

FILED: August 30, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4557
(3:18-cr-00200-MOC-DSC-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KEITH ANTONIO BARNETT

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: September 1, 2022

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v.

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Defendant – Appellant.

O R D E R

The Court amends its opinion filed on August 30, 2022, as follows:

On the last line of page 6, the citation to the United States Sentencing Guidelines is corrected to read, “U.S.S.G. § 2D1.1 cmt. n. 17.”

For the Court – By Direction

/s/ Patricia S. Connor, Clerk

PUBLISHED

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Defendant – Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Max O. Cogburn, Jr., District Judge. (3:18-cr-00200-MOC-DSC-1)

Argued: January 27, 2022

Decided: August 30, 2022

Amended: September 1, 2022

Before RICHARDSON, RUSHING, and HEYTENS, Circuit Judges.

Affirmed by published opinion. Judge Rushing wrote the opinion, in which Judge Richardson and Judge Heytens joined.

ARGUED: Richard Croutharmel, Raleigh, North Carolina, for Appellant. Anthony Joseph Enright, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee. **ON BRIEF:** R. Andrew Murray, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

RUSHING, Circuit Judge:

A jury convicted Keith Antonio Barnett for his role in a drug trafficking conspiracy, and the district court sentenced him to 276 months in prison. On appeal, his counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), representing that Barnett has no meritorious grounds for appeal but questioning whether the district court erred by applying the Sentencing Guidelines' two-level enhancement for maintaining a premises for the purpose of drug distribution, *see* U.S.S.G. § 2D1.1(b)(12). We ordered supplemental briefing on this issue and held oral argument.

We conclude that the evidence supports the district court's findings that Barnett and his coconspirator dealt drugs out of the coconspirator's home, where they stored and packaged drugs that Barnett then sold directly outside the home and along the street. The district court therefore did not clearly err in applying the premises enhancement. Finding no other meritorious claim in the record, we affirm.

I.

A federal grand jury charged Barnett in a superseding indictment with conspiring to traffic crack cocaine from 2016 to 2018, *see* 21 U.S.C. §§ 841(a)(1), 846; distributing crack cocaine and possessing crack cocaine with intent to distribute on September 22, 2017, *see* 21 U.S.C. § 841(a)(1), (b)(1)(C); and possessing multiple controlled substances with intent to distribute on October 9, 2017, *see* 21 U.S.C. § 841(a)(1). The charges were the result of an investigation into drug distribution occurring at 2708 South Calvary Street—a house at the end of a dead-end road in Gastonia, North Carolina (the Calvary Street house).

At Barnett's trial, witnesses testified that Barnett's cousin Rodney Rhodes lived at the Calvary Street house and the two men worked together selling illegal drugs, including crack cocaine. A resident of the Calvary Street neighborhood testified that he saw Barnett at the Calvary Street house "all the time" and he was there with Rhodes "every day." S.I.A. 241. The resident testified that he personally witnessed Barnett sell crack cocaine on Calvary Street "[a]t least 12 to 15 times." S.I.A. 242. A witness who supplied drugs to Rhodes and Barnett for distribution—and who lived around the corner from the Calvary Street house—confirmed that Barnett "would frequent" the Calvary Street house. S.I.A. 197. The supplier testified that "about five, six, seven times a day," Barnett would get in and out of cars driving through the Calvary Street neighborhood, ostensibly to carry out drug transactions. S.I.A. 205. He also testified that on a few occasions Barnett retrieved drugs from the supplier's house with or on behalf of Rhodes.

A police detective and a government informant both testified about a controlled purchase of crack cocaine at the Calvary Street house on September 22, 2017. The informant explained that, earlier in the autumn of 2017, he happened to run into Barnett at the Calvary Street house when the informant was picking up a child for football practice and accidentally pulled his car into the wrong driveway. Barnett approached the informant at the Calvary Street house driveway, gave the informant his phone number, and told him to call Barnett for drugs. The informant alerted Chad Bingham, a detective with the City of Gastonia police department. At Detective Bingham's direction, on September 22 the informant bought a quarter ounce of crack cocaine from Barnett at the Calvary Street house. The entire transaction was videorecorded on a hidden camera fastened to the informant.

Allen Isenhour, a Gaston County detective, testified about the subsequent search of the Calvary Street house and Barnett's arrest. Undercover surveillance had revealed "multiple lookouts up and down" Calvary Street, so a specialized police unit executed the search warrant. S.I.A. 102. Detective Isenhour recalled that, as police approached the Calvary Street house on October 9, 2017, he saw Barnett run from the front yard into the front door of the house and then back out a side door. Before Barnett could escape over a fence at the edge of the property, he was intercepted by an officer and arrested. Police found two plastic baggies of drugs behind the fence where Barnett was apprehended. Detective Isenhour also related that inside the house police discovered 45.2 grams of powder cocaine, 122.4 grams of crack cocaine, a box of plastic baggies, and digital scales, all in plain sight.

