

1
2 UNITED STATES COURT OF APPEALS
3 FOR THE SECOND CIRCUIT
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5
6 August Term, 2003
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8 (Argued December 8, 2003 Decided October 5, 2004)
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10 Docket Nos. 01-1215, 01-1240, 01-1242, 01-1374, 01-1577
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14 UNITED STATES OF AMERICA,
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16 Appellee,
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18 v.
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20 RASHEEN LEWIS, also known as Rasheed Lewis, also known as
21 "Noriega", also known as Francis G. Sheen, KENNETH RICHARDSON aka
22 "Prino", aka "Tyree", aka "Ricco", AARON HARRIS, aka "Dog", aka
23 "Toast", aka "DMX", aka "Hit Man Sosa", JOHN FOSTER, also known
24 as "D.C.", also known as Troy Kelly, also known as Anthony
25 Johnson, also known as John Billups, also known as David Nunley,
26 LUKE JONES, aka "Mega",
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28 Defendants-Appellants.
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32 Before:

33 NEWMAN, CARDAMONE, and KATZMANN,
34 Circuit Judges.
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38 Defendants appeal their judgments of conviction and
39 sentences, some entered after a jury trial and some after a
40 guilty plea, in the United States District Court for the District
41 of Connecticut (Nevas, J.) during the period from December 2000
42 to October 2001. The convictions were imposed for activities
43 related to a narcotics conspiracy in Bridgeport, Connecticut.
44 Defendants raise a number of issues on appeal, two of which
45 relating to defendants Jones and Lewis are addressed in this
46 opinion, and the rest of which are considered in a summary order
47 filed concurrently with this opinion.
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49 Affirmed.
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DAVID L. LEWIS, New York, New York (Lewis & Fiore, New York, New York, of counsel), for Defendant-Appellant Rasheen Lewis.

BARRY M. FALLICK, New York, New York (Rochman Platzer Fallick & Sternheim, LLP, New York, New York, of counsel), for Defendant-Appellant Kenneth Richardson.

LAURA J. LEFKOWITZ, New York, New York (Roger L. Stavis, Stavis & Kornfeld, LLP, New York, New York, of counsel), for Defendant-Appellant John Foster.

EDWARD T. MURNANE, Jr., Bridgeport, Connecticut, (Gary A. Mastronardi, Law Firm of Gary A. Mastronardi, Bridgeport, Connecticut, of counsel), for Defendant-Appellant Luke Jones.

DAWN E. CARADONNA, Law Office of Dawn E. Caradonna, Peterborough, New Hampshire (Richard B. Lind, Law Office of Richard B. Lind, New York, New York, of counsel), for Defendant-Appellant Aaron Harris.

ALEX V. HERNANDEZ, Assistant United States Attorney, Bridgeport, Connecticut (Kevin J. O'Connor, United States Attorney, Alina P. Marquez, Jeffrey A. Meyer, Assistant United States Attorneys, District of Connecticut, Bridgeport, Connecticut, of counsel), for Appellee United States of America.

1 CARDAMONE, Circuit Judge:

2 Five defendants: John Foster, Aaron Harris, Rasheen Lewis,
3 Kenneth Richardson, and Luke Jones, appeal their judgments of
4 conviction and sentences entered in the United States District
5 Court for the District of Connecticut (Nevas, J.) on June 21,
6 2001, April 6, 2001, March 26, 2001, April 4, 2001, and October
7 29, 2001, respectively, after a jury convicted Foster, Harris,
8 Lewis and Richardson of conspiracy to distribute cocaine and
9 heroin in violation of 21 U.S.C. § 846 in December 2000 and after
10 Jones pled guilty to unlawful possession of a firearm in
11 violation of 18 U.S.C. § 922(g)(1) in September 2000.

12 Defendants raise a number of objections to the proceedings
13 below. Although we affirm the judgments of conviction and
14 sentences in each case, two of the objections warrant a writing
15 and are addressed in this opinion. Defendants' remaining
16 challenges are without merit and are disposed of in a summary
17 order filed concurrently with this opinion.

