UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8168
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HERMON ONEAL MANNING,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W 91 CR 132 3)

April 5, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Appellant Manning was sentenced to serve 97 months in prison and assessed other punishment after he pleaded guilty to one count of distributing cocaine within a thousand yards of a school. Without even mentioning a provision in the plea agreement in which he purportedly waived the right to appeal his sentence, he has appealed and contested the district court's application of 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Sentencing Guidelines. We pretermit the issue whether Manning waived his sentence appeal rights and find no merit in his objections to the sentence.

BACKGROUND

Manning was charged in two separate counts with distribution of "crack" cocaine within 1000 feet of a public school, both offenses having occurred on August 31, 1991. On that date two undercover officers purchased two rocks of crack cocaine from co-defendant Jerry Lowe, who received it from Manning. Previously, on June 13, 1991, Manning had been charged with possession of cocaine. On that date, Waco police officers behaving suspiciously, and when they tried to investigate, he evaded a body frisk and ran away. When the police apprehended him, he was found lying face down in a field, with a bag containing 6.81 grams of crack cocaine only two or three feet away.

Manning's base offense level was calculated at 26, an amount arrived at by totaling the weight of cocaine involved in the two sales on August 30 with another sale on August 13 and the amount seized on June 13. Over Manning's objection, the court made no adjustment for acceptance of responsibility. Manning admitted delivering one rock of cocaine to Lowe for sale to the undercover officers. He denied delivering the other rock. Because Manning would not admit involvement in the "related conduct," credit was denied.

DISCUSSION

Manning first disagrees that the 6.81 grams of cocaine seized on June 13 should be included as part of the "relevant conduct" for sentencing purposes. Section 1b1.3(2) of the Guidelines allows the court to consider other offenses that are "part of the same course of conduct or common scheme or plan" as the offense of conviction. Whether several transactions are part of the same course of conduct or common scheme or plan as the offense of conviction is a factual determination, which we review for clear error. Drug incidents that occur five months apart have been held to constitute relevant conduct factually. United States v. Moore, 927 F.2d 825, 827-28 (5th Cir.), cert. denied, ___ U.S. ___, 112 S. Ct. 205 (1991). In this case, we find no clear error in the trial court's determination that all four crack cocaine incidents were "relevant" to Manning's offense of conviction. All of the incidents involved crack cocaine and were located in the same general area. At least three of the incidents occurred close to a public school. Manning was a participant in three of the four incidents, and Lowe was also a participant in three incidents. Lowe was used as direct distributor to the public for both Manning and co-defendant Warren. Manning's possession of 6.81 grams of crack cocaine on June 13 reflected his ability to engage in numerous sales. The district court determined by "clear and convincing evidence" that Manning's June 13 relevant conduct had occurred and was pertinent for sentencing. We cannot disagree.

Manning next contends that two points should have been subtracted from his offense level for acceptance of responsibility.

U.S.S.G. § 3e1.1. In his interview with the probation officer, however, while Manning admitted giving Lowe one rock of cocaine to deliver to the undercover officers on August 31, he denied giving another rock to Lowe on the same date. He also denied making any prior sale and denied dealing cocaine for money. The probation officer, following this circuit's authority, concluded that Manning should not receive a credit for acceptance of responsibility, because he had not accepted responsibility "for the total related conduct." United States v. Morning, 914 F.2d 699 (5th Cir. 1990). Manning relies on an amendment to the commentary to § 3e1.1, which became effective in November 1992, more than a year after the offense occurred and six months after he had been sentenced. As amended, the Guidelines now provide for an acceptance of responsibility reduction if "the defendant clearly demonstrates acceptance of responsibility for his offense."

Our court has stated that review of the district court's ruling on acceptance of responsibility is even more deferential than a pure clearly erroneous standard. United States v. Lghodaro, 967 F.2d 1028, 1031-32 (5th Cir.), cert. denied, ___ U.S. ___, 112 S. Ct. 885 (1992).

We decline to apply the revised standard to Manning's sentence. First, he was sentenced properly according to the Guidelines an interpretative authority of this circuit, which had been uniformly applied at the time of his conduct and sentencing. Second, the decision on acceptance of responsibility is under the old and new standards a factual one, and we are averse to requiring

district courts to re-evaluate the facts underlying their sentencing decisions unless there is compelling reason to do so. We are, however, aware of no authority that requires application of this kind of change in the Guidelines to sentencing and conduct that transpired months earlier.

Even if the new application n.1 to § 3e1.1 were properly applicable in Manning's case, however, he still would not be entitled to the two-level reduction. The note still requires consideration of whether a defendant has truthfully admitted the conduct comprising the count of conviction. It says that "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." Here, Manning denied that he was dealing crack cocaine for money. This denial was flatly contradicted by the facts and the PSR. Under either standard, he has not accepted responsibility.

Manning's third contention is that the sentencing court should not have considered the 6.81 grams of cocaine seized on June 13, because that seizure violated the fourth amendment. Unlike several circuit courts, this court has not yet determined whether evidence that could be suppressed in the guilt phase of a prosecution, because it was seized in violation of the fourth amendment, may nevertheless be considered in determining an appropriate Guideline sentence. Compare United States v. Tejada, 956 F.2d 1256 (2d Cir.), cert. denied, 113 S. Ct. 1992, with United States v. Nichols, ___ F.2d ___ (6th Cir. 1992). We find it

unnecessary to address that issue here, because at no point in the district court did Manning raise this issue. No court has yet determined that the June 13 investigatory detention, pursued an apprehension of Manning, or seizure of the bag of cocaine were illegal. We will not consider this newly raised issue on appeal.

For these reasons, the sentence of the district court is AFFIRMED.