

**United States Court of Appeals  
FOR THE EIGHTH CIRCUIT**

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No. 98-2962EA

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United States of America,

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Appellee,

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v.

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On Appeal from the United States

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District Court for the

Gloria Rodriguez-Ochoa; Rosa  
Martinez-Simental,

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Eastern District of Arkansas.

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Appellants.

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Submitted: February 4, 1999

Filed: February 24, 1999

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Before McMILLIAN, RICHARD S. ARNOLD, and MORRIS SHEPPARD  
ARNOLD, Circuit Judges

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RICHARD S. ARNOLD, Circuit Judge.

Gloria Rodriguez-Ochoa and Rosa Martinez-Simental appeal the sentences imposed by the District Court<sup>1</sup> following their guilty pleas to possession of a controlled substance with intent to deliver, in violation of 21 U.S.C. § 841(a)(1).

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<sup>1</sup>The Honorable Garnett Thomas Eisele, United States District Judge for the Eastern District of Arkansas.

According to Ms. Rodriguez-Ochoa's presentence report, she was the driver and Martinez-Simental was a passenger in a vehicle stopped for speeding; a consensual search of the vehicle revealed 11.41 kilograms of methamphetamine. Before sentencing, defendants jointly moved for a downward departure under U.S. Sentencing Guidelines Manual § 5K2.0, p.s. (1998), based on their claim that they mistakenly believed that they were transporting marijuana, not methamphetamine. At the sentencing hearing, the District Court denied the motion; sentenced Ms. Rodriguez-Ochoa to 10 years imprisonment, the statutory minimum, followed by 5 years supervised release; and sentenced Ms. Martinez-Simental to 5 years and 10 months imprisonment followed by 5 years supervised release. The shorter sentence was imposed on Ms. Martinez-Simental because she had no criminal history and therefore qualified for a "safety valve" reduction in sentence. See U.S.S.G. § 5C1.2.

On appeal, defendants argue that the Guidelines did not contemplate a mistake of fact such as theirs, and thus it should be the basis for a downward departure under section 5K2.0. We disagree. The Sentencing Commission explicitly considered the effect of a drug defendant's mistake of fact on his or her sentencing accountability. See U.S. Sentencing Guidelines Manual § 1B1.3, comment. (n.2(a)(1)) (1998). The District Court correctly concluded here that it could not depart on that basis. The crime to which defendants pleaded guilty was a violation of 21 U.S.C. § 841(a)(1), possessing a controlled substance (any controlled substance) with the intent to distribute it. The nature of the controlled substance becomes relevant only as a sentencing factor. See 21 U.S.C. § 841(b)(1)(A)(viii) (mandatory minimum of ten years for certain quantities of methamphetamine). Cf. United States v. Strange, 102 F.3d 356, 359-61 (8th Cir. 1996) (irrelevant that defendants thought they were transporting marijuana instead of cocaine).

As the District Court said, there is a sense in which the sentence can be described as unfair. But "it is certainly within the province of Congress to resolve

that there is some deterrent value in exposing a drug trafficker to liability for the full consequences, both expected and unexpected, of his own unlawful behavior.” Id. at 361.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.