

APPENDIX

INDEX TO APPENDICES

APPENDIX A	Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit (February 16, 2018).....	App. 1
APPENDIX B	Transcript of an Oral Order on Motion to Suppress in the United States District Court, Middle District of Florida, Orlando Division (October 12, 2016)	App. 5

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10874
Non-Argument Calendar

D.C. Docket No. 6:16-cr-00055-CEM-KRS-4

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ZULEYKA JEANETTE COLON-RIVERA,
a.k.a. Mia,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(February 16, 2018)

Before WILLIAM PRYOR, NEWSOM and ANDERSON, Circuit Judges.

PER CURIAM:

Zuleyka Colon-Rivera appeals her convictions and sentence of 240 months for one count of conspiring to distribute heroin and for three counts of distributing and possessing with intent to distribute heroin. 21 U.S.C. § 841(b)(1)(A)(i), (b)(1)(C); 18 U.S.C. § 2. Colon-Rivera challenges the denial of her motion to suppress on the ground that law enforcement officers used the knock and talk exception to the warrant requirement of the Fourth Amendment as a subterfuge for an investigatory search. Colon-Rivera also challenges the substantive reasonableness of her below-guidelines sentence. We affirm.

The district court did not err by denying Colon-Rivera's motion to suppress. "The Fourth Amendment, which prohibits unreasonable searches and seizures by the government, is not implicated by entry upon private land to knock on a citizen's door for legitimate police purposes unconnected with a search of the premises." *United States v. Taylor*, 458 F.3d 1201, 1204 (11th Cir. 2006). Agents Mark Lee and Daniel Paul Tilton of the Drug Enforcement Agency testified that they visited Colon-Rivera's home to confirm that she had used the alias "Mia" to sell heroin to an undercover officer who could not positively identify the seller.

The district court was entitled to credit the agents' explanation for their visit. *See United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002). Lee, Tilton, and the undercover officer surveilled Colon-Rivera's home from the street until they saw her admit a visitor at 9:20 a.m. They followed the visitor to his

vehicle where he surrendered 13 bags of heroin. *See Kylllo v. United States*, 533 U.S. 27, 32 (2001) (“visual observation is no ‘search’ at all”). Lee and Tilton knocked on Colon-Rivera’s door because they had yet to ascertain Mia’s identity from coconspirators being apprehended by other federal agents. Colon-Rivera agreed to speak to the agents in her kitchen, *see Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990), and allowed Tilton to “take a look” around her home to ensure that she was the only occupant, *see Maryland v. Buie*, 494 U.S. 325, 327 (1990). Tilton then informed Colon-Rivera of her rights to silence and counsel, which she waived. *See United States v. Pineiro*, 389 F.3d 1359, 1366–67 (11th Cir. 2004). Colon-Rivera disavowed any involvement in the drug sale, but she incriminated herself by uttering the undercover officer’s name as the officer entered the kitchen. After the agents arrested Colon-Rivera, they were allowed to ask her to consent to a search of her home. *See United States v. Hidalgo*, 7 F.3d 1566, 1571 (11th Cir. 1993). The agents conducted a valid knock and talk, which led to a consensual search of Colon-Rivera’s home.

The district court did not abuse its discretion when it sentenced Colon-Rivera to concurrent sentences of 240 months for conspiring to distribute and for distributing heroin. Colon-Rivera’s presentence investigation report provided an advisory sentencing range of 262 to 327 months of imprisonment based on her role in managing the trafficking organization for 38 weeks, her distribution of 19

