

April 18, 2023

PUBLISH

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.,

MICHAEL OTIS HUNSAKER, JR.,

Defendant - Appellant.

No. 22-7016

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
(D.C. No. 6:20-CR-00127-RAW-6)

Lisa C. Williams, Special Assistant United States Attorney (Christopher J. Wilson, United States Attorney, with her on the brief), Muskogee, Oklahoma, for Plaintiff-Appellee.

Josh Lee, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant-Appellant.

Before **HARTZ**, **BALDOCK**, and **BACHARACH**, Circuit Judges.

BALDOCK, Circuit Judge.

Defendant Michael Hunsaker was one of 19 alleged co-conspirators charged in a 23-count indictment in the Eastern District of Oklahoma. Defendant was charged in two counts. Count 1 charged him with conspiring to traffic 500 grams

or more of methamphetamine in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A). Count 18 charged him with possession with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). Defendant pled guilty to both counts without a plea agreement. The Presentence Investigation Report (PSR) described Defendant as the “second in command” of a drug trafficking organization [DTO], concluded he was a “manager or supervisor” of the DTO, and recommended a 3-level enhancement to his offense level pursuant to U.S.S.G. § 3B1.1(b) (2018). Section 3B1.1 provides:

Based on the defendant’s role in the offense, increase the offense level as follows:

- (a) If the defendant was an *organizer or leader* of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.
- (b) If the defendant was a *manager or supervisor* (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.
- (c) If the defendant was an *organizer, leader, manager, or supervisor* in any criminal activity other than described in (a) or (b), increase by **2** levels.

(emphasis added).

Over Defendant’s objection, the district court agreed with the PSR’s 3-level enhancement under § 3B1.1(b). Based on a total offense level of 34 and a criminal history category of II, Defendant’s advisory guideline range was 168 to 210 months.

The district court sentenced Defendant to 168 months' imprisonment. Defendant appealed. Our jurisdiction arises under 18 U.S.C. § 3742(a). The sole issue on appeal is whether the district court erred in finding Defendant Hunsaker was a "manager or supervisor" of a drug conspiracy as that phrase is used in § 3B1.1(b). Reviewing the district court's findings of fact under the clearly erroneous standard and the application of those facts to the guidelines de novo, we reverse. *See United States v. Uscanga-Mora*, 562 F.3d 1289, 1296 (10th Cir. 2009).

I.

Because Defendant pled guilty, our point of departure is the PSR. The PSR set forth the following undisputed facts in support of the § 3B1.1(b) enhancement. In June 2019, the Drug Enforcement Agency and Oklahoma Bureau of Narcotics began investigating Anita Cooper, a suspected drug trafficker. Cooper regularly received large quantities of methamphetamine from two sources in Oklahoma City. She would then return home and break down the drug into smaller quantities for sale. The PSR is unclear precisely where Cooper resided but it suggests she had multiple residences in Oklahoma, including one in Muskogee.

Law enforcement soon determined Cooper was part of a larger DTO connected with the Universal Aryan Brotherhood (UAB). Between January and May 2020, law enforcement, through the use of confidential informants, conducted six controlled purchases from Cooper. On multiple occasions beginning in May 2020, law

enforcement followed Cooper and individuals accompanying her to Oklahoma City where she would receive methamphetamine and transport it back to her residence. Intercepted communications indicated Cooper received between 1 and 2.2 pounds of methamphetamine on each occasion. According to paragraphs 45 and 46 of the PSR, Cooper drove to Oklahoma City “roughly five times a month for at least a year,” or, in other words, sixty times in one year, to purchase “bulk quantities” of methamphetamine. Paragraph 51 of the PSR states Cooper admitted she received “one pound to one kilogram of methamphetamine three-four times a week” over the course of the DTO’s operation.

As for Defendant’s role in the conspiracy, the PSR, in paragraphs 47 and 48 as paraphrased, offered the following:

On May 12, 2020, Cooper and Defendant traveled to Oklahoma City to pick up one pound of methamphetamine. Law enforcement observed Cooper walk over to a vehicle registered to a source and grab something from the front seat.

On May 21, 2020, Cooper and Defendant traveled to a source’s residence in Oklahoma City to pick up methamphetamine.

