

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9002

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GRADY LEE WIKE, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
1 92 CR 010 01

April 29, 1993

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Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Grady Lee Wike, Jr., was stopped by state law enforcement agents because he was driving a tractor-trailer rig in an erratic manner. Wike consented to a search of the vehicle, and the agents discovered approximately one pound of methamphetamine. Laboratory analysis showed the methamphetamine to have a net weight of 412.37 grams of 76% purity. Wike pleaded guilty to possession with intent

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to distribute 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine.

In determining the base offense level, the probation officer, in accord with a footnote following the provisions of U.S.S.G. § 2D1.1(c), determined the "actual weight" of the drug. The actual weight is determined by multiplying the weight of the methamphetamine (412.37 grams) by the drug purity (76%), resulting in an "actual weight" of 313.40 grams, which requires a base offense level of 34. The probation officer noted that the base offense level for 412.37 grams would be 28.

Wike filed an objection to the use of the "actual weight" of the methamphetamine as opposed to its total weight in determining the base offense level. Defense counsel argued at the sentencing hearing that the use of the "actual weight" method in determining the quantity of methamphetamine involved in the offense is a violation of equal protection. The district court overruled the objection. The district court granted the Government's § 5K1.1 motion for a departure and sentenced Wike to a term of imprisonment of 120 months to be followed by a term of four years supervised release.

Wike argues that the Sentencing Guidelines violate the equal protection clause because they result in persons guilty of similar crimes receiving dissimilar punishments. Wike contends that there is no rational basis for the distinction made by Congress between methamphetamine and other drugs.

This court will uphold a sentence imposed under the sentencing guidelines if it results from the correct application of the guidelines to factual findings that are not clearly erroneous. U.S. v. Ruff, 984 F.2d 635, 640 (5th Cir. 1993). The district court's legal determination with respect to the guidelines is reviewed de novo.

This challenged provision will "survive an equal protection analysis if it bears a rational relationship to a legitimate end." U.S. v. Galloway, 951 F.2d 64, 66 (5th Cir. 1992).

The footnote following the Drug Quantity Table contained in § 2D1.1(c) provides in part:

Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. . . . The terms "PCP (actual)" and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. . . . In the case of a mixture containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual) or methamphetamine (actual), whichever is greater.

The base offense levels in § 2D1.1 correspond with the provisions of the Anti-Drug Abuse Act of 1986. § 2D1.1 comment. (n.10); § 2D1.1 comment. (backg'd); U.S. v. Rusher, 966 F.2d 868, 878-79 (4th Cir.), cert. denied, 113 S.Ct. 351 (1992). In passing the Anti-Drug Abuse Act of 1986, Congress adopted a "market oriented" approach to punishing drug traffickers, under which the total amount of the mixture distributed, rather than the pure amount of drug involved, is used to determine the length of the sentence. Chapman v. U.S., ___ U.S. ___, 111 S.Ct. 1919, 1925,

114 L.Ed.2d 524 (1991). However, in determining the sentences to be imposed in connection with the distribution of PCP and methamphetamine, Congress determined that the purity of the drug involved should also be taken into account. Id. at 1924. See 21 U.S.C. § 841(b)(1)(A)(viii), 841(b)(1)(B)(viii).

Congress could have rationally concluded that the imposition of harsher penalties on those who have access to purer forms of methamphetamine would deter or eliminate the manufacturers and original distributors of the drug. This rational judgment is sufficient to satisfy due process and equal protection objectives. See U.S. v. Solomon, 848 F.2d 156, 157-58 (11th Cir. 1988) (the court is not responsible for determining if Congress's judgment is correct or if it accomplishes Congressional objectives; its responsibility is limited to determining whether Congress' judgment is rational); Chapman, 111 S.Ct. at 1927 (as long as a penalty is not based on an arbitrary distinction, it does not violate due process or equal protection clauses of the Fifth Amendment).

The Sentencing Commission, in addition to considering the sentencing scheme contained in the applicable statutes, also consulted with numerous experts, including DEA authorities, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, in order to provide a logical sentencing structure for drug offenses. § 2D1.1 comment. (backg'd). Therefore, the use of the "actual weight" method was not the result of an arbitrary or irrational distinction being drawn with respect to methamphetamine and PCP.

The imposition of harsh penalties on those with access to purer forms of methamphetamine serves to protect the public health and welfare and, thus, does not deny Wike equal protection under the Fifth Amendment.

AFFIRMED.