kilograms of heroin, and the seizure of two handguns, currency, and 200 bags of heroin from her home. Colon-Rivera argued that there was an unwarranted disparity between her sentencing range and her coconspirators' sentences of 206 and 168 months, but Colon-Rivera, who went to trial and was found guilty of four drug offenses, was not similarly situated to her coconspirators who pleaded guilty to one drug offense. *See United States v. Docampo*, 573 F.3d 1091, 1101 (11th Cir. 2009). And the district court took into account that Colon-Rivera had been abused as a child and varied downward to impose a sentence 22 months below her applicable guideline range. Colon-Rivera argues that the district court punished her for proceeding to trial as evidenced by its agreement with defense counsel that Colon-Rivera exhibited "bizarre decision-making" by not pleading guilty. The district court explained to Colon-Rivera that she was "not being penalized for not accepting responsibility," but that she could not receive the same leniency as her coconspirators after she required the government to go to trial. Colon-Rivera's sentence, which is well below her statutory maximum penalty of imprisonment for life, is reasonable. *See United States v. Croteau*, 819 F.3d 1293, 1310 (11th Cir.), *cert. denied*, 137 S. Ct. 254 (2016).

We **AFFIRM** Colon-Rivera's convictions and sentence.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,) Case Number
)
v.) 6:16-cr-55-Orl-41KRS
)
ZULEYKA JEANETTE COLON-RIVERA,)
)
Defendant.)
_____)

Transcript of an oral Order on Motion to Suppress
before the Honorable Carlos E. Mendoza
October 12, 2016; 8:35 a.m.
Orlando, Florida

Appearances:

Counsel for Plaintiff: Andrew C. Searle

Counsel for Defendant: Jonathan E. Rose (by telephone)

Proceedings recorded by mechanical stenography,
transcript produced by computer.

Diane Peede, RMR, CRR
Federal Official Court Reporter
401 West Central Boulevard, Suite 4600
Orlando, Florida 32801

P R O C E E D I N G S

THE COURTROOM DEPUTY: This is the case of United States of America versus Zuleyka Jeanette Colon-Rivera, case number 6:16-cr-55.

Will counsel please state their appearances for the record.

MR. SEARLE: Good morning, Your Honor. For the United States, Andrew Searle.

MR. ROSE: Good morning, Your Honor. For the defendant, Zuleyka Jeanette Colon-Rivera, Jonathan Rose.

THE COURT: All right. Good morning. I know that we're getting close to trial and there was an untimely Motion to Suppress filed, and I don't mean that critically.

If you discovered the issue, Mr. Rose, I fully expect that you needed to file that.

But in order to give you as quick a turnaround as possible, I'm going to read my Order into the record, and primarily comprised of findings of fact.

"This cause is before the Court on Defendant's Amended Motion to Suppress and Request For Hearing, Motion Doc. 199, filed on September 13, 2016.

"The United States filed a response to Defendant's Motion to Suppress evidence, Response Doc. Number 204, on September 26, 2016.

"Defendant alleges in the Motion that agents of the

1 Drug Enforcement Agency, D.E.A., used a knock-and-talk
2 investigation as subterfuge to illegally enter then search
3 defendant's residence.

4 "Defendant moves to suppress statements and items
5 of property seized during what defendant characterizes as an
6 unlawful search. The United States opposes the Motion,
7 asserting that the entirety of the transaction was lawful.

8 "Mark Lee, S.A. Lee, has been employed as a D.E.A.
9 special agent for over 20 years.

10 "Daniel Tilton, S.A. Tilton, has been employed as a
11 D.E.A. special agent since 2010.

12 "S.A. Lee and S.A. Tipton (sic) were the only
13 witnesses that testified at the September 28th, 2016,
14 evidentiary hearing. Per the testimony of S.A. Lee and S.A.
15 Tilton, there had been some confusion as to the identity of
16 defendant, as evidenced by some sort of warrant being
17 recalled after it was issued for the wrong person.

18 "The defendants (sic) testified that they were sent
19 -- the agents testified that they were sent to defendant's
20 residence that day to determine who lived there and to
21 identify defendant. They did not possess an arrest warrant
22 and indicated that they were not there to arrest defendant.

