

2014 WL 2753813 (C.A.8) (Appellate Brief)
United States Court of Appeals, Eighth Circuit.

UNITED STATES OF AMERICA, Appellee,
v.
Wesley L. Yellow HORSE, Sr., Appellant.

No. 14-1139.
June 5, 2014.

Appeal from the United States District Court for the District of South Dakota,
Western Division, The Honorable Jeffrey L. Viken, United States District Judge

Appellee's Brief

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***II SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT**

A jury convicted Yellow Horse of conspiracy to distribute marijuana, less than 50 kilograms. The district court at sentencing found that it was reasonably foreseeable to Yellow Horse that the conspiracy involved more than 100 kilograms, and calculated his advisory guideline range accordingly. Yellow Horse was sentenced to a guidelines range sentence of 57 months in prison.

Yellow Horse makes one argument on appeal, namely, that the district court abused its discretion in determining a drug quantity exceeding 100 kilograms for sentencing purposes. The law is well established that the district court may make drug quantity determinations based on imprecise evidence, including quantities from transactions made in furtherance of the larger conspiracy, so long as it was reasonably foreseeable to Yellow Horse, even where he was not directly involved. The district court did not clearly err. Its quantity determinations were supported by a variety of evidence it found credible.

The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Accordingly, the Government does not request oral argument.

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***1 JURISDICTIONAL STATEMENT**

Yellow Horse appeals the final judgment of the district court in a criminal case. The count of conviction alleged a violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B), and the district court had jurisdiction pursuant to 18 U.S.C. §§ 1153, 3231, and 3242. The district court entered its written Judgment and Commitment on January 6, 2014. DCD 865. Yellow Horse filed a timely notice of appeal on January 16, 2014. DCD 879. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.¹

***2 STATEMENT OF THE ISSUES**

I. WHETHER THE DISTRICT COURT CLEARLY ERRED BY FINDING BY A PREPONDERANCE THAT YELLOW HORSE COULD REASONABLY FORESEE HIS CONSPIRACY INVOLVED OVER 100 KILOGRAMS OF MARIJUANA.

United States v. Holmes, Nos. 13-1660, 13-1661, 2014 WL 1876127 (8th Cir. May 12, 2014)

United States v. Walker, 688 F.3d 416 (8th Cir. 2012)

United States v. Webb, 545 F.3d 673 (8th Cir. 2008)

United States v. Waller, 689 F.3d 947 (8th Cir. 2012)

STATEMENT OF THE CASE

A. Procedural history.

Yellow Horse was indicted by a federal grand jury on May 15, 2012, alleging that he and 16 named co-defendants conspired to distribute over 100 kilograms of marijuana from October 2008 to May 15, 2012. DCD 4, pages 1-3. A superseding indictment followed on August 21, 2013, charging Yellow Horse and others with a conspiracy to distribute 50 kilograms or more of marijuana.² DCD 644, pages 1-3.

*3 All but three of the indicted co-conspirators pled guilty, and beginning on August 26, 2013, a jury trial began against Yellow Horse and two others. Yellow Horse was convicted on August 30, 2013, of a lesser-included count: conspiracy to distribute less than 50 kilograms of marijuana.³ DCD 703 (Verdict). On January 3, 2014, he was sentenced to 57 months in prison, with his judgment and commitment entered on January 6, 2014. DCD 865. His timely notice of appeal was filed on January 16, 2014. DCD 879.

B. Yellow Horse's Involvement in the Drug Conspiracy.

Yellow Horse was living in Oglala, South Dakota, on the Pine Ridge Indian Reservation. In the beginning of his involvement of the conspiracy, he was purchasing marijuana from Norton “Porky” Little Spotted Horse. PSR at ¶ 25. Little Spotted Horse was a distributor for Abraham Romero. *Id.* According to Romero, every few weeks Romero was receiving large quantities of marijuana from suppliers in Colorado in an arrangement that stretched over several years, with shipment amounts ranging from a few pounds in the beginning then later 10 pounds per shipment. PSR at ¶ 24. One of the Colorado distributors was ultimately arrested with 50 pounds of marijuana set to be delivered to Romero. *4 *Id.*

