UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-9087

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIMMIE RICHARD WILBOURN,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
7:92 CR 001 K(1)

July 16, 1993

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

PER CURIAM:[*]

Jimmie Wilbourn was convicted, pursuant to his guilty plea, of one count of possessing a flask with intent to manufacture a controlled substance, in violation of 21 U.S.C. § 843(a)(6), (c) (1988). Wilbourn was sentenced to 48 months imprisonment. He appeals his sentence, contending that the district court erred in applying § 1B1.2(a) of the sentencing guidelines and failing to

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

grant a two-level reduction to his base offense level for acceptance of responsibility. Finding no error, we affirm.

I

Law enforcement officials executed a search warrant at a self-storage facility rented by Wilbourn. The officials found laboratory equipment and various chemicals used in the manufacture of amphetamine and phenylacetone, both controlled substances. Among those items found were three-neck, round-bottom flasks.[1] The officials also found quantities of amphetamine and phenylacetone.

Wilbourn was charged in a two-count superseding indictment.[2] Count one of the indictment charged Wilbourn with possession, with intent to manufacture and distribute, amphetamine, in violation of 21 U.S.C. § 841(a)(1) (1988). Count two charged Wilbourn with possession of phenylacetic acid and acetic anhydride, with intent to manufacture and distribute amphetamine, in violation of 21 U.S.C. § 841(d)(1) (1988). Wilbourn pled guilty to a superseding information charging him with one count of possessing a three-neck, round-bottom flask, with intent to manufacture amphetamine and phenylacetone, in violation of 21 U.S.C. § 843(a)(6) and (c) (1988).

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[1] Wilbourn's fingerprints were later found on these flasks, and on other containers found in the storage unit. *See* Presentence Report ("PSR") at 2.

[2] The previous indictment charged Wilbourn with only count two of the superseding indictment. *See* Record on Appeal, vol. 1, at 1.

The probation officer calculated Wilbourn's base offense level to be 28, and criminal history category to be I.[3] These calculations yielded a sentencing range of 78 to 97 months imprisonment. At sentencing, the district court adopted the findings contained in the PSR. Because the statutory maximum sentence for Wilbourn's offense was less than the minimum of the guideline range, the district court sentenced Wilbourn to the statutory maximum of 48 months imprisonment. *See* U.S.S.G. § 5G1.1(a) (Nov. 1991 and 1992).

Wilbourn appeals his sentence, contending that the district court erred in: (a) calculating his base offense level through the application of U.S.S.G. § 1B1.2; and (b) failing to grant a two-level reduction for acceptance of responsibility.

II

A

Wilbourn first contends that the district court erred in applying § 1B1.2[4] when calculating his base offense level. *See*

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[3] *See* United States Sentencing Commission, *Guidelines Manual* (Nov. 1991). The probation officer mistakenly used the wrong edition of the sentencing guidelines, as Wilbourn was sentenced on December 7, 1992. *See* U.S.S.G. § 1B1.11(a) (Nov. 1992) (providing that, barring any *ex post facto* problem, the sentencing court "shall use the Guidelines Manual in effect on the date that the defendant is sentenced"). The 1992 sentencing guidelines were in effect on November 1, 1992, and their use would not have violated the *ex post facto* clause. Because the relevant 1992 sentencing provisions do not differ significantly from their 1991 counterparts, we find only harmless error, and therefore a remand unwarranted. *See United States v. Thomas,* 973 F.2d 1152, 1159 (5th Cir. 1992).

[4] Section 1B1.2 provides:

[I]n the case of conviction by a plea of guilty or *nolo*

Brief for Wilbourn at 9-14 (citing *Braxton v. United States,* ___ U.S. ___, 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991)). He argues that nothing in the plea agreement established a more serious offense than the offense of conviction, and that the court's reliance upon § 1B1.2 was therefore erroneous. *See id.* "While we review the application of the guidelines fully for errors of law, we accept the fact findings of the district court absent clear error." *United States v. Otero,* 868 F.2d 1412, 1414 (5th Cir. 1989).

