

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1915
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WAYNE BOYD SEYFERT,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:92-CR-059-C
- - - - -

August 18, 1993

Before JOLLY, JONES, DUHÉ, Circuit Judges.

PER CURIAM:*

Wayne Boyd Seyfert pleaded guilty to one count of conspiracy to possess with intent to distribute and to distribute methamphetamine. The probation officer recommended increasing Seyfert's base offense by two levels under U.S.S.G. § 2D1.1(b)(1) because Seyfert possessed a firearm during the course of the conspiracy. Seyfert objected to this enhancement because he argued that the conspiracy ended prior to his arrest in possession of the firearm. The district court overruled the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

objection, and Seyfert was sentenced to 51 months imprisonment, five years supervised release, and a \$50 special assessment.

Seyfert argues that the district court erred by enhancing his base offense level by two levels under U.S.S.G.

§ 2D1.1(b)(1) because the conspiracy ended in March, and the methamphetamine seized the day of his arrest was for personal use and not part of the conspiracy.

The district court's finding under § 2D1.1(b)(1) is a factual finding reviewed under the clearly erroneous standard. United States v. Eastland, 989 F.2d 760, 769 (5th Cir.), petition for cert. filed, (U.S. Jul. 13, 1993) (No. 93-5250). Under this standard, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson v. City of Bessemer City, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d (1985).

The two-level enhancement under § 2D1.1(b)(1) should be applied "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." § 2D1.1, comment. (n.3). To establish weapon possession the government must prove by a preponderance of the evidence "that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant." Eastland, 989 F.2d at 770 (internal quotations and citation omitted). The government must show that the weapon was found with the drugs or

drug paraphernalia, or where part of the transaction occurred.

Id.

DEA agents found the firearm and a small quantity of methamphetamine in Seyfert's luggage when he was arrested May 12, 1992. When he pleaded guilty Seyfert admitted that the conspiracy continued until May 12, 1992, and that the drugs seized that day were part of the conspiracy. The district court's finding that Seyfert possessed the firearm was not clearly erroneous.

AFFIRMED.