On June 4, 2020, Cooper returned home after picking up roughly two pounds of methamphetamine. That same day, she and Defendant communicated and discussed Defendant traveling to her residence to obtain methamphetamine. Law enforcement followed Defendant to Cooper’s residence and conducted a traffic stop after he left. Law enforcement seized two ounces of methamphetamine.

On June 10, 2020, Cooper and Defendant arrived at a source’s residence in Oklahoma City and retrieved one pound of methamphetamine. After they left the source’s residence, law enforcement stopped Cooper and

Defendant. A subsequent search of the vehicle revealed approximately one pound of methamphetamine.

On June 11, 2020, Cooper and Defendant retrieved another pound of methamphetamine from the same source.¹

The PSR identified only one buyer who purchased drugs from Defendant. According to paragraph 65 of the PSR, Mark Stubblefield purchased ounce quantities of methamphetamine from Defendant. How often the PSR does not say.

Paragraph 57 of the PSR concluded that Defendant “can be considered second in command under Cooper in the DTO, as well as Cooper’s business partner.” The same paragraph noted Defendant “was involved in many aspects of the methamphetamine distribution process and accompanied Cooper at least four times to pick up methamphetamine and drop off money.” As for the adjustment to Defendant’s offense level based on his role in the conspiracy, the PSR concluded in paragraph 79 that “[t]he [D]efendant is deemed a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive; therefore, three levels are added.”

¹ The PSR does not tell us why Defendant was never arrested on any of the occasions detailing his participation in the conspiracy. Paragraph 29 says that after Defendant was indicted, a federal warrant was issued for him on October 30, 2020. At that time, Defendant was apparently in state custody because on November 4, 2020, the Government filed a petition for a Writ of Habeas Corpus ad Prosequendum. The district court issued the writ the following day.

Defendant filed a written objection to the PSR's conclusion that he was a "manager or supervisor" of the DTO within the meaning of § 3B1.1(b). In a written response, the Government supplemented the PSR with more undisputed evidence (reiterated by the probation office in its response) of Defendant's role in the conspiracy. According to the Government, "co-defendant Everett Hood told investigators that the [D]efendant was Anita Cooper's second in command, that the [D]efendant went everywhere with Cooper, and that the [D]efendant was deeply involved in Cooper's distribution activities[.]" In a post-arrest interview, Defendant provided investigators information about the DTO. Defendant identified not only the two principal sources in Oklahoma City supplying the DTO with methamphetamine, but also identified a "high-ranking" UAB member as their source for the drugs.

Defendant admitted traveling with Cooper to purchase methamphetamine in Oklahoma City on multiple occasions. He admitted to dropping off on behalf of Cooper between \$18,000 and \$20,000 to a source for payment of methamphetamine. Defendant also told investigators that when one of the DTO's sources wanted to check in on Cooper, she would sometimes phone Defendant. Additional examples of Defendant's participation in the conspiracy, gathered from intercepted communications, were set forth in the Government's supplement as paraphrased below:

On August 31, 2019, Defendant "agree[d] to help" Cooper retaliate against an unknown person who stole from her.

On September 10, 2019, Defendant and Cooper “discuss[ed] acquiring” methamphetamine, “albeit a smaller amount,” and splitting the proceeds.

On May 26, 2020, Defendant told Cooper that he was “making arrangements” for them to buy methamphetamine from a new source.

On June 11, 2020, Defendant told Cooper that he located a “possible future customer” for Cooper. At the time, Cooper was attempting to acquire additional amounts of methamphetamine to sell.

On June 14, 2020, Defendant told Cooper that he was going to meet with a “possible alternative source” of methamphetamine and he would let Cooper know how the meeting went.

On June 15, 2020, Defendant and Cooper “discuss[ed]” the need to purchase more methamphetamine to sell and the fact that a source owed Defendant money.

On June 16, 2020, Defendant and Cooper again “discuss[ed]” their need for more methamphetamine to sell. Later the same day, Defendant told Cooper he had found a new source of supply. Cooper asked Defendant how much methamphetamine she could acquire for \$1500 to \$2000.

