United States Court of Appeals
Fifth Circuit
F I L E D
April 21, 2006
Charles R. Fulbruge III
Clerk

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UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 04-41721

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DAVID HENRY TREFT,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

Before HIGGINBOTHAM, DeMOSS, and OWEN, Circuit Judges.

DeMOSS, Circuit Judge:

On June 1, 2004, a jury found David Henry Treft guilty of knowingly or intentionally manufacturing, distributing, or dispensing, or possessing with the intent to manufacture, distribute, or dispense, 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers in violation of 21 U.S.C. § 841(a)(1). The presentence investigation report ("PSR")

recommended a base offense level of 30 for Treft under the United States Sentencing Guidelines ("U.S.S.G."), based on the discovery of 36 empty pseudoephedrine pill packages — which, according to the PSR, contained 77.76 grams of pseudoephedrine when full — in Treft's trash and 99.9 grams of marijuana in Treft's home. The PSR further recommended that the court not consider the 4128.2 grams of liquid containing trace amounts of methamphetamine also found in Treft's home for sentencing purposes pursuant to note 1 of the commentary to § 2D1.1, although the PSR noted that the same liquid should be counted for minimum mandatory sentencing purposes under 21 U.S.C. § 841(b). Treft objected to the PSR's estimate regarding pseudoephedrine and to its use of facts not found by a jury beyond all reasonable doubt in calculating his sentence. He also requested that the district court grant a two-level adjustment pursuant to U.S.S.G. § 2D1.1(b)(6) for satisfying the criteria in § 5C1.2, the "safety valve" provision. The district court rejected Treft's objections and his request for a safety valve adjustment and sentenced him to the statutory minimum of 10 years' imprisonment under 21 U.S.C. § 841(b)(1)(A). Treft appealed, challenging his conviction and sentence. For the following reasons, we affirm both.

I. Facts and Proceedings

In late 2002, an individual complained to the police about chemical odors coming from Treft's home. The police subsequently searched Treft's trash and found thirty-six empty pseudoephedrine packages, peeled lithium batteries, and other items used in the

production of methamphetamine. Based on this information, the police obtained a search warrant and searched Treft's residence. There, the police discovered 0.66 grams of methamphetamine, 99.9 grams of marijuana, 4128.2 grams of a liquid that tested positive for methamphetamine, $13,000 in cash, and other evidence of an active methamphetamine laboratory.

On December 10, 2003, a federal grand jury returned a one-count indictment, charging Treft with knowingly or intentionally manufacturing, distributing, or dispensing, or possessing with the intent to manufacture, distribute, or dispense, 50 grams or more of methamphetamine, its salts, isomers, or salts of its isomers and 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers, all in violation of 21 U.S.C. § 841(a)(1). Treft plead not guilty to the charges against him and proceeded to trial. At the conclusion of the Government's case, Treft moved for a judgment of acquittal, which the district court granted as to the 50 grams of pure methamphetamine but denied as to the 500 grams of a mixture or substance containing a detectable amount of methamphetamine. The jury found Treft guilty of the remaining charge, and the court ordered the preparation of a PSR for sentencing.

The PSR prepared for sentencing recommended a base offense level of 30 for Treft under U.S.S.G. § 2D1.1, based on the discovery of 36 empty pseudoephedrine pill packages, which once contained 77.76 grams of pseudoephedrine, in Treft's trash and 99.9

grams of marijuana in Treft's home. The 4128.2 grams of liquid containing traces of methamphetamine also found in Treft's home were not considered for sentencing purposes pursuant to note 1 of the commentary to U.S.S.G. § 2D1.1,[1] although that same liquid was considered for purposes of 21 U.S.C. § 841(b).[2] After discussing Treft's criminal history and offender characteristics, the PSR concluded that the guideline range for sentencing was 120 to 121 months, considering the statutory minimum term of imprisonment under 21 U.S.C. § 841(b) of 10 years and the maximum term of imprisonment under the guidelines of 121 months. Treft submitted written objections to the PSR, complaining that the PSR's calculation of the amount of pseudoephedrine attributable to him was unreasonable and that the PSR should not have incorporated facts not found by a jury beyond all reasonable doubt in

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[1]Note 1 reads, in substantial part,

> "Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. *Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used.*

U.S.S.G. § 2D1.1 cmt. n.1 (2003) (emphasis added). The district court used the 2003 U.S. Sentencing Guidelines Manual in sentencing Treft.

[2]Section 841(b)(1)(A) provides, in part,

> In the case of a violation of subsection (a) of this section involving . . . 500 grams or more of *a mixture or substance containing a detectable amount of methamphetamine*, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . .

21 U.S.C. § 841(b)(1)(A) (2000) (emphasis added).

calculating his sentence. He also requested that the district court grant a two-level adjustment pursuant to U.S.S.G. § 2D1.1(b)(6) for satisfying the criteria in § 5C1.2, the "safety valve" provision. The district court rejected Treft's objections and his request for a safety valve adjustment and, adopting the PSR's recommendations, sentenced him to 10 years' imprisonment. Treft appealed, challenging his conviction and sentence.[3]

On appeal, Treft argues (1) that the evidence is insufficient to support his conviction, (2) that he was sentenced in violation of the Sixth Amendment, and (3) that the district court erred in denying Treft's request for safety valve relief.

II. Discussion

A. Sufficiency of the Evidence

In an ordinary sufficiency of the evidence case, we review a defendant's claim that the evidence is insufficient to support his conviction in the light most favorable to the verdict, accepting all credibility choices and reasonable inferences made by the jury. *United States v. Wise*, 221 F.3d 140, 147 (5th Cir. 2000); *United States v. Lage*, 183 F.3d 374, 382 (5th Cir. 1999). We must uphold the conviction if a rational jury could have found that the

[3]Treft's original appeal was not timely filed, and this Court remanded the case to the district court for a determination of whether his failure to file in a timely manner was excusable. *United States v. Treft*, No. 04-41721 (5th Cir. Jan. 5, 2005). The district court found the untimely filing excusable and returned the case to this Court for further proceedings. *United States v. Treft*, No. 4:03-CR-190 (E.D. Tex. Feb. 23, 2005).

government proved the essential elements of the crime charged beyond a reasonable doubt. *Wise*, 221 F.3d at 147; *Lage*, 183 F.3d at 382. This standard of review is the same regardless of whether the evidence is direct or circumstantial. *Wise*, 221 F.3d at 147; *Lage*, 183 F.3d at 382.

However, this is not an ordinary sufficiency of the evidence case. Treft does not challenge the factual basis for his conviction; he challenges the legal basis for attributing 500 grams of a mixture or substance containing methamphetamine to him. According to Treft, (1) the liquid containing traces of methamphetamine found in his home should not have been counted for purposes of 21 U.S.C. § 841 because it was an unmarketable mixture under *Chapman v. United States*, 500 U.S. 453 (1991), and (2) there is insufficient evidence to support his conviction if that liquid is not counted. Thus, this case hinges on a legal determination of whether *Chapman*'s marketability test applies in § 841 cases involving methamphetamine. We apply a *de novo* standard of review to legal determinations, *see United States v. Bellew*, 369 F.3d 450, 452 (5th Cir. 2004), but where, as here, a defendant raises a legal argument for the first time on appeal,[4] we review for plain error,

[4]Granted, Treft moved for a judgment of acquittal at trial, but he did not raise his *Chapman* claim at that time. Moreover, he dropped his motion for judgment of acquittal as to the 500 grams of a mixture or substance containing methamphetamine once the district court granted it as to the 50 grams of pure methamphetamine. Thus, he failed to satisfy the purpose of requiring a defendant to object to preserve an issue for review: "to call the court's attention to

see United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), *abrogated in part by Johnson v. United States*, 520 U.S. 461 (1997). We will find reversible error only if there was an error, the error was clear or obvious, and the error affected the defendant's substantial rights. *Calverley*, 37 F.3d at 162-64 (citing *United States v. Olano*, 507 U.S. 725 (1993)).

Because we find that there was no error committed regarding the calculation of methamphetamine quantity in this case, we affirm Treft's conviction. The law in this Circuit is clear: the *Chapman* marketability test does not apply when determining whether a liquid is a mixture or substance containing methamphetamine under § 841. *See United States v. Anderson*, 987 F.2d 251, 257-58 (5th Cir. 1993); *United States v. Sherrod*, 964 F.2d 1501, 1509-11 (5th Cir. 1992); *see also United States v. Palacios-Molina*, 7 F.3d 49, 52-53 (5th Cir. 1993) ("[I]t would appear that [*Chapman*'s] market-oriented analysis was not intended to apply to methamphetamine or PCP. In fact, this Circuit has recognized as much."). Treft gives no reason why we should change our law, other than citing a Seventh Circuit case, *United States v. Stewart*, 361 F.3d 373, 377-80 (7th Cir. 2004), that conflicts with Fifth Circuit precedent. Absent an

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the potential error 'in such a manner so that the district court may correct itself and thus, obviate the need for [appellate] review.'" *United States v. Gutierrez-Ramirez*, 405 F.3d 352, 355 (5th Cir. 2005) (quoting *United States v. Rodriguez*, 15 F.3d 408, 414 (5th Cir. 1994)).

intervening Supreme Court or en banc decision or a change in statutory law,[5] we are bound to follow a prior panel's decision. *United States v. Anderson*, 853 F.2d 313, 320 (5th Cir. 1988). Accordingly, we find that Treft's challenge to the calculation of the quantity of methamphetamine found in his home must fail and, therefore, affirm Treft's conviction.