18 We turn to consider whether it was error for the district
19 court: (1) to increase defendant Harris' sentence for use of a
20 minor in the drug conspiracy pursuant to U.S.S.G. § 3B1.4, and
21 (2) to deny defendant Lewis' motion to suppress evidence seized
22 from his bedroom.

1 BACKGROUND

2 At the eight-day trial the government sought to prove that
3 defendants Harris, Richardson, Lewis and Foster¹ conspired
4 together from 1997 to 2000 to distribute large amounts of heroin,
5 cocaine and cocaine base (crack) at the P.T. Barnum public
6 housing project in Bridgeport, Connecticut and elsewhere in that
7 city. The evidence consisted of, among other things, the
8 testimony of cooperating witnesses -- two of whom had been
9 lieutenants in the drug distribution ring and one of whom was a
10 major supplier to the conspiracy -- law enforcement agents, and
11 defendant Harris. The testimony showed there was a retail drug
12 business operating in the middle court area of the P.T. Barnum
13 project, and that this drug business was run by Luke, Lyle, and
14 Lonnie Jones.² It also showed that defendants Harris,
15 Richardson, Lewis and Foster assisted the Joneses in their retail
16 drug distribution scheme, traveling with and for the Joneses to
17 buy the narcotics, providing the narcotics to the street level
18 sellers -- or selling it themselves -- and carrying weapons and
19 wearing bullet proof vests to protect themselves and their
20 product.

¹ A fifth defendant, Craig Baldwin, also went to trial, but was acquitted by the jury.

² The initial indictments included Luke Jones and two additional defendants, Lonnie and Lance Jones. The district court severed their trials from those of the individuals tried in the instant case. We address Lonnie and Lance Jones' appeals, for which we heard oral argument on the same day as the argument in this case, in a separate opinion and order.

1 In the summary order filed concurrently with this opinion,
2 we affirm the other increases the district court relied on to
3 increase Harris' offense level. Even were we to decide that the
4 trial court incorrectly applied § 3B1.4 in order to increase
5 Harris' offense level, his sentence of life imprisonment would
6 still be mandatory under the guidelines since his offense level
7 would only decrease to 46.

8 The district court based its offense level enhancement under
9 § 3B1.4 on the participation of Glenda Jiminez, who was a minor
10 when she began selling drugs at the P.T. Barnum housing project
11 where Harris played a supervisory role. Jiminez was a witness
12 for the prosecution at trial. Harris contends the district court
13 erred in enhancing his sentence because there was no evidence he
14 personally acted to bring Jiminez into the conspiracy, he was not
15 aware she was a minor, and it was not reasonable to foresee that
16 a minor would be used to further this conspiracy simply because
17 it was a retail drug operation in a public housing project. We
18 review the district court's factual findings for clear error and
19 review its legal determinations de novo, giving due deference to
20 its application of the guidelines to the facts. United States v.
21 Berg, 250 F.3d 139, 142 (2d Cir. 2001).

22 The guidelines provide for a two-level increase "[i]f the
23 defendant used or attempted to use a person less than eighteen
24 years of age to commit the offense." U.S.S.G. § 3B1.4. In
25 addition, the guidelines instruct that any adjustments in chapter
26 3, of which § 3B1.4 is a part, are to be based, "in the case of a

1 jointly undertaken criminal activity . . . , [on] all reasonably
2 foreseeable acts and omissions of others in furtherance of the
3 jointly undertaken criminal activity." § 1B1.3(a)(1)(B). Since
4 the offense of conviction was a conspiracy, which falls under the
5 definition of jointly undertaken activity in § 1B1.3(a)(1)(B),
6 the district court believed Harris would be responsible for any
7 reasonably foreseeable acts of others taken in furtherance of the
8 conspiracy. It specifically found it was reasonable for Harris
9 to foresee that minors would be recruited to distribute narcotics
10 under the circumstances at issue in this case and therefore the
11 enhancement was appropriate.