Before he was indicted by the federal grand jury, Barnett was arraigned in state court on drug charges. The Gaston County prosecutor who handled Barnett's initial appearance in state court testified at his federal trial. He recounted that in the state court proceeding Barnett had accepted all responsibility for the drugs discovered at the Calvary Street house and had asserted that Rhodes "had nothing to do with it." S.I.A. 93.

Barnett testified in his own defense. He disputed the state prosecutor's recollection of his statements about who owned the drugs found at the Calvary Street house, denied selling drugs to the informant, denied fleeing from police or running into the house during the search, and denied being anywhere near the fence or backyard at the time of his arrest. Barnett claimed that he knew nothing about the drugs found in the Calvary Street house or

by the fence, that he had visited the Calvary Street house only three times, and that during September and October 2017 he was living in a motel in Gastonia.

The jury convicted Barnett on all three counts. At sentencing, Barnett objected to the proposed two-level enhancement under the Sentencing Guidelines for maintaining a premises for the purpose of manufacturing or distributing a controlled substance. *See U.S.S.G. § 2D1.1(b)(12)*. The district court overruled Barnett's objection. As the court explained, "plenty of testimony" showed that the Calvary Street house was Barnett's "headquarters," a "thriving business location" where he and Rhodes "operat[ed] their drug business." *S.I.A. 400, 402*. Even if Barnett did not own the house, the court determined, he nevertheless maintained the premises for drug distribution because the drugs he "was actively selling" "up and down that street" were stored "in the house." *S.I.A. 400*. After applying two additional sentencing enhancements—for threatening suspected informants and for obstructing justice by giving false testimony—the district court calculated a Guidelines sentencing range of 292 to 365 months. Varying downward so as "to not over punish [Barnett] for the enhancements," the district court sentenced Barnett to 276 months in prison. *S.I.A. 423*.

Barnett timely appealed. His counsel initially filed an *Anders* brief asserting there were no meritorious issues for appeal but questioning whether the district court erred by applying the premises enhancement, applying the obstruction of justice enhancement, and allegedly double counting the quantity of crack cocaine. Barnett filed over a dozen pro se briefs raising additional claims. We directed supplemental briefing solely to address application of the premises enhancement.

II.

When evaluating a sentencing court's application of the Guidelines, "we review 'legal conclusions *de novo* and . . . factual findings for clear error.'" *United States v. White*, 771 F.3d 225, 235 (4th Cir. 2014) (quoting *United States v. Layton*, 564 F.3d 330, 334 (4th Cir. 2009)). The Government had to prove by a preponderance of the evidence that the premises enhancement applies. See *United States v. Kobito*, 994 F.3d 696, 701 (4th Cir. 2021); *United States v. Carbajal*, 717 Fed. App. 234, 237 (4th Cir. 2018). We may not reverse the district court's findings of fact on this score "simply because we would have decided the case differently." *United States v. Manigan*, 592 F.3d 621, 631 (4th Cir. 2010) (internal quotation marks omitted). Rather, we may find clear error "only if, on the entire evidence, we are left with the definite and firm conviction that a mistake has been committed." *Id.* (internal quotation marks and alterations omitted). In other words, "[i]f 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." *United States v. Wooden*, 887 F.3d 591, 602 (4th Cir. 2018) (internal quotation marks omitted).

The Sentencing Guidelines direct a district court to increase a defendant's offense level by two "[i]f the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance." U.S.S.G. § 2D1.1(b)(12). According to the application note, the enhancement applies to a defendant who "[1] knowingly [2] maintains a premises (*i.e.*, a building, room, or enclosure) [3] for the purpose of manufacturing or distributing a controlled substance, including storage of a controlled substance for the purpose of distribution." U.S.S.G. § 2D1.1 cmt. n.17; *cf. United States v. Johnson*, 737

E.3d 444, 447 (6th Cir. 2013) (dividing the enhancement into three elements). On appeal, Barnett does not quarrel with the district court's findings about his knowledge of the drug operation run out of the Calvary Street house, where powder cocaine, crack cocaine, and drug distribution paraphernalia were undisputedly stored. Instead, Barnett contends that the Government did not prove that he "maintained" the Calvary Street house.

The application note instructs that, when determining whether the defendant maintained a premises, the court should consider not only "whether the defendant held a possessory interest in (*e.g.*, owned or rented) the premises" but also "the extent to which the defendant controlled access to, or activities at, the premises," among other unspecified factors. U.S.S.G. § 2D1.1 cmt. n.17. Barnett argues that the evidence did not prove he maintained the Calvary Street house for drug distribution because it was Rhodes who owned and occupied the house, there was no evidence Barnett lived there, and Barnett's drug sales occurred outside the house.