Wilbourn's argument mischaracterizes the district court's findings. The district court did not rely upon § 1B1.2 in calculating Wilbourn's base offense level. Rather, the court relied upon § 2D1.12(b)(1), which cross-references a sentencing court to apply § 2D1.1, when the offense of conviction involved the unlawful manufacturing of a controlled substance.[5] *See* PSR at 3. Adopting the PSR's finding that Wilbourn's offense involved the

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> *contendere* containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.

U.S.S.G. § 1B1.2 (Nov. 1991).

[5] The 1992 version of § 2D1.12(b)(1), which is almost identical to the 1991 version, provides:

> If the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance unlawfully, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, Trafficking) if the resulting offense level is greater than that determined above.

unlawful manufacturing of amphetamine,[6] *see* Record Excerpts tab 6, at 1, the district court calculated Wilbourn's offense level according to § 2D1.1, and not § 1B1.2.[7] Accordingly, we find no merit to Wilbourn's first argument.

B

Wilbourn also contends that the district court erred in failing to grant a two-level reduction to his base offense level for acceptance of responsibility. *See* Brief for Wilbourn at 19-23. Wilbourn did not raise this sentencing issue before the district court. *See* Wilbourn's Objections to PSR. Therefore, we review the sentencing court's determination for plain error only. *United States v. Lopez,* 923 F.2d 47, 49 (5th Cir.), *cert. denied,* ___ U.S. ___, 111 S. Ct. 2032, 114 L. Ed. 2d 117 (1991). "`Plain error' is error . . . so obvious and substantial that failure to notice and

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[6] The probation officer found that the unlawful manufacturing of amphetamine was relevant conduct to Wilbourn's possession of a three-neck, round-bottom flask, with intent to distribute amphetamine. *See* PSR at 3-4; Addendum to PSR at 2-3; *see also* U.S.S.G. § 1B1.3(a) (Nov. 1991 and 1992) (providing that cross-references in Chapter Two shall be determined on the basis of all relevant conduct). Wilbourn offered no evidence to rebut this finding. Accordingly, the district court was free to adopt this factual finding in the PSR without further inquiry. *See United States v. Sherbak,* 950 F.2d 1095, 1099-1000 (5th Cir. 1992).

Wilbourn maintains that the court erred in using relevant conduct that was related to the charged contained in the dismissed counts of the superseding indictment. *See* Brief for Wilbourn at 15-18. We disagree. We have previously held that "the guidelines allow consideration of relevant conduct of which the defendant has not been convicted." *United States v. Byrd,* 898 F.2d 450, 452 (5th Cir. 1990); *see also United States v. Taplette,* 872 F.2d 101, 106 (5th Cir.), *cert. denied,* 493 U.S. 841, 110 S. Ct. 128, 107 L. Ed. 2d 88 (1989).

[7] Wilbourn does not dispute these calculations. Moreover, there is no difference in these calculations when using the 1991 sentencing guidelines, as opposed to the 1992 guidelines.

correct it would affect the fairness, integrity or public reputation of judicial proceedings." *Id.*

Although the district court used the wrong edition of the sentencing guidelines, we find no plain error. To warrant a two-level reduction for acceptance of responsibility under the 1992 sentencing provisions, Wilbourn had to "clearly demonstrate[] acceptance of responsibility for his offense." U.S.S.G. 3E1.1(a) (Nov. 1992). "[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." *Id.* comment. (n.1). The record indicates that when interviewed by the probation officer, Wilbourn denied ownership of the precursor chemicals found in the storage unit. *See* PSR at 3. This denial amounted to a denial of the relevant conduct))i.e., the unlawful manufacturing of amphetamine))which the district court determined to be true. Moreover, Wilbourn took this position after having stipulated in the factual resume that he possessed illegal flasks found in the storage unit, with the intent to manufacture amphetamine. *See* Record on Appeal, vol. 2, at 398. We therefore hold that the district court did not plainly err in refusing to grant a two-level reduction to Wilbourn's base offense level.

III

For the foregoing reasons, we **AFFIRM.**