

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8630
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES STEPHEN JONES,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC W-91-CR-55(1)
- - - - -

March 18, 1993

Before KING, HIGGINBOTHAM, AND DAVIS, Circuit Judges.

PER CURIAM:*

A district court does not violate the due process rights of a defendant by considering conduct underlying a dismissed count during sentencing. This Court has specifically rejected a due process attack on the lower court's use of drugs from a dismissed count in sentencing as relevant conduct. United States v. Byrd, 898 F.2d 450, 451-52 (5th Cir. 1990).

Because Jones neglected to raise this matter at the district court and failure to consider it will not result in manifest

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

injustice, there is no reason to revisit the issue. United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990).

When the district court considers conduct that did not form the basis of the counts of conviction the defendant is not being punished for an extraneous offense. Byrd, 898 F.2d at 452. Rather, the court uses this information, when relevant to the conviction count, to justify harsher penalties for the offense for which the defendant has been convicted. Id. (citations omitted).

The district court violated neither the plea agreement nor the spirit of Fed. R. Crim. P. 11(e)(3) by considering these drugs as part of relevant conduct. The district court's sentence is AFFIRMED.