

No. 19-11223

IN THE

**United States Court of Appeals**

FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

ALICIA LYNN RODDY,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION  
THE HONORABLE JOHN MCBRYDE PRESIDING

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**Brief of the Appellant**

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## Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of the case. These representations are made so that this Court's judges may evaluate possible disqualification or recusal.

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## **Recommendation on Oral Argument**

Alicia Roddy does not request oral argument. The record is short, and the issue straightforward. Oral argument would not likely help the Court determine the issue.

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---

**Brief of the Appellant**

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**Statement of Jurisdiction**

The district court had jurisdiction over the case pursuant to 18 U.S.C. 3231. The jurisdiction of this Court is invoked under 28 U.S.C. 1291 as this is an appeal from a final decision entered by the United States District Court for the Northern District of Texas.

The district court pronounced sentence on November 1, 2019, and entered a written judgment the same day. ROA.59–62, 157. Alicia Lynn Roddy filed a written notice of appeal on November 7, 2019, which was timely under Fed. R. App. P. 4(b). ROA.64.

## **Statement of the Issue**

The trial court reversibly erred by finding that the 1,000 grams Roddy observed at Isaac's residence the day before her arrest was within the scope of her jointly undertaken criminal activity with him.

## Statement of the Case

### The Complaint

Alicia Lynn Roddy was named in a criminal complaint filed on October 16, 2018. ROA.10. On April 5, 2018, Texas DPS agents and the Tarrant County Sheriff's Office utilized a cooperating defendant to negotiate the purchase of two ounces of methamphetamine from Roddy. ROA.10. Agents thereafter effected a traffic stop on a car that Roddy was traveling in. ROA.10. An agent testified that a Texas Department of Public Safety special agent who was sitting in an unmarked vehicle behind Roddy's car saw her toss out two plastic bags over a concrete barrier during the stop. ROA.10. He recovered the bags and found they contained methamphetamine. ROA.10. Roddy admitted to possessing and redistributing numerable ounces of methamphetamine in a post-*Miranda* interview. ROA.11.

### The Information and Plea of Guilty

The Government later filed a criminal information, alleging that Roddy did knowingly and intentionally possess with intent to distribute methamphetamine in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). ROA.20. Roddy waived indictment, and pleaded guilty to the information without the benefit of a plea agreement. ROA.30, 181. She executed a factual résumé to provide the district court a factual basis for her plea. ROA.32. Roddy stipulated to the following facts.

On April 5, 2018, agents/officers arrested Alicia Lynn Roddy in possession of approximately 10 grams of methamphetamine. Alicia Lynn Roddy possessed the methamphetamine with the intent to distribute it to others.

ROA.32.

### **The Presentence Report**

The presentence report (“PSR”) summarized Roddy’s offense conduct, relying on the criminal complaint, the information, factual résumé, and investigative material compiled by the Texas Department of Public Safety. ROA.181.

The Tarrant County Combined Narcotics Enforcement Team utilized a cooperating defendant to purchase two ounces of methamphetamine from Roddy on April 5, 2018. ROA.181. Roddy informed the cooperating defendant that she was at a storage unit in Arlington at the time. ROA.181. Agents conducted a traffic stop of a vehicle that left the storage unit with Roddy riding in the backseat. ROA.181. The driver of the car denied consent to search, but the front-seat passenger advised the agents that the items in the car came from the storage unit and belonged to Roddy. ROA.181. A canine was brought in which alerted. Roddy tossed out two plastic bags while agents were searching the vehicle. ROA.181. The two bags were later determined to contain 10 grams of methamphetamine (“Ice”). ROA.181.

In a post-arrest interview, Roddy admitted that she had distributed methamphetamine the night before, and identified her source as Ruben Joe Isaac. ROA.182. She told the agents that she had purchased an ounce of meth-

amphetamine from Isaac that day, and happened to see that he had a gallon-sized Ziploc bag with him that contained a kilogram of methamphetamine. ROA.182. She had utilized Isaac as her source of supply for the past year with her first transaction with him occurring sometime in the summer of 2017. ROA.182. She had purchased at least an ounce of methamphetamine from Isaac every other day during the prior two months. ROA.182. She acknowledged she knew Isaac possessed firearms at his house. ROA.182.

Agents later searched his house, and found two bags of methamphetamine in a safe in his garage and three firearms, one being in the garage. ROA.182. Roddy had told agents that she usually entered through the garage for her purchases from Isaac. ROA.182. The search netted 464 grams of methamphetamine. ROA.182.

