stash houses because they are so frequently robbed. Based on the photographs from the house, he believed that the $3,504 found in the southeast bedroom was also intended for use in narcotics trafficking. Williams additionally confirmed that the proper conversion rate was $75 per gram.

After Johnson offered no rebuttal evidence, the district court agreed with the Government that Johnson should be held responsible for all of the currency found in the home. It then sentenced Johnson to 105 months of imprisonment—a sentence at the top of the Guidelines range.

Johnson appealed, arguing that the district court failed to make legally sufficient factual findings to support its determination that he was responsible for all of the currency discovered in the 2nd Street residence. Johnson contended that the Guidelines range would have been even lower had the district court not held him responsible for all the money at issue. More specifically, the base offense level would have been 24 instead of 25. With that base offense level and Johnson's criminal history category of IV, the Guidelines would have recommended a sentence of 77 to 96 months of imprisonment. *See* U.S.S.G. Ch. 5, Pt. A, Sentencing Table.

A panel of this court unanimously held that the district court failed to "make an express finding whether Johnson was directly or indirectly responsible for the disputed currency." *United States v. Johnson*, 812 F. App'x 252, 252 (5th Cir. 2020) ("*Johnson* I") (per curiam). After noting that a "district court may consider drug quantities not specified in the count of conviction if they are part of the defendant's 'relevant conduct,' as defined by § 1B1.3[,]" the panel vacated the sentence and remanded the case for resentencing. *Id.* The panel ordered the district court "to determine the amount of currency for which Johnson was directly or indirectly responsible under § 1B1.3 and to provide the factual findings required to support its decision." *Id.* The court clarified that "[t]o hold Johnson indirectly accountable under [§ 1B1.3(a)(1)(B)] for third-party drug sales, the district court was required to find the following: (1) Johnson agreed to participate jointly in drug sales with a third party, (2) the drug sales at issue were within the scope of that joint activity, and (3) Johnson could have reasonably

foreseen the quantity of drugs represented by those sales in connection with the joint undertaking." *Id.*

On remand and without conducting any additional fact-finding, the district court issued an order stating that it was making factual findings supporting a determination that Johnson was "indirectly" responsible for the entire $7,809 seized from the 2nd Street residence. The district court then made the following findings: "1. Defendant agreed to participate jointly in drug sales with a third party; 2. [t]he drug sales at issue were within the scope of that joint activity; [and] 3. Defendant could have reasonably foreseen the quantity of drugs represented by those sales in connection with the joint undertaking[.]" The district court used a conversion rate of $31.75 per gram to convert the amount of currency to 246.08 grams of cocaine base.

In response to the district court's order, Johnson filed a motion, asserting that it should withdraw the order since it had "restate[d] the relevant-conduct criteria as factual conclusions[,]" but "[w]ithout reference to underlying facts." He then requested that the district court commission "a second addendum" from the local probation office. Johnson also contended that the district court should have used a conversion rate of $75 per gram, not $31.75.

The Government objected to Johnson's requested relief to the extent that he challenged the district court's conclusion that Johnson was responsible for all the cash discovered in the home. Otherwise, the Government agreed that the district court should amend its order as to the conversion rate. The district court issued an amended order using a conversion rate of $75 per gram (or $2,100 per ounce) and otherwise denied Johnson's motion. It then imposed the same term of imprisonment as before, i.e., 105 months.

Johnson timely appealed.

## II. DISCUSSION

On his second appeal, Johnson argues that the district court failed on remand to comply with this court's mandate by not making the requisite factual findings. He also contends that, even if the district court complied with the mandate, it erred in determining that Johnson was indirectly responsible for the entire amount of the currency seized from the 2nd Street residence and the error was not harmless.[1] We will discuss each issue in turn. But first, some additional background is needed.

"In determining a defendant's base offense level, a district court may consider other offenses in addition to the acts underlying the offense of conviction, as long as those offenses constitute relevant conduct as defined [by § 1B1.3]." *United States v. Barry*, 978 F.3d 214, 219 (5th Cir. 2020) (citation omitted). To determine a defendant's relevant conduct for the purposes of sentencing, the district court may convert money taken from the defendant into an equivalent quantity of drugs when "the amount [of drugs] seized does not reflect the scale of the offense." *United States v. Haines*, 803 F.3d 713, 743 (5th Cir. 2015) (quoting U.S.S.G. § 2D1.1 cmt. n.5). "In cases of 'jointly undertaken criminal activity,' relevant conduct may expand beyond the offense of conviction to include all drug quantities involved in transactions carried out by third-party participants." *Johnson* I, 812 F. App'x at 252 (citing, inter alia, § 1B1.3(a)(1)(B) & cmt. n.3(D)). "[I]n order for [a defendant] to be accountable under section 1B1.3 for the losses incurred by third parties, the district court must have made findings establishing that: (1) [the defendant] agreed to undertake criminal activities jointly with third parties, (2) the losses caused by the third parties were within the scope of that

