

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1391
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PATRICK BOUVIER GREEN,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. CR3-91-306-R
- - - - -

March 19, 1993

Before KING, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:*

Patrick Bouvier Green was convicted by a jury of conspiracy to distribute cocaine and aiding and abetting the distribution of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1) and 18 U.S.C. § 2, and the district court sentenced him to a term of imprisonment for 60 months. Green argues on appeal that the Sentencing Commission exceeded the authority given to it by Congress in the Sentencing Reform Act by allowing relevant conduct outside the offense of conviction to be considered at sentencing under U.S.S.G. § 1B1.3. He also argues that there was

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

no evidence to support the district court's factual finding that he distributed cocaine base instead of merely powder cocaine.

The original Presentence Report (PSR) calculated Green's base offense level at 30 based on quantities of cocaine base and cocaine powder. Green objected, and the Government admitted that it could not establish that Green was aware of the two other deliveries of cocaine base by his codefendants prior to his involvement on July 2, 1991. The probation officer reduced Green's base offense level to 20 and adjusted his guideline range to 33-41 months. However, the probation officer noted that because 21 U.S.C. § 846 has a mandatory minimum sentence of five years, U.S.S.G. § 5G1.1(b) provides that the guideline sentence is 60 months. The district court accepted the guideline application in the PSR, determined Green's offense level to be 20, and sentenced him to 60 months as required by the statutory minimum.

Green's complaint about the use of additional quantities of cocaine base distributed by his codefendants and attributed to him at sentencing under U.S.S.G. § 1B1.3 as relevant conduct is not borne out by the facts. The record shows that the district court did not consider that evidence in sentencing him. Further, because 21 U.S.C. § 846 mandates a sentence of at least 60 months, the guidelines sentence was 60 months under U.S.S.G. § 5G1.1(b). See United States v. Schmeltzer, 960 F.2d 405, 408 (5th Cir.), cert. denied, 113 S.Ct. 609 (1992).

AFFIRMED.