

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7774
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID L. COX, a/k/a Scrap,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(CR-E90-167-S)

(November 22, 1993)

Before POLITZ, Chief Judge, JOLLY and DUHÉ, Circuit Judges.

POLITZ, Chief Judge:*

Convicted on a guilty plea of conspiracy to distribute more than 500g of cocaine in violation of 21 U.S.C. §§ 841, 846, David Lynn Cox appeals his sentence of 84 months imprisonment. We affirm.

Background

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Because of a prior drug conviction, Cox faced a statutory mandatory minimum of 10 years imprisonment.¹ Pursuant to a plea agreement the government agreed to forego prosecution on other charges and accept a 10-year maximum sentence. The agreement required acceptance by the court and assured that any information Cox provided would not be used against him unless he violated the agreement's requirement of cooperation. The government in turn agreed to move for a downward departure under U.S.S.G. § 5K1.1 if Cox provided substantial assistance.

At sentencing the district court adopted the relevant PSR findings which computed to an offense level of 34 and a criminal history category of III, resulting in a sentencing range of 188-235 months.² Acting pursuant to the government's motion for departure based on substantial assistance the court sentenced Cox to 84 months, a term of supervised release, a fine, and the statutory assessment. Cox timely appealed.

Analysis

Cox's first complaint is that the district court did not resolve factual disputes, particularly the question whether he was the leader or organizer. We conclude that the district court made an implicit finding that Cox was the leader. Whether the court did or did not, however, is of no relevance herein because with the prior conviction and a conspiracy involving more than 500g of cocaine, the mandatory minimum of 10 years applied and became the

¹21 U.S.C. § 841(a), (b)(1)(B)(ii).

²The PSR reflected information that the scheme involved 10Kg of cocaine, resulting in a base offense level of 32. As the leader or organizer of five or more persons, Cox received a four-level increase but was granted a two-level decrease for acceptance of responsibility. The criminal history category was based on his prior conviction and parole status at time of offense.

guideline threshold.

Nor was there any relevance to the dispute over amount. The PSR reported 10Kg. It is not seriously contested that more than 5Kg was involved. That quantity, in conjunction with the prior conviction, triggered the mandatory minimum.

Cox next complains about the government's 5K1.1 motion for downward departure. He first contends that the motion was not submitted to the court. The docket sheet and documents themselves belie this contention. He then complains that the government did not fully pursue a downward departure. We are not persuaded. The government acted properly under the circumstances. It filed the conditionally promised motion for downward departure and, in the process, fulfilled its duty to the court to furnish all relevant information, pro and con,³ including Cox's denial of the amount involved and his efforts to conceal his post-guilty plea attempts to purchase cocaine.

Cox further asserts that he should be resentenced because he was not given reasonable notice that the government would inform the court of his unlawful activity while awaiting sentencing. Cox misperceives the law. We have held⁴ that sentences within the guideline range do not trigger the **Burns v. United States**⁵ notice requirement. Regardless, the plea agreement provided ample notice to Cox that his truthfulness, candor, and cooperation would be relevant issues at sentencing.

³**United States v. Goldfaden**, 959 F.2d 1324 (5th Cir. 1992).

⁴**United States v. Tyree**, No. 92-1842, slip op. at 9 (5th Cir. Mar. 12, 1993) (unpublished); **United States v. Thomas**, No. 92-7050, slip op. at 4 (5th Cir. Nov. 23, 1992) (unpublished).

⁵111 S.Ct. 2182 (1991). In **Burns**, the Supreme Court addressed whether parties are entitled to notice before the district court departs upward or downward from the guidelines range. **Id.** at 2186 n.4.

Finally, Cox's argument that his breach of the plea agreement entitled him to withdraw his guilty plea is meritless, requiring no response.

AFFIRMED.