[1] He does not challenge, however, the rate to convert the currency discovered in the home to a corresponding quantity of cocaine base.

agreement, and (3) the third parties' misconduct was reasonably foreseeable to [the defendant]. *United States v. Hammond*, 201 F.3d 346, 351 (5th Cir. 1999) ("*Hammond* I") (per curiam). "'Relevant conduct' attributed to a defendant under the sentencing guidelines . . . does not require proof beyond a reasonable doubt, only [] a preponderance of the evidence." *United States v. Smith*, 13 F.3d 860, 863 n.5 (5th Cir. 1994), *cert. denied*, 511 U.S. 1134 (1994).

*A. Compliance with the Mandate*

Because Johnson objected to the district court that it failed on remand to make the factual findings as ordered by this court, he has preserved his argument that the district court did not comply with this court's mandate. *See United States v. Pineiro*, 470 F.3d 200, 204–05 (5th Cir. 2006) (per curiam). Thus, whether the district court adhered to the mandate is reviewed de novo. *See id.* at 205. To comply with the mandate, the district court had to "implement both the letter and the spirit of the . . . mandate and [could] not [have] disregard[ed] the explicit directives of [this] court." *United States v. Teel*, 691 F.3d 578, 583 (5th Cir. 2012) (citation omitted). The district court did what was required of it.

On Johnson's initial appeal and relying upon *United States v. Evbuomwan*, 992 F.2d 70, 74 (5th Cir. 1993), this court took issue with the fact that the district court had not made any findings regarding Johnson's responsibility for the currency at issue. *Johnson* I, 812 F. App'x at 252.[2] *Evbuomwan* stands for the proposition that an appellate court "cannot assume that the trial court complied with § 1B1.3 by making an implicit ruling on the basis of [a] PSR's implicit finding." 992 F.2d at 74. Here, the district court implicitly determined that Johnson was accountable for all the money

[2] The panel also cited to *Smith*, which we discuss further below.

discovered in the 2nd Street residence based on the PSR and its addendum's implicit findings as to § 1B1.3 liability. Since this court "do[es] not tolerate inferences based on inferences[,]" *see id.*, it remanded Johnson's case so that the district court could ascertain the amount of currency for which Johnson was directly or indirectly accountable under § 1B1.3 and provide the factual findings required to support that determination, *Johnson* I, 812 F. App'x at 252.

On remand, the district court made the three required findings for § 1B1.3 liability and unequivocally held Johnson indirectly responsible for all of the $7,809. Accordingly, the district court's order, as amended, complied with this court's mandate, including the spirit of it as embodied by *Evbuomwan*.

Nevertheless and relying primarily on *United States v. Hearns*, 845 F.3d 641, 651–52 (5th Cir. 2017) ("*Hearns* I") (per curiam), for support, Johnson argues that another remand is required because the district court merely repeated the findings that this court had ordered it to make, and such a copy and paste job did not comply with the mandate since we are just left to "guess at the inferences underlying" those findings. But this court did not mandate that the district court make findings with references to the underlying evidence. And while we acknowledge that the district court could have done more to explain its reasoning, the deferential, clear-error standard of review that applies to the district court's findings, *see infra* at 11–15, requires us to determine whether those findings are plausible within the totality of the record existent on remand.

Furthermore, Johnson's reliance upon *Hearns* I is misplaced. In *Hearns* I, a jury convicted the defendant of conspiring to commit bank fraud as to three properties, but the PSR held her responsible under § 1B1.3 for losses associated with six additional properties. *Id.* at 650–51. The PSR

asserted that the remaining properties "involved fraud in the mortgage loan process" but "otherwise provided no information or evidence to support the loss amounts or Hearns's involvement in the other transactions." *Id.* at 650. Observing that "bare assertions made [within the PSR] are not evidence standing alone[,]" this court vacated the defendant's term of imprisonment and remanded for resentencing. *Id.* at 651 (citations omitted). *Hearns* I—as evidenced further by the discussion below and as the Government asserts—may be distinguished on the ground that this court's concern in *Johnson* I "was that the district court failed to make the required findings, not[,] [as in *Hearns* I,] that the record could not support" the findings made.