12 We write on the issue of whether § 3B1.4 can be applied to
13 increase the offense level of the leader of a conspiracy who was
14 not directly involved with recruiting a minor, and did not have
15 actual knowledge that such individual was a minor, but who
16 nonetheless had general authority over the activities in
17 furtherance of the conspiracy. This issue is one of first
18 impression in this Circuit.

19 First, we agree with the majority of our sister circuits
20 that have ruled on § 3B1.4. Those circuits have held, based on
21 its plain language, that § 3B1.4 does not require scienter in
22 order to apply the enhancement, that is, it is not necessary for
23 the government to show that a defendant had actual knowledge that
24 the person undertaking criminal activity was a minor. United
25 States v. Thornton, 306 F.3d 1355, 1358-60 (3d Cir. 2002); United
26 States v. Gonzalez, 262 F.3d 867, 870 (9th Cir. 2001); United

1 States v. McClain, 252 F.3d 1279, 1285-87 (11th Cir. 2001). In
2 addition, we are in agreement with two of our sister circuits
3 that have held that the intersection of §§ 3B1.4 and
4 1B1.3(a)(1)(B), based on the plain language of those provisions,
5 mandates the result reached by the district court in this case.
6 McClain, 252 F.3d at 1287-88; United States v. Patrick, 248 F.3d
7 11, 27-28 (1st Cir. 2001). The rationale of these cases is
8 bottomed on the introductory commentary to Part B of chapter 3 of
9 the guidelines, of which § 3B1.4 is a part. The comment states
10 that "[t]he determination of a defendant's role in the offense is
11 to be made on the basis of all conduct within the scope of
12 § 1B1.3 (Relevant Conduct)." U.S.S.G. ch. 3, pt. B, introductory
13 cmt. Section 1B1.3(a)(1)(B) provides that where the offense is a
14 jointly undertaken criminal activity, chapter 3 sentencing
15 adjustments are to be made on the basis of "all reasonably
16 foreseeable acts and omissions of others in furtherance of the
17 jointly undertaken criminal activity." The offense of conspiracy
18 is a jointly undertaken criminal activity, § 3B1.4 is a chapter 3
19 sentencing adjustment, and we agree with the district court's
20 finding that the use of a minor by one of defendant Harris' co-
21 conspirators was a reasonably foreseeable act in furtherance of
22 the conspiracy. It follows that these two guideline provisions
23 permit the two-level enhancement.

24 Harris contends that the decisions denying such an
25 enhancement, in the absence of evidence that the defendant
26 himself affirmatively took steps to recruit a minor, are the more

1 reasonable interpretation of these guidelines. The cases Harris
2 cites are inapposite because they dealt with the question of what
3 constitutes use (or attempted use) of a minor for the purpose of
4 § 3B1.4, and not with the intersection of §§ 3B1.4 and
5 1B1.3(a)(1)(B). See United States v. Parker, 241 F.3d 1114,
6 1120-21 (9th Cir. 2001); United States v. Butler, 207 F.3d 839,
7 844-49 (6th Cir. 2000). Although these cases expressed concern
8 that all co-conspirators might be strictly liable whenever a
9 minor is involved in any way in their conspiracy, we think such
10 concern is unwarranted. The sentencing enhancement may be
11 imposed on co-conspirators who did not themselves use or attempt
12 to use minors only if those co-conspirators could have reasonably
13 foreseen that minors would be used by others in their conspiracy.
14 See § 1B1.3(a)(1)(B). This requirement of reasonable
15 foreseeability means that courts must assess the factual
16 circumstances in each case.

17 In this case, the district court was not clearly erroneous
18 to find that Harris could reasonably have foreseen that a minor
19 would be used in the conspiracy that he headed. Harris was an
20 organizer and leader of the drug distribution ring in a public
21 housing project. Even though he did not request that a minor be
22 recruited or even know that this had occurred, he should have
23 anticipated that co-conspirators under his supervision would
24 recruit a minor because they were operating in an environment
25 where adults and minors lived together in close proximity.
26 Harris' sentence is therefore affirmed.