None of these facts preclude application of the premises enhancement here. As an initial matter, Barnett's lack of possessory interest in the Calvary Street house is not dispositive. *See United States v. Carter*, 834 F.3d 259, 262–263 (3d Cir. 2016) ("[T]he absence of [the defendant's] name on a deed or lease is insufficient to preclude the enhancement's application."); *United States v. Jones*, 778 F.3d 375, 385 (1st Cir. 2015) ("The enhancement does not require either ownership or a leasehold interest."); *see also United States v. Stukes*, 774 Fed. App. 788, 791 (4th Cir. 2019) (affirming application of the enhancement based on testimony that the defendant "ran a trap house," despite the absence of "a documented possessory interest in the house"). Factors other than possessory

interest are also relevant, including the defendant's control over the premises or the activities occurring there. See U.S.S.G. § 2D1.1 cmt. n.17. In making this assessment, courts have considered factors such as the defendant's ready access to the premises, staying overnight, the defendant's frequency at the premises, and the defendant's participation in the drug activity there. See, e.g., *Carbajal*, 717 Fed. App. at 238–239; *United States v. Clark*, 665 Fed. App. 298, 302–303 (4th Cir. 2016); *United States v. Christian*, 544 Fed. App. 188, 191 (4th Cir. 2013); *Jones*, 778 F.3d at 384–385; *United States v. Lockhart*, 732 Fed. App. 842, 848–849 (11th Cir. 2018).

A finding that certain facts are sufficient to support the premises enhancement in one case, however, does not mean those facts are necessary in every case. See *Carbajal*, 717 Fed. App. at 238 (citing *United States v. Bell*, 766 F.3d 634, 637–38 (6th Cir. 2014)). “[A]pplication of the premises enhancement is a fact-specific inquiry that considers the totality of the circumstances.” *Id.* at 237; see *Carter*, 834 F.3d at 262 (“[T]he enhancement is flexible and adaptable to a variety of factual scenarios.” (internal quotation marks omitted)). Thus, if the sum of the evidence supports it, the enhancement can apply in cases, like here, where the defendant does not live at the premises, see *Carbajal*, 717 Fed. App. at 236; *Stukes*, 774 Fed. App. at 789; *Lockhart*, 732 Fed. App. at 848, or exercise exclusive control over it, see *Carbajal*, 717 Fed. App. at 238–239; *Clark*, 665 Fed. App. at 301–303; *Jones*, 778 F.3d at 385.

The evidence here supported the district court's finding that Barnett maintained the Calvary Street house for drug distribution. Barnett claimed ownership of the bulk drugs

stored inside the house alongside the accoutrements of drug trafficking.¹ See, e.g., *United States v. Adams*, 860 Fed. App. 290, 292 (4th Cir. 2021) (noting the “distribution level amount of the drug” found in the house). He frequented the Calvary Street house, apparently for the primary—if not sole—purpose of accessing the drugs he stored there in order to portion and sell them, which he did both on the property and up and down Calvary Street multiple times per day. See *Clark*, 665 Fed. App. at 303 (considering the defendant’s “integral participation in the rampant drug activity” occurring at the premises); *United States v. Henderson*, 604 Fed. App. 655, 658 (10th Cir. 2015) (considering the defendant’s drug sales “at or near his residence”). After Barnett encountered the informant in the driveway of the Calvary Street house, he invited the informant to return to the house to purchase drugs; Barnett later completed that sale on the premises. See *Lockhart*, 732 Fed. App. at 848 (noting that the defendant “invited the undercover agent to the apartment to sell him narcotics”). When police arrived to execute the search warrant at Calvary Street, Barnett ran into the house before heading for the fence to make his escape. The district court did not clearly err in finding by a preponderance of the evidence that these facts demonstrated Barnett’s access to and control over the Calvary Street house and the drug distribution business operating there.²

¹ We acknowledge that, in his testimony, Barnett disputed this and other evidence presented at trial. But we must defer to the district court’s credibility determinations on clear error review. See *United States v. Pulley*, 987 F.3d 370, 376 (4th Cir. 2021).

² Because we sustain the district court’s application of the premises enhancement based on evidence of Barnett’s own conduct in maintaining the Calvary Street house, we need not address the Government’s alternative argument that the enhancement was proper

III.

We have reviewed the other two issues in Barnett's counsel's *Anders* brief as well as the issues Barnett raised in his pro se supplemental briefs. After careful examination in accordance with *Anders*, we find no reversible error.³ The judgment of the district court is

AFFIRMED.

based on the conduct of his coconspirator, Rhodes, via the relevant-conduct principles set forth in U.S.S.G. § 1B1.3(a)(1)(B). See *United States v. Rich*, 14 F.4th 489, 495–497 (6th Cir. 2021) (collecting cases and upholding application of the premises enhancement based on the jointly undertaken activity of the defendant's coconspirators).

³ Barnett's claims of ineffective assistance of trial counsel are not cognizable on direct appeal because the claimed ineffectiveness does not conclusively appear on the face of the record. See *United States v. Faulls*, 821 F.3d 502, 507–508 (4th Cir. 2016). Those claims should be raised, if at all, in a motion under 28 U.S.C. § 2255.