Yellow Horse met Romero in the spring of 2009. PSR at ¶ 27. Yellow Horse began receiving quantities of marijuana directly from Romero that he would repackage into smaller quantities and sell. In an interview with law enforcement, Yellow Horse confessed that he would receive quantities from Romero ranging up to about 2 pounds, and he would break those quantities into portions he sold for \$5 and \$10. *Id.* Yellow Horse also described how Romero tried to get him to sell larger quantities of marijuana, but he refused because of difficulty he had selling smaller quantities. ST Ex. 1 at page 1. He also traded cars to Romero for marijuana, and on various occasions, Yellow Horse obtained and distributed marijuana that he got from others. ST Ex. 1 at page 3. Yellow Horse also knew of others who were distributing marijuana they received from Romero. *Id.*

Yellow Horse also admitted to law enforcement that, in fall 2009, he observed Romero with “four circular metal wheel type objects.” ST Ex. 1 at page 4. He described them as looking like two halves of a semi truck wheel that were welded together. *Id.* The objects were made of aluminum, and Yellow Horse observed Romero cut the objects apart with a saw and remove marijuana that filled the inside of the objects. *Id.*

Several trial witnesses testified about observing Yellow Horse's *5 involvement in the conspiracy. Yellow Horse's son and his son's girlfriend each testified about living with Yellow Horse and witnessing his drug dealing. His son testified that he and his dad repackaged bulk marijuana into smaller quantities and sold it from their home in \$10 portions. Tr. Trans. Vol. 3 at pages 502-03. His son's girlfriend testified that she got marijuana from Yellow Horse, and she saw him in possession of a square-shaped quantity about “5 inches by 2 or 3 inches[.]” Tr. Trans. Vol. 3 at page 457. She also witnessed Yellow Horse selling marijuana from the house, ranging from small \$10 quantities up to \$50 quantities. Tr. Trans. Vol. 3 at pages 458-59. Another witness testified that “[p]robably over a hundred times” he purchased from Yellow Horse, with quantities ranging from very small amounts up to, at most, a half ounce of marijuana. Tr. Trans. Vol. 3 at 479-80.

The government also called several witnesses who described observing Yellow Horse transacting with his distributors for larger quantities. Richard Bagola testified that he saw Yellow Horse at Little Spotted Horse's house getting marijuana. Tr. Trans. Vol. 2 at page 197. When asked about quantities, Bagola discussed one instance in which he thought Yellow Horse bought a half pound from Little Spotted Horse. Tr. Trans. Vol. 2 at page 198.

Jimmy Bravo testified that, like Yellow Horse, he received marijuana from *6 Abraham Romero and from Little Spotted Horse. Tr. Trans. Vol. 2 at page 246. He also testified that he received marijuana from Yellow Horse. *Id.* He first stated that he bought it from Yellow Horse "once or twice," then later testified that it was "[p]retty much every day. Off and on." Tr. Trans. Vol. 2 at pages 246, 249. Bravo bought as much as an ounce at a time from Yellow Horse, and he saw him with 3 pounds on his table at one point. Tr. Trans. Vol. 2 at page 249. On two occasions, Bravo received a quarter pound of marijuana from Yellow Horse as a "front," for which Yellow Horse expected payment of \$300. Tr. Trans. Vol. 2 at page 251. When asked how much marijuana Bravo estimated he saw Yellow Horse with over the years, Bravo responded, "[a]bout 160 pounds." *Id.*

Abraham Romero testified that he had distributed marijuana in the past, stopped for a period of time, then started distributing marijuana again in 2008, obtaining quantities ranging from 2 pounds to 10 pounds at a time. Tr. Trans. Vol. 3 at page 523. Romero testified that he had "a whole bunch of people" selling marijuana for him. Tr. Trans. Vol. 3 at page 528. He confirmed that Yellow Horse was one of them. Tr. Trans. Vol. 3 at page 529. Romero confirmed that he met Yellow Horse through "Porky" Little Spotted Horse, and that he also supplied marijuana to Little Spotted Horse and Bravo. Tr. Trans. Vol. 3 at page 530. Romero confirmed that he provided marijuana directly to *7 Yellow Horse, both for payment up front and also on credit. Tr. Trans. Vol. 3 at pages 530-31.

