APPENDIX 1a

FILED: May 29, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4295
(7:16-cr-30026-MFU-4)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TERRANCE NATHANIEL BROWN, JR., a/k/a War, a/k/a War Stone, a/k/a Luciano

Defendant - Appellant

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Agee, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX 2a

THACKER, Circuit Judge, dissenting, in part:

I dissent solely with respect to the sentencing of Appellant Terrance Nathaniel Brown, Jr. I have grave concerns that following this case, with a wave of the hand and the disclaimer that the sentence imposed *for a drug distribution conspiracy* would be the same *regardless of the quantity of drugs distributed*, district courts can essentially disregard the relevant Sentencing Guidelines range and count on us to credit their 18 U.S.C. § 3553(a) analysis as sufficient, even absent a requisite finding as to the nature and scope of the conduct at issue.

Therefore, for the reasons set forth below, I would remand for resentencing so that adequate factual findings can be made on the record with regard to Brown's purported responsibility for his co-conspirator's drug weight.

I.

At sentencing, Brown objected to the drug weight calculation in his presentence investigation report ("PSR"). Specifically, he contended that his Sentencing Guidelines range was overstated because the base offense level calculation attributed to him 180 kilograms of marijuana equivalent distributed by a subordinate drug dealer, Corey Owens.

Based on evidence provided by Owens and a narcotics agent at the sentencing hearing, the district court concluded that the drugs attributable to Owens were reasonably foreseeable to Brown and, thus, were attributable to Brown. And the district court adopted Brown's PSR in its entirety. As a result, the district court varied upward from Brown's Sentencing Guidelines range of 188 to 235 months to impose the statutory maximum of 240 months' imprisonment. The district court also indicated it would have imposed the

same sentence based on the 18 U.S.C. § 3553(a) factors irrespective of the drug weight calculation.

II.

We review a district court's sentencing decision by determining first whether there has been procedural error and second whether a sentence is substantively reasonable. *United State v. Provance*, 944 F.3d 213, 215 (4th Cir. 2019). We review factual findings for clear error, including a district court's drug weight determination. *United States v. Flores-Alvarado*, 779 F.3d 250, 254 (4th Cir. 2015). "[I]f the district court makes *adequate findings* as to a controverted sentencing matter, this court must affirm those findings unless they are clearly erroneous." *Id.* (emphasis supplied) (alterations and internal quotation marks omitted).

Pursuant to the Sentencing Guidelines, a sentencing court determines a defendant's offense level by evaluating his "relevant conduct," that is, his own acts as well as, "in the case of a jointly undertaken criminal activity . . . , all acts and omissions of others that were:" (1) "within the scope of the jointly undertaken criminal activity"; (2) "in furtherance of that criminal activity"; and (3) "reasonably foreseeable in connection with that criminal activity." U.S.S.G. § 1B1.3(a)(1)(B) (2016). All three aspects of this joint activity must be proven by a preponderance of the evidence. *United States v. Bell*, 667 F.3d 431, 440 (4th Cir. 2011). Acts of others outside the scope of the conspiracy in which the defendant agreed to participate -- even if those acts are known or reasonably foreseeable -- are not "relevant conduct" for sentencing purposes. *See* U.S.S.G. § 1B1.3 & cmt. 3B.

Owens's operation. Though Owens distributed cocaine as well as marijuana, the Government did not put on evidence associating Brown with Owens's cocaine.

The district court credited the cooperators' testimony about Owens's marijuana distribution and expressly rejected Owen's disavowal of a supervisory relationship between the co-conspirators. Emphasizing the district court's statement that its sentencing decision would have been unchanged regardless of any difference in the drug weight, the Government argues that any error in the drug weight attribution was harmless. The majority accepted this harmless error argument. I do not.

B.

A district court's Sentencing Guidelines error is harmless if "(1) the district court would have reached the same result even if it had decided the [G]uidelines issue the other way, and (2) the sentence would be reasonable even if the [G]uidelines issues had been decided in the defendant's favor." *United States v. Gomez-Jimenez*, 750 F.3d 370, 382 (4th Cir. 2014) (internal quotation marks omitted). Undertaking an "assumed error harmlessness inquiry," *id.*, we assume the district court erred by attributing Owens's drug quantities to Brown. Here, the district court expressly indicated its evaluation of the 18 U.S.C. § 3553(a) factors compelled its sentencing decision no matter the quantity of drugs the court were to find. Crediting that assertion, we next ask whether the sentence would be reasonable even if Owens's drugs were not attributed to Brown.