23 "Further, S.A. Tipton (sic) testified that he did
24 not bring a waiver of rights form or a search authorization
25 form with him, as he was there to assist S.A. Lee in

1 conducting a knock and talk.

2 "On February 24th, 2016, at the behest of case
3 agent Conrad Henry, S.A. Lee, S.A. Tilton and D.E.A. Task
4 Force Officer Ashley Scott," or, "'T.S.A. Scott,' traveled to
5 defendant's residence in Orlando, Florida, to conduct a
6 knock-and-talk investigation. S.A. Lee was the lead agent.

7 "That very morning lawful personnel were serving
8 multiple arrest warrants on members of an Orlando drug
9 organization called The Company. Prior to February 24th,
10 2016, law enforcement personnel suspected that defendant was
11 a member of The Company.

12 "S.A. Lee, S.A. Tilton and T.S.A. Scott arrived at
13 defendant's residence in separate unmarked automobiles at
14 6:00 a.m. in order to conduct surveillance on defendant's
15 residence prior to initiating the knock and talk. The
16 automobiles were unmarked and separately parked on public
17 property. All three occupants were communicating through
18 two-way radios and dressed in civilian attire. S.A. Lee and
19 S.A. Tilton were carrying concealed firearms.

20 "At approximately 9:20 a.m. a male parked a black
21 Mitsubishi SUV around the corner from defendant's residence,
22 then proceeded to enter. The SUV was not visible from
23 defendant's residence. And upon departing from defendant's
24 residence, S.A. Lee, S.A. Tilton and T.S.A. Scott made
25 contact with the male, later identified as Domingo

1 Perez-Lamboy, 'Perez.'

2 "Perez voluntarily exited the SUV and agreed to
3 speak to the agents. A nervous Perez consented to a pat-down
4 search after indicating he was not in possession of a
5 firearm -- or of a weapon. While conducting the pat-down,
6 S.A. Lee noticed a bulge in his front trouser pocket that did
7 not appear to be a weapon. Perez admitted the bulge was 13
8 bags of heroin and was promptly taken into custody.

9 "At approximately 9:40 a.m., S.A. Lee and S.A.
10 Tipton (sic) knocked on defendant's front door. Once
11 defendant answered, S.A. Lee and S.A. Tipton identified
12 themselves as law enforcement officers and sought defendant's
13 permission to enter the residence.

14 "Defendant invited the defendants (sic) inside and
15 agreed to speak to them in a dining room adjacent to the
16 living room. Concerned with the possibility that other
17 persons might be present in the residence, S.A. Tipton (sic)
18 obtained consent from defendant to conduct a sweep that took
19 less than one minute.

20 "Once completing the sweep, S.A. Tipton advised
21 defendant of her constitutional rights via a D.E.A. 13-Alpha
22 card. The defendant orally waived her rights. It is worth
23 noting that S.A. Lee and S.A. Tipton testified that defendant
24 never requested an attorney and that she fluently spoke and
25 understood English without assistance.

1 "S.A. Lee then proceeded to ask defendant questions
2 about a July 7, 2015, drug transaction where defendant
3 allegedly sold 200 bags of heroin to a then-undercover T.S.A.
4 Scott. Defendant repeatedly denied being a drug dealer and
5 claimed to have no knowledge of any drug organization.
6 Defendant further denied any involvement in the July 7, 2015,
7 drug transaction.

8 "As the questioning was coming to a close, S.A. Lee
9 asked T.S.A. Scott to enter the residence. Once making eye
10 contact with T.S.A. Scott, defendant spontaneously uttered
11 the word 'Ashley' while making eye contact with T.S.A. Scott.
12 Defendant's utterance was the first mention of T.S.A. Scott's
13 name during the entire conversation. Notwithstanding the
14 utterance, defendant continued to deny any involvement in
15 drug activity and even denied ever having had contact with
16 T.S.A. Scott.