At Defendant’s sentencing hearing, the district court adopted the PSR in its entirety and found “by a preponderance of the evidence that details of the [PSR], supplemented by filings of both parties, accurately reflect[ed] the Defendant’s role in the offense as a manager/supervisor” within the meaning of U.S.S.G. § 3B1.1(b). *See United States v. McDonald*, 43 F.4th 1090, 1095 (10th Cir. 2022) (“At sentencing, the government has the burden of proving by a preponderance of the evidence any findings necessary to support a sentence enhancement.” (quotation marks omitted)). The court provided only a brief explanation for its decision:

As identified in the PSR, this Defendant was responsible for picking up large amounts of methamphetamine from an identified source of supply As supplemented by the government’s response to the Defendant’s objection, a co-conspirator informed law enforcement that the Defendant was Anita Cooper’s second in command and went everywhere with Cooper. And further, the Defendant was responsible for attempting to recruit additional source[s] of supply for the [DTO].

II.

Section 3B1.1 of the Sentencing Guidelines allows a district court to enhance a defendant’s sentence for his aggravating role in the underlying offense. U.S.S.G. § 3B1.1. The court is to determine a defendant’s role in the offense on the basis of all “relevant conduct,” rather than on the basis of elements and acts cited in the counts of conviction alone. *Id.* § 3B1.1 intro. cmt. The commentary to § 3B1.1 says that to qualify for an adjustment under this section, “the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants” in the underlying offense. *Id.* § 3B1.1 cmt. n.2. The commentary lists factors, accurately identified by the district court in this case, relevant to our determination of whether a defendant is a “manager or supervisor” under subsection (b):

Factors the court should consider include [1] the exercise of decision making authority, [2] the nature of participation in the commission of the offense, [3] the recruitment of accomplices, [4] the claimed right to a larger share of the fruits of the crime, [5] the degree of participation in planning or organizing the offense, [6] the nature and scope of the illegal activity, and [7] the degree of control and authority exercised over others.

Id. § 3B1.1 cmt. n.4; *see United States v. Aptt*, 354 F.3d 1269, 1286 (10th Cir. 2004)

(explaining that while note 4 speaks only to choosing between whether a defendant was a “leader or organizer” or a “manager or supervisor,” the Tenth Circuit has deemed the factors listed in note 4 as relevant in determining whether a defendant was a manager or supervisor “at all”).

In one of our earliest pronouncements on § 3B1.1 generally, we stated:

Key determinants of the applicability of § 3B1.1 are control and organization: “the defendant must have exercised some degree of *control over others* involved in the commission of the offense or he must have been responsible for *organizing others* for the purpose of carrying out the crime. This requirement is implicit in the terms ‘organizer, leader, manager and supervisor,’ each of which suggests the presence of underlings or subordinates.”

United States v. Reid, 911 F.2d 1456, 1464 (10th Cir. 1990), *superceded in part on other grounds by* U.S.S.G. § 3B1.1 cmt. n.2, *as recognized in United States v. Cruz Camacho*, 137 F.3d 1220, 1224 n.3 (10th Cir. 1998)) (emphasis added) (quoting *United States v. Fuller*, 897 F.2d 1217, 1220 (10th Cir. 1990)). Three years later, in *United States v. Roberts*, 14 F.3d 502 (10th Cir. 1993), we specifically addressed for the first time the meaning of “manager or supervisor” under § 3B1.1(b). We read subsection (b) to mean exactly what we said in *Reid*. To be a manager or supervisor under that subsection, a defendant must have “exercised some degree of control over others” involved in the commission of the crime or “must have been responsible for organizing others” for the purpose of carrying out the offense. *Roberts*, 14 F.3d at 523 (bracket omitted) (quoting *Reid*, 911 F.2d at 1464); *see also United States v.*

Pelliere, 57 F.3d 936, 939 (10th Cir. 1995).

Here, the district court found [defendant] had a “lengthy and ongoing” relationship with [the conspiracy’s alleged leader] and described her role as “a person distributing, delivering, assisting in making arrangements for methamphetamine, and “act[ing] as a source of methamphetamine to promote this activity *Although these findings are not clearly erroneous, they do not constitute evidence of decision-making authority or control over a subordinate necessary to conclude [defendant] was a supervisor or manager.*

Roberts, 14 F.3d at 524 (emphasis added).

