

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 92-1842  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JEFFREY WAYNE TYREE,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Northern District of Texas  
(3:90 CR 014 D)

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( March 12, 1993 )

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

**BACKGROUND**

Jeffrey Wayne Tyree was convicted and sentenced following his guilty plea to charges in a superseding criminal information that he intentionally and knowingly used a telephone to facilitate the possession of a listed chemical, 21 U.S.C. § 841(d)(1), with intent

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to manufacture a controlled substance in violation of 21 U.S.C. § 841(d)(1).

The Presentence Report (PSR) indicated that a confidential informant notified drug enforcement authorities that Tyree was attempting to purchase phenylacetic acid, a precursor chemical used to manufacture methamphetamine, from a janitorial supply company. PSR ¶ 5. Tyree was later observed at a restaurant loading a cardboard drum into his vehicle from another vehicle owned by an employee of the janitorial supply company. Id. at ¶ 6. As he attempted to drive away, Tyree was arrested by DEA agents and the cardboard drum, containing phenylacetic acid, was found within Tyree's vehicle and seized. Id. at ¶¶ 6, 9. Tyree, after being informed of his constitutional rights, told one agent that he purchased the drum for \$8000 and that the chemical would yield about 15 pounds of amphetamine. Id. at ¶ 8. The factual resume made part of the plea agreement shows that Tyree purchased the chemical with the intention of manufacturing methamphetamine. The drum weighed 110 pounds. PSR, ¶¶ 1, 13.

In determining the base offense level, the PSR relied on U.S.S.G. § 2D1.1, the guideline for § 841(d)(1), because Tyree's guilty plea established facts that proved a more serious offense than the offense of conviction.<sup>1</sup> PSR ¶ 12; see § 1B1.2, comment. (n.1). The PSR calculated a base offense level by converting 110 pounds of phenylacetic acid into 44 pounds of phenylacetone, then

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<sup>1</sup> Although the penalty for violating § 843(b) is, in part, a maximum sentence of 4 years, see § 843(c), the maximum sentence for violating § 841(d)(1) is 10 years. See § 841(d).

converting 44 pounds into grams, or 19,958.4 grams. The PSR further reported that, "[f]or conversion purposes, 1 gram of [phenylacetone], when possessed for the purpose of manufacturing methamphetamine, equals 2.08 grams of cocaine; 19,958.4 grams of [phenylacetone] times 2.08 grams of cocaine equals 41,513.5 grams or 41.5 kilograms of cocaine." PSR ¶ 13. The Drug Quantity Table under § 2D1.1(c)(5) fixes a base offense level of 34 for drug-equivalency quantities between 15 and 50 kilograms. PSR ¶ 13.

The PSR calculated a total offense level of 34 and a criminal history category of II. PSR ¶¶ 13-20, 27. Tyree's sentence was reduced markedly because of his plea agreement, which was based on a violation of § 843(b). Because the corresponding guideline range of 168 to 210 months for § 841(d)(1) offenses exceeds the statutory maximum of 48 months for § 843(b) offenses, the guideline range is fixed at 48 months. *Id.* at ¶ 34-35; see § 5C1.1(a). The district court accordingly sentenced Tyree to 48 months incarceration.

Tyree filed a § 2255 motion to vacate, set aside, or correct sentence, alleging that he had insufficient time to read the PSR before sentencing and that his sentence was based on incorrect information. A magistrate judge recommended that the district court deny his motion, concluding that he failed to establish "good cause" for not directly appealing his sentence. Tyree filed objections to the magistrate judge's recommendations, alleging, in part, that counsel failed to inform him of his right to appeal. The district court adopted the findings and recommendations of the

magistrate judge and denied Tyree's motion, noting that, because the statutory maximum became the guideline sentence with no apparent basis to reduce it, it was not necessary, under Fed. R. Crim. P. 32(a)(2), for the court to inform Tyree of his right to appeal.

Tyree appealed and this Court reversed and remanded for an evidentiary hearing to determine whether counsel had informed Tyree of his right to appeal. United States v. Tyree, (No. 91-7301) (May 20, 1992) (unpublished). This Court held, in part, that, "[s]hould the district court find that Tyree's attorney failed to inform him of his right to appeal, Tyree will be entitled to an out-of-time appeal."