B. *Booker* Challenge

The record demonstrates, and the Government does not dispute, that Treft made a *Blakely* objection at sentencing by objecting to the district court's adoption of the PSR, which used facts – empty pseudoephedrine packages discovered in his trash and marijuana discovered in his home – not found by a jury beyond a reasonable doubt in calculating his sentence. Accordingly, Treft preserved his *Booker* challenge and we review for harmless error. *United States v. Saldana*, 427 F.3d 298, 313-14 (5th Cir. 2005) (holding that a *Booker* challenge is preserved when a *Blakely* objection – even one that is "less than crystal clear" – is made at sentencing).

Harmless error, as defined by the Federal Rules of Criminal Procedure, is "any error, defect, irregularity or variance that does not affect substantial rights," and such an error must be

[5]The definition of "mixture of substance" in the commentary to U.S.S.G. § 2D1.1 has been amended since we decided *Anderson* and *Sherrod*, but the definition in 21 U.S.C. § 841(b) has not. Thus, *Anderson* and *Sherrod* govern the definition of "mixture or substance" under § 841. *See Neal v. United States*, 516 U.S. 284, 290 (1996); *United States v. Morgan*, 292 F.3d 460, 465 (5th Cir. 2002).

disregarded. FED. R. CRIM. P. 52(a); *Saldana*, 427 F.3d at 314. The government bears the burden of proving beyond a reasonable doubt that an error is harmless. *Saldana*, 427 F.3d at 314. In the *Booker* context, although it is plainly erroneous to sentence a defendant based on facts not found by a jury beyond a reasonable doubt, *id.*; *United States v. Mares*, 402 F.3d 511, 520-21 (5th Cir. 2005), we will affirm a defendant's sentence if the government demonstrates that the *Booker* error was harmless, *Saldana*, 427 F.3d at 314. According to the Government in this case, the district court would have sentenced Treft to ten years' imprisonment under 21 U.S.C. § 841(b)(1)(A) regardless of whether it considered the pseudoephedrine packages discovered in his trash or the marijuana discovered in his home. We agree with the Government. Section 841(b)(1)(A) mandates a minimum sentence of ten years' imprisonment for a conviction under § 841(a) involving 500 grams or more of a mixture or substance containing methamphetamine. Treft was convicted of such an offense. The district court could not have sentenced Treft to anything less than ten years in prison. Thus, any error committed by the court in considering facts not found by a jury beyond all reasonable doubt was harmless.

C. "Safety Valve" Adjustment

We review a district court's findings of fact regarding U.S.S.G. § 5C1.2 for clear error and its legal interpretation of that section *de novo*. *United States v. Miller*, 179 F.3d 961, 963-64

(5th Cir. 1999).

U.S.S.G. § 5C1.2, also known as the "safety valve" provision, limits the applicability of statutory minimum sentences in certain cases, specifically, those involving less culpable defendants who fully assist the Government. U.S.S.G. § 5C1.2, cmt. ("Background") (2003); *Miller*, 179 F.3d at 964. To receive safety valve protection, a defendant must satisfy the five criteria listed in § 5C1.2; if he does so, the court will "impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence." U.S.S.G. § 5C1.2(a). Furthermore, under § 2D1.1(b)(6), the court will decrease the defendant's base offense level by two levels once the safety valve is triggered. U.S.S.G. § 2D1.1(b)(6). The district court in this case rejected Treft's request for a two-level safety valve adjustment, finding that he had not satisfied the fifth criterion of the safety valve provision.[6] Treft argues on appeal that the district court erred because it based its decision to reject his request on his failure to plead guilty. According to Treft, the district court determined that Treft had not satisfied § 5C1.2(a)(5) because he insisted on going to trial.

Section 5C1.2(a)(5) requires that "not later than the time of the sentencing hearing, the defendant . . . truthfully provide[] to the Government all information and evidence the defendant has

[6]The parties do not dispute whether Treft satisfied the first four criteria in § 5C1.2.

concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." U.S.S.G. § 5C1.2(a)(5). Although it may be the case, as Treft contends, that a court may not deny safety valve relief simply because a defendant pleads not guilty, that is not what the district court did in this case. First, the record demonstrates that the district court went to great lengths to determine whether Treft had provided the information and evidence required by § 5C1.2(a)(5), even continuing sentencing to November 5, 2004 to gather more information.[7] And, more importantly, the parties stipulated on the second day of sentencing that Treft had not provided the Government with "all information or evidence regarding Treft's methamphetamine production/distribution." (R. at 103.) Accordingly, Treft was not eligible for a safety valve adjustment regardless of whether he plead guilty or went to trial. The district court did not err in denying Treft's request for safety valve relief.

III. Conclusion

Accordingly, we AFFIRM Treft's conviction and sentence.

[7]In fact, the record indicates that Treft's safety valve argument is disingenuous because the district court never stated that it was basing its safety valve decision on Treft's plea of not guilty. Rather, the district court simply indicated that it would be a rare case in which a defendant both plead not guilty and provided the government with all the information and evidence required by § 5C1.2(a)(5); the court did not state that such a case could never exist.