Importantly, unlike the respective roles of a leader or organizer, we have never distinguished the role of a manager from that of a supervisor for purposes of § 3B1.1. *See, e.g., United States v. Zar*, 790 F.3d 1036, 1056–59 (10th Cir. 2015); *United States v. Gonzalez Edeza*, 359 F.3d 1246, 1248–49 (10th Cir. 2004). Our decision in *United States v. Valdez-Arieta*, 127 F.3d 1267 (10th Cir. 1997), helps illustrate the point. The district court enhanced the defendant’s offense level by two levels pursuant to § 3B1.1(c) because he increased the volume of drugs supplied by his accomplice’s prior sources and provided a much larger supply of drugs from sources to whom his accomplice did not have access. Recall that subsection (c) provides for a two-level increase in the offense level if a defendant was an “organizer, leader, manager, or supervisor” in criminal misconduct other than described in subsections (a) or (b). In that case, the defendant claimed he and his accomplice were “joint partners” and argued the record contained no evidence that he exercised control over any subordinate or underling in the drug conspiracy. We

reasoned the defendant had misread our prior precedents and held that the role of organizer under § 3B1.1 did not require a finding that a defendant controlled subordinates because “[a] defendant can organize an illegal activity without exercising control over the other participants in the activity.” *Valdez-Arieta*, 127 F.3d at 1270. “[W]hile control over subordinates is *required* to find that a defendant played a management, supervision, or leadership role in a criminal activity, we conclude that a sentence enhancement under § 3B1.1(c) for a defendant who acts as an organizer does not require the presence of underlings in the endeavor.” *Id.* at 1272 (emphasis added); *see also id.* at 1271 (“It is true that the ‘leader,’ ‘manager,’ and ‘supervisor’ prongs of § 3B1.1(c) do suggest an element of control over others.” (citing *United States v. Cordoba*, 71 F.3d 1543, 1547 (10th Cir. 1995))).

If *Valdez-Arieta* helps illustrate the point, our more recent decision in *Zar* brings home the point. That case involved a mortgage fraud scheme. The defendant recruited others to participate in the fraudulent scheme, advised them as to which properties to buy and sell, directed their utilization of grant programs, and introduced them to an accomplice so he could act as their real estate agent. The district court found the defendant was a “manager or supervisor” of the scheme and enhanced his offense level by three levels under § 3B1.1(b). We agreed because the defendant exercised decision-making authority over those he recruited to participate in the scheme. We reasoned that “this [C]ourt has consistently interpreted the

‘manager/supervisor’ role as one *requiring* the defendant to exercise some degree of ‘decision-making authority,’ ‘control,’ or ‘organizational authority’ over a subordinate participant in the offense.” *Zar*, 790 F.3d at 1058 (emphasis added); *see also United States v. Lozano*, 921 F.3d 942, 948 (10th Cir. 2019) (recognizing a defendant “need only manage or supervise one of his co-conspirators” to qualify for a three-level enhancement” under § 3B1.1(b)).

III.

Given the foregoing precedents, we have no choice but to conclude on the record before us that the district court erred when it enhanced Defendant’s offense level by three levels pursuant to U.S.S.G. § 3B1.1(b). We accept the undisputed facts as stated in the PSR and the Government’s supplement thereto. These facts, however, simply do not establish that Defendant was a “manager or supervisor” of the DTO within the meaning of § 3B1.1(b). We can locate little, if any, evidence in the record to suggest Defendant managed or supervised “one or more other participants” in the DTO. *Id.* § 3B1.1 cmt. n.2. But such evidence is what our precedents plainly require before a district court may hold a defendant is a “manager or supervisor” of a criminal conspiracy pursuant to § 3B1.1(b). *E.g.*, *Zar*, 790 F.3d at 1058; *Roberts*, 14 F.3d at 523.