On remand, an evidentiary hearing was held before a magistrate judge, who found that counsel did not inform Tyree of his right to appeal. The magistrate judge recommended that (1) Tyree be granted an out-of-time appeal, (2) Tyree's original sentence be vacated, and (3) he be resentenced. The district court granted an out-of-time appeal but did not vacate Tyree's original sentence.

#### **OPINION**

##### The sentence

Tyree argues that the district court erred when it sentenced him based on information he provided to a DEA agent. This argument lacks merit.

A sentence imposed by the trial court will be upheld so long as the sentence was determined by a proper application of the guidelines to facts that are not clearly erroneous. United States

v. Buenrostro, 868 F.2d 135, 136-37 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990). Furthermore, where no challenge to the underlying facts is raised, the court is free to adopt the facts reported in the PSR without further inquiry. United States v. Rodriguez, 897 F.2d 1324, 1326-27 (5th Cir.), cert. denied, 111 S. Ct. 158 (1990). Information relied upon by the court in sentencing must have some indicia of reliability. See U.S.S.G. § 6A1.3(a), p.s.

Objections regarding sentencing raised for the first time on appeal are reviewed for plain error. United States v. Goldfaden, 959 F.2d 1324, 1327 (5th Cir. 1992); United States v. Lopez, 923 F.2d 47, 50 (5th Cir.), cert. denied, 111 S. Ct. 2032 (1991). Plain error occurs when failure to consider the issue results in "manifest injustice." Lopez, 923 F.2d at 50.

The record does not support Tyree's assertion that it sentenced him according to his statement to a DEA agent that the phenylacetic acid would produce fifteen pounds of amphetamine. Rather, the district court adopted the calculations in the PSR which resulted in considerably higher yields of amphetamine. The findings by the Probation Department, unopposed by Tyree at the sentencing hearing, contained the necessary indicia of reliability. Nor does Tyree demonstrate how the district court erred when it applied the sentencing guidelines.

For reasons set forth above, the sentence imposed by the district court was not plain error.

The criminal information

Tyree argues that the charge for which he pleaded guilty was invalid because he never had the "intent to manufacture a controlled substance" and because the charge was not supported by an underlying crime. He argues further that "phenylacetic acid" is not a listed chemical.

General principles addressing the adequacy of a charging instrument apply equally to the indictment and criminal information. See Fed. R. Crim. P. 7(c). An indictment is sufficient if it contains the elements of the offense, fairly informs the defendant of the charges, and enables the defendant to plead acquittal or a conviction as a defense to future prosecutions for the same offense. United States v. Moody, 923 F.2d 341, 351 (5th Cir.), cert. denied, 112 S. Ct. 80 (1991). The indictment must contain the essential facts constituting the offense and must allege each material element of the offense. United States v. Harper, 901 F.2d 471, 473 (5th Cir. 1990). It is generally sufficient when the indictment tracks the statutory language defining the offense. Moody, 923 F.2d at 351. A failure to raise objections to an indictment during pretrial proceedings will result in waiver of rights otherwise violated. United States v. Wylie, 919 F.2d 969, 972 (5th Cir. 1990); see Fed. R. Crim. P. 12(b)(2), 12(f).

Tyree failed to challenge the indictment or superseding criminal information during pretrial proceedings. In such cases, this Court should read the criminal information liberally. Wylie, 919 F.2d at 972. The criminal information charged that Tyree

[o]n or about December 28, 1989 . . . intentionally and knowingly did unlawfully use a communication facility, that is, a telephone, in facilitating the possession of a listed chemical with the intent to manufacture a controlled substance, a felony pursuant to Title 21, United States Code, Section 841(d)(1) . . . [and] used said telephone to discuss with a person known to the United States Attorney and the defendant, the purchase and delivery of phenylacetic acid, a chemical used in manufacturing a controlled substance [. . . i]n violation of Title 21, United States Code, Section 843(b).

The criminal information tracked the statutory language and contained the essential facts constituting material elements of the offense. See 21 U.S.C. § 843(b). Tyree's "plea agreement/factual resume" provided the "elements of the offense" and material facts underlying his guilty plea. Because phenylacetic acid is a "listed precursor chemical" pursuant to 21 U.S.C. § 802(34)(H), Tyree's argument that the chemical is not listed lacks merit.

