IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8417
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID CURTIS HOOT,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. A-91-CR-117(2)
- - - - - - - - - - -
March 16, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:[*]

In calculating the base offense level, the probation officer considered 300 pounds of marihuana. Appellant, David Curtis Hoot, objected to this finding on the ground that the conspiracy involved merely 100 pounds. Nevertheless, the sentencing court adopted the findings in the presentence report (PSR) and sentenced Hoot accordingly. On appeal, Hoot again argues that the offense did not involve 300 pounds of marihuana. As support

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

for his argument, he relies on cases from other circuits that are factually distinguishable.

The quantity of drugs used to calculate the base offense level amounts to a factual finding reviewable for clear error only. United States v. Devine, 934 F.2d 1325, 1337 (5th Cir. 1991), cert. denied, 112 S. Ct. 954 (1992); United States v. Thomas, 870 F.2d 174, 176 (5th Cir. 1989). During sentencing, moreover, a district court may consider quantities of drugs not specified in the count of conviction. United States v. Ponce, 917 F.2d 841, 843-44 (5th Cir. 1990), cert. denied, 111 S. Ct. 1398 (1991). If a defendant is convicted of conspiracy to distribute a controlled substance -- as Hoot was here -- and the offense involved a negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. United States v. Sarasti, 869 F.2d 805, 806 (5th Cir. 1989); U.S.S.G. § 2D1.4, comment. (n.1).

This Court faced a similar situation in United States v. Sarasti. There, the defendant pleaded guilty to a count referring to "more than 500 grams of cocaine." 869 F.2d at 806. In sentencing Sarasti, however, the district court considered evidence that the offense of conviction was part of a scheme envisioning the transportation of more than five kilograms of cocaine. Id. at 807. This Court found that the sentencing court properly considered this information in assessing the offense level. Id.

The evidence indicates that Hoot negotiated to sell 300 pounds of marihuana. The sentencing court, therefore, did not "clearly err" in using that amount to sentence Hoot.

AFFIRMED.