

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1553
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAL L. HARRIS,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. CR3-90-218-T
- - - - -

March 18, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Hal L. Harris pleaded guilty to one-count of possession of phenylacetic acid with intent to manufacture a controlled substance. The district court downwardly departed from the 120 guideline range and sentenced Harris to five years probation. However, following probation revocation proceedings the district court sentenced him to 120 months imprisonment and three years supervised release. Harris challenges the district court's application of the guidelines, and this Court reviews the claim

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

de novo. United States v. Otero, 868 F.2d 1412, 1414 (5th Cir. 1989).

When a defendant's probation is revoked the court may "impose any other sentence that was available . . . at the time of the initial sentencing." 18 U.S.C. § 3565(a)(2). "The original determinations of total offense level and criminal history category, based upon relevant facts established at the time of sentencing, delimit the sentences that were then available." United States v. Smith, 907 F.2d 133, 135 (11th Cir. 1990) (quoted with approval in United States v. Williams, 961 F.2d 1185, 1187 (5th Cir. 1992)). The district court may not consider the defendant's conduct while on probation to upwardly depart from the original guideline range because at the time of the original sentence a departure could not have been based on this conduct, and therefore the longer sentence of imprisonment was not then available. Smith, 907 F.2d at 135; Williams, 961 F.2d at 1187. The court may rely on the defendant's probationary conduct to determine the appropriate sentence within the original guideline range. Williams, 961 F.2d at 1187.

Harris's argument that the district court considered his probationary conduct to upwardly depart is factually flawed. The district court specifically stated that it was departing upward from the chapter 7 guideline range of 33-41 months to sentence Harris to 120 months imprisonment, the maximum sentence available under the original guideline calculations. Under Smith and Williams the district court could rely on Harris's probationary conduct to determine the appropriate sentence within the 120

month guideline range. Williams, 961 F.2d at 1187; Smith, 907 F.2d at 136. The sentence imposed was not an upward departure from the original guideline sentence; this claim is meritless.

Harris's also argues that the sentence imposed was not available at the time of initial sentencing because the district court was required to downwardly depart in accordance with the Government's U.S.S.G. § 5K1.1 substantial assistance motion, and therefore the 120 month sentence was not available. The original guideline calculations determine what sentences were available, and in this case 120 months was the maximum sentence available. Smith, 907 F.2d at 135.

Harris also argues that the district court failed to consider the policy statements in chapter 7 of the guidelines because the court sentenced him to 120 months imprisonment and the suggested guideline range was 33-41 months imprisonment. See U.S.S.G. § 7B1.1(a)(1), p.s., 7B1.4(a)(1), p.s. The policy statements are merely advisory and are not binding on the district court. United States v. Headrick, 963 F.2d 777, 780-82 (5th Cir. 1992). The commentary to U.S.S.G. § 7B1.4 specifically states that an upward departure is appropriate when the original sentence was the result of a downward departure for substantial assistance. U.S.S.G. § 7B1.4, p.s., comment. (n.4).

At the sentencing hearing following probation revocation the district court noted that the court had made a substantial downward departure at the original sentencing hearing on the basis of the Government's 5K1.1 motion. The court also noted that Harris's conduct while on probation "demonstrated a complete

disregard for the law, and the conduct constitutes a menace to the public at this time." The court considered the recommended sentence of 33-41 months and determined that it was inadequate in light of Harris's conduct and the relevant factors under 18 U.S.C. § 3553(a). Id. The district court acted properly, and Harris's claim is without merit. Headrick, 963 F.2d at 782.

AFFIRMED.