Let us begin with co-conspirator Everett Hood’s statements to authorities that Defendant “was Anita Cooper’s second in command . . . and . . . was deeply involved

in Cooper’s distribution activities.” These are conclusions, not facts. The commentary to § 3B1.1 says that “[i]n distinguishing a leadership and organizational role from one of mere management or supervision, titles such as ‘kingpin’ or ‘boss’ are not controlling.” U.S.S.G. § 3B1.1 cmt. n.4. By the same measure, we believe titles such as “second in command,” in themselves, tell us little about whether a defendant was a manager or supervisor “at all.” *Aptt*, 354 F.3d at 1286. We may say the same for the conclusion that Defendant was “deeply involved in Cooper’s distribution activities.” *Cf. United States v. Johnson*, 278 F.3d 749, 753–54 (8th Cir. 2002) (labeling the defendant as the conspiracy leader’s “right hand man” *coupled with* evidence that the leader placed the defendant “in charge” when the leader was unavailable or did not want to be disturbed held sufficient to support a § 3B1.1(b) enhancement). The Government tells us that prior to the sentencing hearing, it provided Defendant discovery materials containing the report detailing the co-conspirator’s interview. But the report is not part of the record on appeal. Nor does it appear to have been made part of the record in the district court. The burden of proof to establish the enhancement’s applicability, of course, was on the Government. *See McDonald*, 43 F.4th at 1095. This surely means the Government was responsible for presenting the report to the district court and making the report part of the record if it tended to establish Defendant was a “manager or supervisor” under § 3B1.1(b).

Co-conspirator Hood also told authorities that Defendant “went everywhere with Cooper.” Again, this is a conclusory statement largely unsupported by the facts presented. To be sure, the PSR in paragraphs 47 and 48 provides four instances where Defendant accompanied Cooper to Oklahoma City to pick up and pay for pound quantities of methamphetamine. Four trips, however, is a largely unremarkable number given paragraphs 45 and 46 of the PSR tells us Cooper, during the course of the conspiracy, traveled to Oklahoma City “roughly five times a month for at least a year,” or around sixty times in total, to purchase “bulk quantities” of methamphetamine. Moreover, even assuming Defendant was in the company of Cooper frequently, “a close personal relationship with . . . [Cooper] does not prove [D]efendant acted as a manager or supervisor.” *Roberts*, 14 F.3d at 524.

“[A] 3-level increase under § 3B1.1(b) can be predicated only on evidence [D]efendant acted in a supervisory or managerial capacity *independent* of any intimate connection to [a] major player in the criminal activity.” *Id.* That Defendant, on one identified occasion, obtained two ounces of methamphetamine from Cooper and sold an unspecified number of “ounce quantities” of the drug to an identified purchaser is of little help to the Government’s cause. Defendant’s role as a supplier of drugs to another individual absent evidence that the individual worked for Defendant and the conspiracy is not enough to establish Defendant’s role as a manager or supervisor. *See United States v. Anderson*, 189 F.3d 1201, 1212 (10th

Cir. 1999); *Roberts*, 14 F.3d at 524.

Furthermore, none of the other facts presented by the Government constitute evidence of the decision-making authority or control over a subordinate necessary to a holding that Defendant was a “manager or supervisor” under § 3B1.1(b). Defendant’s knowledge of the DTO no doubt came about from his close association with Cooper. But neither their relationship alone nor the knowledge Defendant gained about the DTO from Cooper establish the necessary authority or control over another. The same may be said of the fact that Defendant paid sources on behalf of Cooper or was available to a source if that source wanted to “check in” on Cooper. Lastly, Defendant (1) *agreeing* to help Cooper retaliate against another, (2) *discussing* with Cooper the need to purchase more methamphetamine, (3) *informing* Cooper he had located a “possible future customer,” and (4) *telling* Cooper he was “making arrangements” to purchase drugs from a new source and was going to meet with a “possible alternative source” do not further the Government’s position. Talk is cheap. Our precedents interpreting § 3B1.1(b) require more.

Because the undisputed evidence does not establish by a preponderance that Defendant was a “manager or supervisor” subject to a 3-level enhancement to his offense level under U.S.S.G. § 3B1.1(b), this matter is remanded to the district court with instructions to vacate Defendant’s present sentence and resentence him consistent with this opinion.

REMANDED WITH INSTRUCTIONS.