UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8475
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOEY DALE DULOCK,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W 92 CR 4 1)

April 27, 1993

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

EDITH H. JONES, Circuit Judge:[*]

Appellant Joey Dale Dulock pled guilty to two counts of possession with intent to distribute amphetamine, violating 21 U.S.C. § 841(a)(1), and 18 U.S.C. § 2 on January 3 and January 8, 1992. Dulock was sentenced to concurrent terms of 121 months imprisonment on each count, followed by five years of supervised release, a $1,500 fine on each count and a $100 special assessment.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

He has appealed four elements of the sentencing computation, but none of these presents reversible error. We affirm the sentence.

The first three challenges raised by Dulock all involve factual determinations under the Sentencing Guidelines. This court will uphold a district court's sentence if it results from a correct applications of the Guidelines to factual findings that are not clearly erroneous. United States v. Chavez, 947 F.2d 742, 746 (5th Cir. 1991).

Dulock first contends that the district court erred in calculating the quantity of drugs attributable to him. In particular, he argues that the information relied upon by the district court in calculating the drug amounts, particularly that gleaned from his co-defendant Bass, was unreliable and inaccurate.[1] As Dulock acknowledges, under the Guidelines the sentencing court considers drug quantities involved in all transactions which are part of the same course of conduct or common scheme or plan as the offense of conviction. U.S.S.G. §§ 1B1.3(a)(2), § 2D1.1, comment. In this case, the information contained in the PSR bears sufficient indicia of reliability to support the court's sentencing decision. See United States v. Sherbak, 950 F.2d 1095, 1100 (5th Cir. 1992). Each drug transaction utilized by the district court in calculating Dulock's base offense level was either independently confirmed by two separate sources or was the result of a validly executed search

[1] Although Dulock contends that the court should have made its factual determinations by a clear and convincing standard of proof, that is not the standard in our circuit, and we see no reason to deviate from the preponderance standard.

warrant. Two uncorroborated transactions were not included in the probation officer's calculation of Dulock's base offense level. Moreover, it is the defendant's burden to demonstrate that the evidence relied upon by the district court at sentencing was materially untrue. United States v. Rodriguez, 897 F.2d 1324, 1328 (5th Cir.), cert. denied, 111 S. Ct. 158 (1990). Dulock failed to provide any factual rebuttal for the district court's findings. He acknowledges, in fact, that if "double counting" were eliminated, the drug quantity connected to him, although much smaller, would remain within the base offense level that the district court used.

Dulock's next challenge to the district court's denial of a two-level reduction in his base offense level for acceptance of responsibility also founders on the clearly erroneous standard. Before the Guidelines were amended effective November 1, 1992, a defendant was required to accept responsibility for all relevant conduct in order to receive the two-level reduction for acceptance of responsibility. U.S.S.G. § 3E1.1(a); United States v. Alfaro, 919 F.2d 962, 968 (5th Cir. 1990). In his initial interview with the probation officer, Dulock stated that he was first introduced to methamphetamine and amphetamine in May 1991, by James Wesley Bass. He also blamed Bass for the drugs found in the second search of his shop, maintained that he did not distribute drugs, and refused to accept responsibility for any of the relevant conduct used to calculate his base offense level, despite the corroboration of such activity by several sources. Because Dulock clearly failed to accept responsibility for offense conduct and falsely denied his

involvement in relevant conduct, whether his acceptance of responsibility is determined under the current standard or that in effect at the date of the offenses, Dulock does not qualify for the reduction.

Dulock's third factual challenge is to the district court's determination that he distributed drugs while on probation for another offense, a determination that increased his criminal history from Level II to Level III. Dulock was on probation from September 15, 1988, to March 15, 1989, for harassment by telephone. The district court adopted the probation officer's finding that Dulock had engaged in drug trafficking during that period of time. One source used for the PSR indicated that Dulock had possibly been distributing drugs as early as his high school years, and the PSR traced a pattern of drug distribution as far back as 1985. Several sources confirmed that Dulock distributed drugs out of his bar the Watering Hole, from 1985 to 1987 using his business as a cover for distribution activities. While he was on probation from 1988 to 1989, Dulock owned and operated J.D.'s Restoration, an automobile repair shop. Several sources, as well as evidence discovered during searches of the business, confirmed that Dulock was distributing drugs out of J.D.'s Restoration from 1990 to 1992. Most importantly, in a drug enforcement debriefing of convicted amphetamine/methamphetamine distributor James Ricky Kinsey within a month after Dulock's probation had ended, Kinsey stated that Dulock had been obtaining multi-ounce amounts of amphetamine/methamphetamine from Robert Payne.

The PSR acknowledges that there is no decisive proof of Dulock's engaging in drug distribution while he was on probation, yet both the probation officer and the district court deduced that fact from the surrounding circumstances. Particularly in view of Kinsey's debriefing information, we cannot find that inference to have been clearly erroneous.

Dulock's only legal challenge to the district court's application of the Guidelines asserts that methamphetamine was never properly reclassified as a scheduled II controlled substance and therefore remains a schedule III controlled substance. This court has already rejected that argument. united States v. Kinder, 946 f.2d 362, 368 (5th Cir. 1991), cert. denied, 112 S. Ct. 1677 (1992).

For these reasons, the sentence imposed by the district court is AFFIRMED.