Johnson relies on two additional cases, both of which are also inapposite. The first, *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, required the district court to permit supplemental filings on remand and to conduct further proceedings as necessary to develop a sufficient record for the purposes of determining the propriety of modifications to a consent decree. 675 F.3d 433, 438 (5th Cir. 2012) ("*LULAC* II"). There, however, the district court did not further develop the record on remand. *Id.* "By approving a modification of the Consent Decree without holding a hearing and demanding a more developed factual record," this court held that "the district court failed to follow the letter and spirit of" the appellate court's mandate. *Id.* (citation and internal quotation marks omitted). In *United States ex rel. Little v. Shell Expl., Prod. Co.*—the second case—this court concluded that the district court had failed to "apply the more exacting legal standards [the appellate court] required on remand" and "to address the specific questions [this court] remanded for it to address[.]" 602 F. App'x 959, 965–66 (5th Cir. 2015) ("*Little* II").

In *LULAC* II and *Little* II, the district courts evidently did not comply with this court's instructions. Here, in contrast and as discussed above, the district court did what was required of it. In truth, this case is more akin to

*Hammond* I. In *Hammond* I, the district court failed to make the necessary findings that the defendant was liable under § 1B1.3(a)(1)(B). 201 F.3d at 351. This court emphasized that "[t]hese findings need not be expressly made, but the meaning of the [district] court's findings must be clear." *Id.* It sent the case back to the district court for resentencing, permitting the district court to "reimpose the same sentence if it is able to rule explicitly that Hammond agreed to joint undertaking of criminal activity" with third parties and that the relevant conduct "w[as] within the scope of that agreement." *Id.* at 352. On remand, the district court reimposed the same sentence, "convinced that the reversal of its earlier ruling had been a result of 'deficient articulation' and that this court had been 'looking for certain key words.'" *United States v. Hammond*, 275 F.3d 43, 43 (5th Cir. 2001) ("*Hammond* II") (unpublished). It also made findings to support the pronounced sentence. *Id.* The sentence was upheld on a second appeal. *Id.* If the district court's actions on remand were sufficient to comply with *Hammond* I's mandate, then so too were the district court's actions in the case at bar.

In sum, the district court complied with this court's mandate.

*B. Johnson's Relevant Conduct*

Because Johnson objected to the district court that it failed on remand to make the factual findings required to hold him accountable for the full $7,809 seized by the police, he has preserved his argument that the district court erred in holding him accountable for the money. *See United States v. Rodriguez-Leos*, 953 F.3d 320, 326 (5th Cir. 2020). Hence, "we review [the] district court's interpretation of the Sentencing Guidelines de novo and its factual findings for clear error." *Barry*, 978 F.3d at 217. The determination of a drug quantity is a factual finding subject to clear-error review. *Smith*, 13 F.3d at 865 n.11. "There is no clear error if the district court's finding is plausible in light of the record as a whole." *Barry*, 978 F.3d at 217 (citation

omitted). A finding of fact is clearly erroneous only if, after reviewing all of the evidence, we are left "with the definite and firm conviction that a mistake has been committed." *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011) (per curiam) (citation omitted). Thus, "we will not conclude that a district court's finding of fact was clearly erroneous based only on our belief that, had we been sitting as the trier of fact, we would have weighed the evidence differently and made a different finding." *Id.* (citation internal quotation marks omitted).

This court remanded Johnson's case for the district court to determine whether Johnson was directly or indirectly responsible for the currency at issue, and the district court made a determination as to the latter. As noted, the district court was required to make three findings to conclude that Johnson was indirectly liable under § 1B1.3(a)(1)(B): (1) an agreement to jointly participate in drug sales with a third party; (2) the relevant sales were within the scope of the agreement; and (3) the quantity of drugs represented by the proceeds of the narcotics sales was reasonably foreseeable. The district court issued these findings and they were plausible in light of the record.

First, Johnson plausibly agreed to jointly participate in drug sales. While the record does not indicate who those third parties were, it shows that Johnson was the resident of a home that was specifically used by multiple drug dealers to distribute narcotics. For starters, LPD's controlled buys at the house revealed that several individuals were selling drugs from that location. Moreover, Johnson and other individuals received mail that was addressed to the 2nd Street residence. On the night of the drug bust, Johnson and a second individual were arrested from the home. Williams testified unrebutted that the 2nd Street Residence was used as a "trap house" to deal drugs and that the amount and locations of currency found within the home were consistent with narcotics trafficking. These facts accord with the Sentencing Guidelines' broad definition of "jointly undertaken criminal

activity," i.e., "a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy." *See* § 1B1.3(a)(1)(B) cmt. n.3(A).

Williams's testimony also plausibly indicates that the drug sales at issue—present as cash located throughout the 2nd Street residence—were within the scope of the agreement. Although Johnson asserts that he was not aware of the $1,200 found behind the dry wall or the $3,504 found in the southeast bedroom (or that he even used the bedroom), the home was used by multiple individuals to deal drugs and Williams opined that both sums of money (and their location in the residence) were consistent with narcotics sales. Johnson suggests that his conduct was similar to "dealers [who] share a common source of supply, but otherwise operate independently." While the Guidelines indicate such individuals are not liable under § 1B1.3, Johnson has not demonstrated that the only proper inference on this set of facts is that he operated alone.