Romero also testified that his supplier had been stopped and arrested in Colorado, en route delivering 50 pounds of marijuana destined for delivery to Romero in Kyle, South Dakota. Tr. Trans. Vol. 3 at pages 534-45. Romero was asked how much the supplier who got caught in Colorado had previously supplied him. He responded, "[a] hundred pounds, a hundred pounds, 120 pounds, I think. I didn't keep track. I think it's like 120." Tr. Trans. Vol. 3 at page 543. In his trial testimony, Romero also confirmed what was stated in his factual basis supporting his own plea agreement -- that it was reasonably foreseeable that the conspiracy involved more than a hundred kilograms of marijuana. *Id.*

On cross-examination by Yellow Horse's counsel, Romero testified that he was secretive about his drug business in that he did not keep written records, did not take photographs, and he hid his drugs. Tr. Trans. Vol. 3 at pages 547-48. But he was also asked whether he kept his distributors disconnected from one another: "You didn't want the other person to know about the other person, is that typically true?" Tr. Trans. Vol. 3 at page 549. And he responded, "No, they know it." *Id.* Romero was also asked if he would explain to his distributors "how many different pounds of drugs [Romero] had coming in," to which he *8 responded "[y]es." Tr. Trans. Vol. 3 at page 550.

The central issue at Yellow Horse's sentencing was, just as it is on appeal, the appropriate quantity for guidelines purposes. The government introduced the summary report from Yellow Horse's law enforcement interview (ST Ex. 1) as a sealed exhibit. Counsel for each side discussed at length their views of how the district court should determine quantity for Yellow Horse's sentencing purposes based on the trial evidence and the sentencing exhibit. The district court ultimately gave a lengthy explanation before making its ruling:

On the drug quantity issue as it affects the federal sentencing guideline calculation, in paragraph 33 of the presentence report, to set the base offense level, the government has carried its burden by a preponderance of the evidence or the greater weight of evidence that this conspiracy, reasonably foreseeable to Mr. Yellow Horse, involved at least 100 kilograms or more of marijuana. And I say that based on [ST Ex. 1], which is sealed, but in the record for the examination of the United States Court of Appeals. By my own finding from the trial testimony and the discussion today, Mr. Grey, certainly at least Mr. Yellow Horse's co-conspirators were Abraham Romero, Jimmy Bravo, Norton Little Spotted Horse, and Zeno Little. As those names appear in [ST Ex. 1], the scope of this conspiracy becomes clear it was not just

Abraham Romero, secretive as though he may be, it's very clear that Mr. Yellow Horse had knowledge of all of those co-conspirators being involved with Romero as a source. And the amounts of marijuana involved based on trial testimony I don't find to be fantastic; I find them to be the recollections of people who, as always in drug cases, have a motivation to testify. The jury can believe or disbelieve them, but reality is that a jury sorted out the credible issues and convicted Mr. Yellow Horse of this conspiracy to distribute marijuana.

*9 My own view of the testimony, as I sat and listened to it throughout the course of the trial, is that Mr. Yellow Horse, though in terms of handling quantities, was not a major player in this matter and so testified to by Agent Cooper his knowledge of the foreseeability they had of the amount of marijuana involved by the people who are engaged in the conspiracy, as I said, three of whom have pled guilty with factual basis statements all under oath stating in the factual basis statements that the conspiracy involved in excess of a hundred kilograms of marijuana. That squares with my recollection of the trial testimony. It could be considered relatively conservative if you view not only [ST Ex. 1], but the information recited in the presentence report to which you made objections, but I think which the government has overcome with its presentation.

So my finding based on the evidence at trial which I heard, the involvement of Mr. Yellow Horse with Romero, Bravo, Little Spotted Horse, and Zeno Little, and the circumstances I have in front of me, though not a precise calculation, certainly involved 220 pounds or more of marijuana, which is a hundred kilograms or more of marijuana, an appropriate drug quantity supported by the evidence for a base offense level of 26. That's my ruling.

ST at pages 47-49.

Additional facts will be added as necessary.