The PSR summarized Roddy's dealings with Isaac: "The investigation revealed, in all, Roddy purchased 1 ounce of methamphetamine on 20 occasion [sic]; 2 ounces of methamphetamine on five occasions, and three ounces of methamphetamine on two occasions from Isaac. This results in a total of 36 ounces (1,020.6 grams) of methamphetamine." ROA.182. The report also summarized some of Roddy's other episodes of distribution and buys, totaling 99.35 grams of methamphetamine. ROA.182-83.

Converting Ice and methamphetamine into drug equivalents, the PSR calculated a total of 4,439.9 kilograms of converted drug weight. ROA.183. This total includ-

ed the 10 grams of Ice that Roddy had tossed out of the car and a kilogram of methamphetamine that she had seen at Isaac's house:

Roddy is responsible for the methamphetamine observed by Roddy at Isaac's house as they were involved in a jointly undertaken criminal activity (drug-trafficking) and Roddy observed these drugs at Isaac's residence on April 4, 2018.

ROA.183.

The PSR included the methamphetamine Roddy had seen at Isaac's house in its calculation by deciding, "[p]ursuant to USSG § 1B1.3(a)(1)(B) Isaac's possession of the 1 kilogram of methamphetamine was within the scope and in furtherance of the jointly undertaken criminal activity, and it was reasonably foreseeable by Roddy as Isaac was her long-term source of supply." ROA.183. Based on these findings, the PSR concluded Roddy's Base Offense Level totaled 32. It added two two-point enhancements, one for the presence of firearms in Isaac's house and another for Isaac's importation of methamphetamine from Mexico. ROA.185. Roddy's Total Offense Level totaled 33 after applying a three-point deduction for acceptance of responsibility. ROA.185.

Roddy's criminal-history score was nine, which established a Criminal History Category of IV. ROA.194.

These calculations established an advisory Guideline Imprisonment Range of 188 to 235 months. ROA.199.

### **Roddy's Objection**

Roddy objected to the kilogram of methamphetamine she saw at Isaac's house being included in the calculation of her offense conduct. She argued that this episode fell outside the Sentencing Commission's definition of relevant conduct.

ROA.219–21.

The Government countered the methamphetamine was properly included in the transaction because Roddy's "agreement" with Isaac was a continuous and ongoing understanding as opposed to an 'agreement' for a one-time transaction." ROA.204.

### **The Addendum**

The probation officer rejected Roddy's objection, concluding that she "was engaged in an ongoing jointly undertaken criminal activity with Isaac to possess and distribute methamphetamine." ROA.211. She determined, "the defendant agreed to purchase methamphetamine from Isaac, who was a methamphetamine source of supply, on a regular and reoccurring basis." ROA.212. She concluded, "In this case, the offense is more appropriately viewed as one jointly undertaken criminal activity as the defendant was a regular customer of Isaac's, who purchased methamphetamine every other day at his residence where the methamphetamine was located." ROA.212.



## **The Sentencing Hearing**

Roddy maintained her objection to the PSR's offense-conduct calculation at sentencing. ROA.160–61, 219–21. The district court overruled the objection, relying upon the PSR addendum and the Government's response. ROA.161.

The district court adopted the facts and conclusions set forth in the PSR as modified or supplemented by the addendum. ROA.161–62. It determined that the Total Offense Level was 33, that the Criminal History Category was IV, and that the advisory Guideline Imprisonment Range was 188 to 235 months' imprisonment. ROA.162. It sentenced her to 235 months' imprisonment, the top of the Guideline range. ROA.169. It ordered that she serve a term of supervised release of three years and pay a special assessment of \$100. ROA.169, 171. It ordered that the conditions of supervised release would be "the standard conditions that will be set forth in the judgment of conviction and sentence" and special conditions that it orally pronounced from the bench. ROA.169–70.

This appeal followed.

## Summary of Argument

Alicia Lynn Roddy began buying methamphetamine from Ruben Joe Isaac in the summer of 2017. She'd usually buy in one-ounce quantities, but occasionally bought two-, three-, or even four-ounce quantities during the ensuing year. She admitted buying one-ounce quantities about every other day in March and April 2017. On April 5th, the day before her arrest, she went to Isaac's house, as she usually did, to buy an ounce of methamphetamine from him. While there, she observed he had a gallon-sized Ziploc bag filled with methamphetamine. She concluded her transaction and left.

The trial court included the contents of Isaac's Ziploc bag in Roddy's Guideline calculations, finding that it was part of Roddy's "jointly undertaken criminal activity." This it did based solely on her seeing the bag and her past transactional history with Isaac. There was no evidence she had pooled her resources with Isaac regarding the bag's contents, nor any evidence of any future agreements concerning its distribution. The trial court, therefore, clearly erred in determining that the contents of the Ziploc bag should be included in Roddy's Base Offense Level in her Guideline calculations. This error was not without harm. Inclusion of the bag's contents resulted in a higher Guidelines calculation and, consequently, a higher sentence of imprisonment.