With respect to the foreseeability finding and as the Government observes, "The idea that Johnson would intend to distribute cocaine base at a trap house but fail to foresee successful distribution of cocaine base by others, from the same location, belies common sense." Turning to the record, the piece of evidence that most plausibly indicates foreseeability, and, perhaps, more generally that Johnson is liable under § 1B1.3(a)(1)(B), is that he claimed ownership of all the property located within the 2nd Street residence. A fortiori, if Johnson admitted responsibility for the money discovered within the home, he must have foreseen its existence.[3]

[3] Johnson does not argue that he never made this statement, which was recorded in the PSR. "The defendant has the burden of showing that the information in the PSR is materially unreliable[,]" *Hearns* I, 845 F.3d at 650, which means Johnson's "unrebutted post-arrest admissions are fair game at sentencing[,]" *see United States v. Barfield*, 941 F.3d

The final case that Johnson discusses at length in his opening brief—*United States v. Smith*—is a good case on which to conclude our analysis. *Smith*, like this case, involved a drug bust at a residence. 13 F.3d at 862. Four individuals were arrested at the scene, only two of which—Sheila Smith and Byron Phillips—were prosecuted by the United States Attorney. At issue on appeal was, in relevant part, whether the district court properly held Smith and Phillips accountable under § 1B1.3(a)(1)(B) for all of the cocaine found in the home. *Id.* at 863. As to Phillips, his PSR "d[id] not state that Phillips lived in the house" where the drugs were discovered or that "Phillips agreed to participate in any way with" his co-conspirators. *Id.* at 866. Indeed, the only fact supporting Phillips's enhanced sentence for relevant conduct was his PSR's statement "that police seized 7 grams of cocaine from the house, and therefore 7 grams would be considered in Phillips' [sic] sentencing." *Id.* This court vacated Phillips's term of imprisonment and remanded for fact-finding and resentencing, reasoning that "[t]he trial court made no specific findings that Phillips was involved in any jointly undertaken criminal activity, but merely adopted the findings of Phillips' [sic] presentence report without commenting on them." *Id.* at 867.

Johnson argues that another remand is warranted here because his situation is analogous to that of Phillips. While that may have been true after

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757, 766 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1282 (2020). This said, Johnson contends that his statement speaks to whether he is directly—not indirectly—responsible for the entire $7,809. Johnson is correct that direct responsibility is a separate form of liability under § 1B1.3. *See* § 1B1.3(a)(1)(A). And he is right that the district court did not rule on whether he was directly accountable for the cash. But Johnson is mistaken that we should only consider his admission if we were to hold him directly liable for the currency, which in turn would necessitate a ruling from us without any findings from the district court (a result that would be incongruous with *Johnson* I). Johnson never qualified the nature of his control over the property located at the 2nd Street residence, and he does not explain why we should (or even could) read such a qualification into the record.

the district court initially passed judgment on Johnson, it is not the case now. The district court's sentencing of Phillips in *Smith* suffered from the same underlying defect as in *Evbuomwan*, namely that the district court had implicitly imputed joint liability to the defendant under § 1B1.3 based on the PSR's implied findings. In truth, *Smith* cites *Evbuomwan* in support of vacating Phillips's sentence. *See* 13 F.3d at 867 nn. 21 & 24 (citing 992 F.2d at 74). Noting in *Johnson* I that the district court had made the same mistake as that which had occurred in *Evbuomwan* and *Smith*, this court remanded the case for fact-finding and resentencing. Because the district court then made the factual findings required to hold Johnson accountable under § 1B1.3(a)(1)(B) for the currency discovered at the 2nd Street residence, his reliance on *Smith* is inapt.

If anything, another part of *Smith* supports affirming the district court on Johnson's second appeal. Regarding the sentencing of Smith herself, this court upheld her term of imprisonment because the district court had made a "finding that Smith was accountable [under § 1B1.3(a)(1)(B)] for all the cocaine found in the house" and that finding was not clearly erroneous. *Id.* at 865. This court affirmed Smith's sentence even though there was "no evidence"—as Johnson intimates there actually must be for § 1B1.3(a)(1)(B) liability—that Smith, Phillips, and the other two co-conspirators "ever pooled their profits, loaned each other money, or shared each others' drugs[.]" *Id.* Similar to Smith's situation, the district court made the requisite factual findings for Johnson to be held responsible for the cash under § 1B1.3(a)(1)(B). And, like with Smith, evidence suggests that Johnson is responsible for jointly undertaken criminal activity even though it does not reveal he and others pooled resources or profits. Accordingly, this court will uphold Johnson's sentence as it did for Smith.

## III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.