SUMMARY OF THE ARGUMENT

The parties agree on the applicable law. The district court was allowed to determine drug quantity, applying a preponderance standard, using amounts from transactions in furtherance of the broader conspiracy. Those amounts may include transactions in which Yellow Horse was not directly involved, so long as it was reasonably foreseeable to Yellow Horse. Because of the nature of the illicit *10 drug economy, the law does not require precision -- a district court may properly arrive at numeric calculations based on imprecise evidence.

Here, numerous witnesses placed Yellow Horse in the midst of a large marijuana conspiracy. He regularly sold marijuana to many clients who came to his house. Yellow Horse dealt directly with an area distributor who, by his own admission, received and distributed large quantities of marijuana, totaling over 100 kilograms. Yellow Horse admitted to seeing that distributor cut into a large packaged quantity. Another co-conspirator estimated seeing Yellow Horse with about 160 pounds of marijuana over the years. Several co-conspirators admitted under oath that the conspiracy involved over 100 kilograms of marijuana.

Given that evidence, the district court did not clearly err in holding, for guidelines purposes, that it was reasonably foreseeable to Yellow Horse that his conspiracy involved over 100 kilograms of marijuana. In any event, the district court also stated that it would arrive at the same sentence under the statutory sentencing factors, thereby rendering any error harmless.

ARGUMENT

I. THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING BY A PREPONDERANCE THAT YELLOW HORSE COULD REASONABLY FORESEE HIS CONSPIRACY INVOLVED OVER 100 KILOGRAMS OF MARIJUANA.***11 A. Standard of review.**

“ [D]rug quantity and identity determinations are factual findings, which we review for clear error, applying the preponderance-of-the-evidence-standard.’ ” *United States v. Colton*, 742 F.3d 345, 358 (8th Cir. 2014) (quoting *United States v. Walker*, 688 F.3d 416, 420 (8th Cir. 2012)). “ ‘This court will overturn a finding of drug quantity only if the entire record definitively and firmly convinces us that a mistake has been made.’ ” *United States v. Holmes*, Nos. 13-1660, 13-1661, 2014 WL 1876127 at *3 (8th Cir. May 12, 2014) (quoting *United States v. Young*, 689 F.3d 941, 945 (8th Cir. 2012)) (additional internal citation omitted).

B. The district court properly considered amounts from transactions in which Yellow Horse was not directly involved.

The applicable law in this appeal is well settled. “ ‘In a drug conspiracy case, the district court may consider amounts from drug transactions in which the defendant was not directly involved if those dealings were part of the same course of conduct or scheme.’ ” *Walker*, 688 F.3d at 421 (quoting *United States v. Bradley*, 643 F.3d 1121, 1126 (8th Cir. 2011) (itself quoting *United States v. Rodriguez*, 484 F.3d 1006, 1014 (8th Cir. 2007))). The district court, for sentencing purposes, “ ‘may consider all transactions known or reasonably *12 foreseeable to the defendant that were made in furtherance of the conspiracy.’ ” *Walker*, 688 F.3d at 421 (quoting *United States v. Payton*, 636 F.3d 1027, 1046 (8th Cir. 2011)) (additional citations omitted).

This Court has also recognized that a sentencing court “ ‘may make a specific numeric determination of quantity based on imprecise evidence.’ ” *Walker*, 688 F.3d at 421 (quoting *United States v. Roach*, 164 F.3d 401, 413 (8th Cir. 1998)). Also, “ ‘[a] sentencing court may determine drug quantity based on the testimony of a co-conspirator alone.’ ” *Walker*, 688 F.3d at 421 (quoting *United States v. Sara-bia-Martinez*, 276 F.3d 447, 450 (8th Cir. 2002)).

It is of no consequence that the jury's verdict specified a quantity lower than the quantity found by the district court for sentencing purposes. “[A] district court may impose a sentence based on a drug quantity determination greater than that found by the jury so long as the sentence does not exceed the statutory maximum of the convicted offense and the district court's calculation is supported by sufficient evidence.” *United States v. Webb*, 545 F.3d 673, 677 (8th Cir. 2008) (citing *United States v. Serrano-Lopez*, 366 F.3d 628, 638 (8th Cir. 2004); *United States v. Johnston*, 353 F.3d 617, 624 (8th Cir. 2003) (per curiam)).