Tyree argues for the first time on appeal that the plea agreement was coerced and that he had no opportunity to read the factual resume. The transcript of the plea hearing, however, shows that the guilty plea was valid and supported by a factual basis. The district court also accepted the plea agreement and noted that it dropped Tyree's minimum sentence from 168 to 48 months.

For reasons set forth above, the district court did not plainly err when it convicted and sentenced Tyree for violating § 843(b) as charged in the criminal information.

#### Good behavior

Tyree argues for the first time on appeal that his "good behavior" and "unusual personal characteristics," including high work performance ratings, merit his release from confinement.

Tyree supports his argument with copies of performance ratings from the federal prison's central file and various academic certificates.

Tyree does not challenge the validity of any ruling made by the district court. This Court need not address this issue because it is frivolous.

Time to review PSR

Tyree argues that, because his attorney requested additional time to go over the PSR with him, the district court's failure to permit it violated local rule 10.9, Fed. R. Crim. P. 32(a)(1)(A), and Burns v. United States, \_\_\_ U.S. \_\_\_, 111 S. Ct. 2182, 2187, 115 L. Ed. 123 (1991). This argument lacks merit.

A defendant is entitled to an opportunity to review the PSR and file objections. See Fed. R. Crim. P. 32(a). The district court complied with Rule 32(a)(1)(A), which requires that the district court ascertain whether the defendant has gone over the PSR with his attorney.

The local rule upon which Tyree relies requires written consent by the defendant where the defendant is given less than ten days to file written objections to the PSR. Rule 10.9, Local Rules for Northern District of Texas, amended January 1, 1989. At the sentencing hearing, Tyree's attorney informed the district court that, because Tyree had only seen the PSR that day, he believed that the hearing should be postponed to allow more time for Tyree to review the PSR. The district judge, however, allowed Tyree an opportunity at the sentencing hearing to discuss the PSR with his



attorney. This was an acceptable alternative to Tyree and his attorney. Tyree went through the PSR with his attorney and found "nothing factually wrong with the presentence investigation report." At that time, Tyree's attorney indicated that they were both ready to proceed with the sentencing hearing. Because there were no objections, the local rule was irrelevant, or alternatively, it was waived. The district court concluded that Tyree had an "ample opportunity to point out inaccuracies in the PSR." That ruling was not plain error.

Nor does Tyree's argument trigger reversal under Burns, an upward-departure case. Tyree was sentenced within the range determined by the sentencing guidelines, therefore his sentence was not an upward departure requiring "reasonable notice." See United States v. Williams, 937 F.2d 979, 981 (5th Cir. 1991) (citing Burns, 111 S. Ct. at 2187). Nonetheless, in light of the above, Tyree received "reasonable notice."

Not only is Tyree bound by his guilty plea to the facts stated therein, see, e.g., United States v. Broce, 488 U.S. 563, 570, 109 S. Ct. 757, 102 L. Ed.2d 927 (1989), but the PSR put Tyree on notice to assure that all information in the PSR was correct. See United States v. Gaudet, 966 F.2d 959, 962 (5th Cir.), petition for cert. filed, (Nov. 16, 1992) (No. 92-6597). Having failed to oppose the facts and conclusions set forth by the PSR, Tyree must show that the district court plainly erred when it adopted the PSR and sentenced him accordingly. For reasons set forth above, Tyree has not made such a showing.

Procedural bar of § 2255 issues

Tyree argues that the district court erred when it dismissed claims in his § 2255 petition as procedurally barred under United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 978 (1992). Although this argument lacks merit and was previously rejected by this Court, United States v. Tyree, at 4 (No. 91-7301) (May 20, 1992) (unpublished), Tyree misstates the standard of review. Because the Tyree was granted this out-of-time appeal for failure of counsel to inform Tyree of his right to appeal, any issues properly raised are directly before this Court. The procedural bar under Shaid, which applies to § 2255 motions, is thus irrelevant. As set forth above, Tyree's arguments lack merit even under the broader review afforded to issues on direct appeal.

Judgment affirmed.