## **Argument**

### **Issue No. 1**

The trial court reversibly erred by finding that the 1,000 grams Roddy observed at Isaac's residence the day before her arrest was within the scope of her jointly undertaken criminal activity with him.

#### **Standard of Review**

A district court's finding that conduct was within the scope of jointly undertaken criminal activity is a finding of fact and reviewed for clear error. *See United States v. Smith*, 13 F.3d 860, 865 (5th Cir. 1994).

#### **Argument and Authorities**

The Sentencing Guidelines allow jointly undertaken criminal activity to be considered in calculating a defendant's guidelines. The Guidelines set out:

In the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—

- (i) within the scope of the jointly undertaken criminal activity,
- (ii) in furtherance of that criminal activity, and
- (iii) reasonably foreseeable in connection with that criminal activity that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

U.S.S.G. 1B1.3(a)(1)(B).

But while jointly undertaken criminal activity may be considered in a Guidelines calculation, a defendant's accountability for the acts of others is limited by the scope of her agreement to jointly undertake the particular criminal activity. That means that acts of others not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to her, are not considered relevant conduct. U.S.S.G. 1B1.3 cmt. 3(B). In applying this section, a court must first determine if the conduct (acts and omissions) of others was in furtherance of the jointly undertaken criminal activity. U.S.S.G. 1B1.3 cmt. 3(C). If it does, it must then determine if the acts of others that were within the scope of, and in furtherance of, the jointly undertaken criminal activity were reasonably foreseeable in connection with that criminal activity. U.S.S.G. 1B1.3 cmt. 3(D).

It is not enough to find only that the defendant knew or could have foreseen that others were selling drugs. *United States v. Enbuoman*, 992 F.2d 70, 73–74 (5th Cir. 1983). The Government must establish that the defendant agreed to jointly undertake criminal activities with the third person, and that the particular crime was within the scope of that agreement to hold the defendant accountable for the crime of that third person. *Id.*

Here, the PSR took a simple fact of sensory perception—Roddy seeing a drug-filled Ziploc bag—and transmogrified it into jointly undertaken criminal activity. It relates:

[Roddy] identified her source of supply as Ruben Joe Isaac (Isaac) (related case), whom she knew as “Dino.” Roddy admitted the day before, on April 4, she purchased 1 ounce of methamphetamine from Isaac and advised during this transaction she observed Isaac in possession of a gallon-sized Ziploc bag (1 kilogram) of methamphetamine. Roddy had utilized Isaac as her source of supply for the past year with her first methamphetamine with Isaac occurring in the summer of 2017.

ROA.182.

From this instance of seeing, the PSR concluded, “Roddy agreed to purchase methamphetamine from Isaac, who was a methamphetamine source of supply, on a regular and recurring basis.” It, however, states no facts supporting this conclusion of future conduct. It points to no written agreements for future sales, no oral agreements, no down for payments for future sales, no evidence of sales on credit, no layaway plans, and no designs of consignment. It doesn’t point to any facts showing Isaac set this methamphetamine apart for Roddy’s future purchases. It conjures up its conclusion of jointly undertaken activity, not based on any agreement for future buys or facts of foreseeability, but only upon a history of past transactions.

In this case, the offense is more appropriately viewed as one jointly undertaken criminal activity as the defendant was a regular customer of Isaac’s, who purchased methamphetamine every other day at his residence where the methamphetamine was located.

ROA.212.

In other words, it converted a history of repeated sales transactions into a future of jointly undertaken criminal activity without anything more than Isaac's possession of methamphetamine than she was buying at the time.

But a regular customer isn't a joint venturer and repeated buy-sell transactions are not properly considered jointly undertaken criminal activity. Consider a grocery-store shopper. She might shop regularly at the same store, stopping there on her way home from work, buying the same produce and groceries every day or every other day for herself and her family, for years. Her regular patronage doesn't turn her into a joint venturer with the store. And the fact that she regularly buys groceries at the store, but sees a horde of other groceries and produce on the shelves set out for other customers doesn't convert her into a pseudo grocer either. In a similar vein, the grocery store's decision to stock up on groceries because she and others like her are likely to stop by to buy for their families doesn't transmute those regular customers into joint operators, even though their regular purchases may be what sustains its very existence. The relationship remains vendor/vendee no matter how many groceries the store decides to stock and how many groceries any particular customer decides to buy at any given time, even if it's every day.

The Sentencing Guidelines are careful to maintain this kind of distinction even in the area of narcotics distribution. The sharing of a common source of supply and the knowledge of others selling the same type of drug in the same geographic area are facts that the commentary finds inadequate to support a determination of joint-

ly undertaken activity. U.S.S.G. 1. The Guidelines point to the pooling of resources and profits as the key ingredient that determines whether individual drug dealers are engaged in jointly undertaken activity. *See id.* That is because the buyer is no longer a buyer, but a joint venturer, sharing the risks of profits and rewards.