*13 Here, the district court did not clearly err in determining that it was reasonably foreseeable to Yellow Horse that his conspiracy involved over 100 kilograms of marijuana. Yellow Horse confessed to being part of Romero's network of marijuana distributors, admitting that he obtained quantities directly from Romero on multiple occasions. He knew various other of Romero's distributors, even having been first introduced to Romero by another of Romero's distributors--Little Spotted Horse--from whom Yellow Horse also received marijuana. Yellow Horse also admitted witnessing Romero cut into one of four large wheel-like objects and remove marijuana.

Romero, for his part, confirmed that the conspiracy involved over 100 kilograms of marijuana. He also admitted that he regularly received 10 pound shipments, and that a 50 pound shipment had been intercepted in Colorado.

Another of Romero's distributors, Jimmy Bravo, testified that he bought marijuana from Yellow Horse often, seeing him with as much as 3 pounds at a time. When asked to estimate how much marijuana he had seen Yellow Horse possessing over the years, Bravo's estimate was about 160 pounds. Moreover, the district court considered additional factual basis

statements from other defendants indicted in the conspiracy in which they each admitted, under oath, that *14 it was reasonably foreseeable to them that the conspiracy involved over 100 kilograms of marijuana.

All taken together, whether he was directly involved with transactions totaling 100 kilograms or not, the district court did not clearly err in concluding, by a preponderance of the evidence, that it was foreseeable to Yellow Horse that his conspiracy involved over 100 kilograms of marijuana. Especially given the district court's careful and extensive record on the issue, Yellow Horse cannot meet his burden on appeal of showing, "definitively and firmly," that the district court made a mistake in calculating the quantity. *Holmes*, 2014 WL 1876127 at *3.

C. If there had been error, it would have been harmless.

Even assuming procedural error occurred, this Court does not remand for resentencing if the error was harmless, i.e., if the sentencing record "clearly indicated the district court would have imposed the same sentence regardless of the error." *United States v. Waller*, 689 F.3d 947, 958 (8th Cir. 2012) (summarizing the holding of *United States v. Sanchez-Martinez*, 633 F.3d 658, 660-61 (8th Cir. 2011)).

*15 The district court here explained its sentence of 57 months imprisonment with reference to 18 U.S.C. § 3553, stating "I do think that guidelines would put me in the same place as the sentencing statute in terms of the seriousness of the conduct and the need for punishment." ST at page 75. Thus, even if the quantity calculation was erroneous, it appears from the record that the district court would have imposed the same sentence.

CONCLUSION

Based on the foregoing, the government respectfully requests this Court affirm Yellow Horse's sentence.

Footnotes

- 1 References to the record will be as follows: Yellow Horse's Appellant Brief will be called "AB" followed by appropriate page numbers. The district court record will be denoted by the letters "DCD" followed by the appropriate docket number and relevant page number. The jury trial transcript will be cited as "Tr. Trans.," followed by relevant volume and page numbers. Admitted trial exhibits will be referred to as "Tr. Exh." followed by the relevant exhibit. The pre-sentence investigation report prepared by United States Probation will be referred to as "PSR" followed by the relevant paragraph number. The transcript from Yellow Horse's January 3, 2014, sentencing hearing will be referred to as "ST" followed by the relevant page number. An exhibit from the sentencing hearing will be referred to as "ST Ex. 1" followed by the relevant page number.
- 2 The superseding indictment was sought pursuant to a policy memorandum issued by the Attorney General of the United States on August 12, 2013. See www.justice.gov/oip/docs/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf. Of particular relevance here, the policy memorandum encourages prosecutors to decline to charge quantities necessary to trigger a mandatory minimum sentence under certain circumstances, yet maintains that prosecutors must remain candid with the court about quantity at sentencing.
- 3 The jury's verdict convicting Yellow Horse of a conspiracy involving less than 50 kilograms of marijuana rendered his maximum sentence at 5 years imprisonment, pursuant to 21 U.S.C. § 841(b)(1)(D).