1 well-delineated exceptions to the warrant requirement. Katz v.
2 United States, 389 U.S. 347, 357 (1967). One of the exceptions
3 is a search conducted pursuant to consent by an authorized third
4 party. In such case, neither a warrant nor probable cause is
5 necessary to justify the search; the government is simply
6 required to prove by a preponderance of the evidence adequate
7 authority to consent. See, e.g., United States v. Matlock, 415
8 U.S. 164, 171 (1974).

9 The defendant concedes that his mother had permission to
10 access his room, and had actually entered it a number of times to
11 clean it. Further, it is uncontested that there was no lock on
12 his bedroom door, which was a room located within his mother's
13 bedroom. That proof demonstrates that she had access and
14 permission to enter, and could indeed enter at any time. Under
15 the law of this Circuit, this evidence is sufficient to show that
16 the mother had actual authority to consent to the search of her
17 son's bedroom. See Koch v. Town of Brattleboro, 287 F.3d 162,
18 167 (2d Cir. 2002).

19 Once a person gives authority, to be shared in common, with
20 another over certain premises, any hope that a search of those
21 premises based on that other person's consent will be found a
22 Fourth Amendment violation is slim at best. The reason for this
23 conclusion is because the Supreme Court made clear that common
24 authority rests on the notion that any co-inhabitant can permit
25 inspection in his/her own right and others, including defendant,
26 have assumed the risk that such permission to search might occur.

1 Matlock, 415 U.S. at 171 n.7. Accordingly, the defendant's
2 decision to permit his mother joint access to his bedroom limits
3 his reasonable expectation of privacy in that room, and to that
4 extent also limits his Fourth Amendment protection in the effects
5 seized there. See id.

6 Moreover, the case law does not support Lewis' claim that
7 the officers should have asked his permission to search since he
8 was outside of the apartment in handcuffs in a police car at the
9 time of the search. Supreme Court and Second Circuit law
10 establishes that in situations where the defendant is present --
11 and even in situations where the defendant has already refused
12 consent -- the officers may nevertheless rely on consent from a
13 third party who has the requisite authority to give it. See,
14 e.g., Matlock, 415 U.S. at 166, 171 (warrantless search may be
15 justified based on the consent of a third party with proper
16 authority even when the arrested defendant was on the scene and
17 available to give consent); United States v. Davis, 967 F.2d 84,
18 86-88 (2d Cir. 1992) (third-party consent justified a search and
19 seizure despite fact that defendant was in the custody of police
20 in squad car outside and was never asked to consent); see also
21 United States v. Sumlin, 567 F.2d 684, 687-88 (6th Cir. 1977)
22 (holding that since Matlock did not rely on the defendant's
23 absence in order to justify third-party consent, but instead
24 relied on an assumption of risk analysis, it was not
25 constitutionally significant that defendant refused to consent to
26 the search before the officers requested and were given third-

1 party consent). In consequence, the search of Lewis' bedroom
2 while he was present outside does not violate his Fourth
3 Amendment rights.

4 CONCLUSION

5 Accordingly, for the reasons stated, we affirm the sentence
6 imposed upon Harris and the order denying Lewis' suppression
7 motion. Because we have resolved all the other issues on this
8 appeal in the summary order filed concurrently with this opinion,
9 the judgments of conviction are affirmed.

10 However, the mandate in this case will be held pending the
11 Supreme Court's decision in United States v. Booker, No. 04-104,
12 and United States v. Fanfan, No. 04-105 (argued October 4, 2004).
13 Should any party believe there is a need for the district court
14 to exercise jurisdiction prior to the Supreme Court's decision,
15 it may file a motion seeking issuance of the mandate in whole or
16 in part. Although any petition for rehearing should be filed in
17 the normal course pursuant to Rule 40 of the Federal Rules of
18 Appellate Procedure, the court will not reconsider those portions
19 of its opinion that address the defendants' sentences until after
20 the Supreme Court's decision in Booker and Fanfan. In that
21 regard, the parties will have until 14 days following the Supreme
22 Court's decision to file supplemental petitions for rehearing in
23 light of Booker and Fanfan.