Here, Roddy began buying from Isaac in the summer of 2017. ROA.182. She, at times, bought a single ounce. ROA.207. Other times, she bought a bit more. ROA.208. The PSR doesn't say how often or how much she bought over the course of that year, except that, historically, she bought an ounce from him about every other day a couple of months before she was arrested. ROA.182. Her relationship with Isaac at this point couldn't be characterized as anything more than an implied agreement to redistribute just what Isaac had sold to her in any particular transaction. *See United States v. Maseratti*, 1 F.3d 330, 336 (5th Cir. 1993) (holding that the drug-conspiracy laws focus on whether the participants knowingly joined an agreement to distribute drugs). Indeed, the PSR does not point to any agreement or understanding that Roddy had with Isaac beyond these stochastic transactions. *Cf.* U.S.S.G. 1B1.3 cmt. 4(C)(v).

On April 4, 2019, the day before she was arrested, she went to Isaac's, as was her usual practice at the time, to engage in a single, one-ounce sale of methamphetamine. ROA.182. Sometime during the transaction, she happened to see that he had a gallon-sized Ziploc bag with methamphetamine in it. ROA.207. The PSR presents no evidence that she entered into any future agreements with him

regarding that methamphetamine, that she pooled any of her resources with him to redistribute it, or that she somehow got to share in its profits. To be sure, agents searched Isaac's house the next day and found two bags of methamphetamine weighing just 464 grams, and there was no evidence presented that Roddy had anything to do with the disappearance of the other 532 grams she had seen the day before. *See* ROA.182.

The fact of her observation—seeing Isaac possessing a large, plastic bag of methamphetamine—only goes to demonstrate her knowledge that Isaac was involved in much larger quantities of methamphetamine than she was. *See* U.S.S.G. 1B1.3 cmt. 4(C)(vii). This knowledge, without more, cannot support a finding of jointly undertaken criminal activity. *See id.* Nowhere in the Guidelines does it say that sensory perception alone can support a finding of jointly undertaken criminal activity. The district court, therefore, clearly erred by including the kilogram of methamphetamine that Roddy only saw, and did not buy, as part of her Guidelines calculation. *See* ROA.161–62, 183–85.

### **Guideline Calculation Was Not Without Harm**

The district court's error was not without harm. The PSR calculated a Total Converted Drug Weight of 4,439.9 kilograms, which equated to a Base Offense Level of 32. U.S.S.G. 2D1.1(c)(4).<sup>1</sup> ROA.184. The 1,000 grams of methamphetamine seen

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<sup>1</sup> It appears that the PSR contains a typographical error regarding the correct subsection.



in Isaac's garage amounted to 2,000 kilograms of the Total Converted Drug Weight. U.S.S.G. 2D1.1 cmt. 8(D). If this 2,000 grams of Converted Drug Weight were not included in the calculation, the the Total Converted Drug Weight would have amounted to 2,439.9 kilograms which would have equaled a Base Offense Level of 30. U.S.S.G. 2D1.1(c)(5). The advisory Guidelines Imprisonment Range then would have been 151–188 months' imprisonment, not the 188 to 235 months found in the PSR. ROA.199. The district court sentenced Roddy to 235 months' imprisonment, finding that the requirements of 18 U.S.C. 3553(a) would be satisfied at the top of the prescribed advisory range. ROA.169. Roddy's sentence, therefore, would likely have been 188 months' imprisonment or less but for the district court's error.

## **Conclusion**

For the foregoing reasons, this Court should vacate the district court's judgment and remand the case for resentencing.

Dated: March 13, 2020

Respectfully submitted,

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## Certificate of Service

I, Peter Smythe, certify that today, March 13, 2020, I served a copy of this brief for Appellant upon opposing counsel via email and to Ms. Roddy via first-class mail, postage pre-paid, to-wit:

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## Certificate of Compliance

### Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

This brief complies with the type-volume of Federal Rule of Appellate Procedure because this brief contains 4,153 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure and the type style requirements of the rules because it has been prepared in a proportionally spaced typeface using Pages for the Mac in Arno Pro 14 pt. font.

*/s/ Peter Smythe* \_\_\_\_\_

Peter Smythe

Attorney for the Appellant

Dated: March 13, 2020

## ECF Certifications

This brief complies with ECF pleading requirements because we've made the required privacy redactions, the electronic submission is an exact copy of the paper document, and the electronic filing is free of viruses.

*/s/ Peter C. Smythe* \_\_\_\_\_

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Dated: March 13, 2020