But without Owens's drug quantity, Brown was only personally connected to approximately three kilograms of marijuana equivalent, which supports a base offense level of eight, a total offense level of 17, and a Sentencing Guidelines range of 37 to 46

C.

On appeal, we lack key factual determinations as to the scope of Brown's involvement in the drug distribution and certainly do not have an adequate explanation as to how a 240-month sentence for drug distribution involving three kilograms of marijuana equivalent avoids "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a). Though adopting the PSR "can be a satisfactory means of resolving factual disputes," *Flores-Alvarado*, 779 F.3d at 256 (citation omitted), the PSR here did not identify an agreement between Owens and Brown involving cocaine distribution, nor did it explain how such distribution would have been foreseeable to Brown. The district court needed to make these determinations on the record and its failure to do so interferes with our ability to fairly review Brown's sentence.

"[T]he assumed error harmlessness inquiry is an appellate tool that we utilize in appropriate circumstances to avoid the 'empty formality' of an unnecessary remand *where it is clear* that an asserted guideline miscalculation did not affect the ultimate sentence." *United States v. Hargrove*, 701 F.3d 156, 163 (4th Cir. 2012) (emphasis supplied). In my view, this is not such a case. As we have previously explained, our assumed harmless error standard is not meant to "allow district courts to ignore their responsibility to consider the [G]uidelines in a meaningful manner when sentencing a defendant." *Id.* (citing *Rita v. United States*, 551 U.S. 338, 351 (2007)). I fear that the majority's decision -- utilizing harmless error analysis to uphold a 194-month variance primarily based on a defendant's *acquitted* conduct as opposed to the actual offense of conviction -- does just that.

IV.

A.

Because I am firmly of the view that we cannot hold the assumed error to be harmless, I would consider whether the district court did in fact err. Here, the district court failed to make a finding as to the scope of Brown's agreement sufficient to meet our standard. Therefore, in my view, we should remand for that finding to be made on the record. *See Flores-Alvarado*, 779 F.3d at 255 (quoting *United States v. Soto-Piedra*, 525 F.3d 527, 531 (7th Cir. 2008) ("Conspiracy liability . . . is generally much broader than jointly undertaken criminal activity under [the Sentencing Guidelines]")). "[T]o determine the defendant's accountability for the conduct of others under [the Sentencing Guidelines], the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e. the scope of the specific conduct and objectives embraced by the defendant's agreement." U.S.S.G. § 1B1.3 cmt. 3B (2016).

Without such a finding, we cannot even proceed to determine which of Owens's drugs (especially the cocaine amounts) are within the scope of Brown's agreement with Owens. How can we? The district court itself did not explain the scope of that agreement. The district court erred in failing to recognize that Owens's drug weight included cocaine. The Government attempts to avoid drawing attention to this by arguing that the district court "credited the trial testimony . . . that Brown and Owens sold drugs together." Gov't Br. 33–34. But the relevant trial testimony and the court's conclusion referenced marijuana

dealing. In *Flores-Alvarado*, we made clear that the district court must define "the scope of the criminal activity the particular defendant agreed to jointly undertake." 779 F.3d at 256 (quoting U.S.S.G. § 1B1.3, cmt. 2). But, with respect to defining the scope of the criminal activity in this case, the closest the district court came was saying it credited testimony that "Mr. Brown and Mr. Owens were selling *marijuana* together." J.A. 3049 (emphasis supplied). Yet the court never explained whether cocaine distribution was part of their joint activity. Therefore, although we know the court understood Brown to have agreed to participate in the overarching conspiracy, we lack a more specific finding that encompasses cocaine. The Sentencing Guidelines and our precedent require more. *See Flores-Alvarado*, 779 F.3d at 256 ("[T]he scope of the criminal activity jointly undertaken by the defendant . . . is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant . . . ." (emphasis in original) (quoting U.S.S.G. § 1B1.3 cmt. 2)).

V.

By holding Brown responsible for the full drug weight in the PSR, the district court attributed Owens's cocaine distribution to him without the requisite "particularized findings with respect to both the scope of the defendant's agreement and the foreseeability of the conduct" involving that drug. *Flores-Alvarado*, 779 F.3d at 255 (emphasis omitted). I cannot conclude that this error -- which caused an under-supported 194-month upward variance -- was harmless. As a result, I would remand for adequate findings on the record with regard to Brown's agreement to and involvement in Owens's drug distribution.

I therefore respectfully dissent.