17 "S.A. Lee then told defendant that if she was not a
18 drug dealer, would she object to his searching the residence.
19 It is worth noting that at the September 28, 2016,
20 evidentiary hearing, S.A. Lee testified that he asked to
21 'take a look around,' whereas S.A. Tipton (sic) testified
22 that S.A. Lee used the term 'search' in seeking defendant's
23 consent. Defendant consented with a single caveat: That
24 S.A. Lee not destroy her home while conducting the search.
25 While S.A. Lee conducted the search, defendant decided to

1 smoke a cigarette inside the residence.

2 "Further, because defendant was dressed only in a
3 long t-shirt, S.A. Tipton (sic) offered defendant an
4 opportunity to put on more clothes, an offer defendant
5 eventually accepted.

6 "Also, throughout the interaction, defendant's cell
7 phone continued to ring. Defendant told the officers that
8 the call was from her mother, who was watching her children,
9 and that she did not want to answer.

10 "Upon being granted permission to search the home,
11 S.A. Lee entered the master bedroom. He found one firearm on
12 the bed and one on the floor. Upon observing an open drawer,
13 S.A. Lee observed a satchel and a gray -- and a dark gray
14 safe. S.A. Lee found a large amount of U.S. currency,
15 approximately 200 individually packaged baggies of what he
16 suspected was heroin, and several empty gun boxes that
17 included firearm magazines.

18 "Upon leaving the bedroom, S.A. Lee directed S.A.
19 Tipton (sic) to place defendant in handcuffs as she was under
20 arrest. Defendant asked S.A. Lee to gather her multiple cell
21 phones. Defendant then gave S.A. Lee the security code for
22 one of her cell phones.

23 "S.A. Lee transported defendant in his unmarked car
24 for processing."

25 The findings of the Court are as follows:

1 "The knock and talk was not subterfuge for an
2 unlawful search, as evidenced by the officers arriving
3 without a search warrant, rights advisement forms, or search
4 authorization forms. The officers' explanation that they
5 were there to confirm defendant's identity in light of the
6 prior recalled warrant is both reasonable and credible.

7 "Secondly, the sweep was consensual.

8 "Third, defendant was properly Mirandized.

9 "Fourth, the eventual search was consensual.

10 "Five, the motion is denied."

11 Is there anything from the government at this
12 point?

13 MR. SEARLE: No, Your Honor. Thank you.

14 THE COURT: Mr. Rose, anything from the defense?

15 MR. ROSE: No, Your Honor. There is -- there's one
16 issue, very quickly, with regard to the motion, just so the
17 Court is aware.

18 THE COURT: All right. So we're closing the motion
19 out. You have another issue involving the case you want to
20 bring to my attention?

21 MR. ROSE: Very quickly, yes.

22 THE COURT: All right. No. Take your time. Go on
23 ahead, Mr. Rose.

24 MR. ROSE: This is -- this is just for the Court's
25 edification, so to speak. Mr. Castrofort was hospitalized

1 either Monday or yesterday, probably yesterday, because he
2 had to have emergency gallbladder surgery. He's going to be
3 in the hospital until Friday. Just for the Court's
4 edification, we've had some things due yesterday that Mr.
5 Searle filed, but because of his hospitalization, Mr.
6 Castrofort wasn't able to comply with that.

7 THE COURT: Thank you for bringing that to my
8 attention.

9 MR. ROSE: And won't be for some time, apparently.

10 THE COURT: And thank you for bringing that to my
11 attention. We'll adjust accordingly.

12 Mr. Rose, have a good morning.

13 MR. ROSE: Thank you, Your Honor.

14 (Proceedings concluded at 8:44 a.m.)

15 - - - - -

16 Reporter's Certification

17 I certify that the foregoing is a correct transcript from the
18 record of proceedings in the above-entitled matter.

19 s/Diane Peede, RMR, CRR
20 Official Court Reporter
21 United States District Court
22 Middle District of Florida
23
24
25
Date: April 4, 2017