IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1177

Summary Calendar

United States of America,

Plaintiff-Appellee,

versus

Charles Richard Bryan,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(CR4 91 028 K)

(November 19, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

On July 8, 1991, Charles Richard Bryan pled guilty to one count of opening and maintaining a place for the manufacture of amphetamine in exchange for a dismissal of the remaining four counts in the indictment. The factual resume accompanying the plea agreement, however, specifically established the more serious charges of conspiracy and manufacturing amphetamine. In sentencing

---

[*]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Bryan the district court accordingly used these more serious offenses rather than the lesser charge to which he pled guilty in calculating the offense level. On February 26, 1992, the court sentenced Bryan to 151 months imprisonment and three years of supervised release. Bryan has appealed his sentence, contending that the district court erred in: (1) using the more serious manufacturing charge established in the factual resume and the entire weight of the amphetamine mixture in determining the offense level; (2) declining to dismiss the indictment after the government destroyed much of the evidence before sentencing; and (3) including the disputed contents of two exhibits in calculating the total mixture weight. We find these objections meritless and affirm.

I.

Bryan does not contest the district court's finding that the factual resume to which he stipulated specifically established the offenses of conspiracy and manufacturing a controlled substance. He does argue that these more serious charges should not displace the opening and maintaining charge to which he pled guilty in determining the offense level. Since the applicable statute, 21 U.S.C. § 856 (a) (1), contains no reference to the quantity of drugs involved, Bryan contends that his offense level should have been calculated at 16 pursuant to U.S.S.G § 2D1.8. The district court therefore erred, Bryan claims, in considering the amount of drugs seized pursuant to § 2D1.1 in setting the offense level at 34. Even if the district court applied the proper guideline, Bryan adds, the court should not have the included the unusable "waste"

portion of the amphetamine mixture in determining the weight of the drugs seized.

Section 1B1.2 (a) provides that in cases "containing a stipulation that specifically establishes a more serious offense than the offense of conviction, [a court should] determine the offense guideline section in Chapter Two most applicable to the stipulated offense." After determining that the factual resume established the charge of manufacturing amphetamine, the district court properly applied § 2D1.1, not § 2D1.8. See, e.g., United States v. Martin, 893 F.2d 73, 74 (5th Cir. 1990). After converting the 18,217 grams of amphetamine to 18.21 kilograms of cocaine equivalent, the court correctly calculated the offense level at 34.

In accord with our precedents, the district court included the entire amphetamine mixture, not just the usable portion, in setting the weight of the drugs at 18,217 grams. See, e.g., United States v. Sherrod, 964 F.2d 1501, 1509-11 (5th Cir. 1992); United States v. Walker, 960 F.2d 409, 412 (5th Cir.), cert. denied, 61 U.S.L.W. 3334 (1992); United States v. Baker, 883 F.2d 13, 15 (5th Cir.), cert. denied, 110 S.Ct. 517 (1989). Bryan concedes the applicability of these Fifth Circuit precedents, but contends that we should follow the approach taken by several other circuits and exclude the unusable waste product in determining the weight of the mixture. See, e.g., United States v. Rodriguez, 1992 U.S. App. Lexis 22744 (3d Cir. September 18, 1992); United States v. Robins, 967 F.2d 1387 (9th Cir. 1992); United States v. Acosta, 963 F.2d

551 (2d Cir. 1992); United States v. Jennings, 945 F.2d 129 (6th Cir. 1991); United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991). It is well-settled, however, that one panel may not overrule the decision of another. See, e.g., Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir. 1991). The district court thus did not err in calculating Bryan's offense level at 34.

Bryan next contends that the district court should have granted his motion to dismiss the indictment after the government destroyed much of material contained in the exhibits before sentencing. Bryan concedes that "[t]he destruction of evidence alone does not constitute a due process violation; the defendant must show bad faith on the part of government officials." United States v. Gibson, 963 F.2d 708, 711 (5th Cir. 1992) (citing Arizona v. Youngblood, 109 S.Ct. 333 (1988)). He maintains that the government's failure to notify him of its intention to destroy the exhibits alone suffices to establish this bad faith. This contention, however, is not supported by reference to any authority. Since Bryan offers no other evidence of the government's alleged bad faith, we must affirm the district court's denial of his motion to dismiss.

Bryan finally challenges the factual basis for the district court's inclusion of DEA Exhibits 10 and 15 in calculating the weight of the drugs for sentencing purposes. The factual resume accompanying the plea agreement stipulated the relevant determinations by the government and Bryan's objections:

> DEA officers seized, among other things, the following items which were analyzed at the DEA laboratory and, in

> the opinion of the chemist, contained the substances indicated:
>
> DEA Exhibit 10--1,800 grams of amphetamine oil.
> . . . .
>
> DEA Exhibit 15--14,800 grams of a mixture containing Phenyl-2-Propanone.
> . . . .
>
> The defendant Bryan says that DEA Exhibit No. 10 was not amphetamine oil, but rather was waste product. Bryan says that DEA Exhibits 11, 13, 14, 15, 16, and 20 contained "mostly" water.

After hearing the testimony of Bryan's chemist and the arguments of counsel, the district court adopted the figures set out by the government in the factual resume.

A district court's findings concerning the quantity of drugs will be upheld unless clearly erroneous. Sherrod, 964 F.2d at 1508 (citing United States v. Ponce, 917 F.2d 841, 842 (5th Cir. 1990), cert. denied, 111 S.Ct. 1398 (1991). Bryan first notes that the government did not provide his chemist with a sample from Exhibit 10. Since his chemist did not have the opportunity to analyze this exhibit and its contents were disputed, Bryan concludes that "there is no proof of what was contained in DEA Exhibit 10 and it should not have been included by the Court." Bryan makes no mention, however, of the DEA chemist's estimates of the drug quantities. This court has expressly identified such estimates as having "sufficient indicia of reliability to support [their] accuracy." U.S.S.G. § 6A1.3 (a). See Sherrod, 964 F.2d at 1508. Given that Bryan offered no evidence to rebut the DEA report, we cannot say that the district court's reliance on the DEA's analysis was clearly erroneous.

Bryan challenges the district court's consideration of Exhibit 15, designated by the DEA chemist as 14,800 grams of a mixture containing Phenyl-2-Propanone, on different grounds. The government presented Bryan's chemist with one jug for analysis. Since four jugs would be needed to hold the quantity described in the exhibit, Bryan contends that the district court's reliance on the figure supplied by the government was mistaken. But, as the government indicated during the hearing below, see R. 3 at 17-18, the DEA report of the initial seizures states that four, not one, jugs containing the mixture were found at the scene. Bryan's argument therefore must fail.

Bryan also reiterates his chemist's reservations concerning the DEA chemist's use of a composite sample to test the mixture, suggesting that this procedure led to an incorrect result. The district court was well aware of this alleged methodological flaw, and yet chose to rely on the DEA chemist's analysis. We cannot say that the court's findings were clearly erroneous.

The judgment is AFFIRMED.