UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1623
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ORA DOYLE KUBOSH,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:92-CR-91-Y)

(June 14, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Appellant Doyle Kubosh contests his 264-month sentence following a guilty plea to one count of conspiring to manufacture, distribute, and possess with the intent to distribute more than one kilogram of methamphetamine. We find no error and affirm.

Kubosh first contends that, assuming the trial court did not clearly err by holding him responsible for 1,500 kilograms of

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

phenylacetic acid that Charles Kubosh negotiated to purchase from an undercover agent, the court incorrectly applied the Guidelines to calculate his offense level based on the estimated amount of methamphetamine 1,500 kilograms of phenylacetic acid could produce. He correctly points out that U.S.S.G. § 2D1.11 governs the computation of the base offense level for possession of phenylacetic acid. If that section applied to his case, possession of 1,500 kilograms of phenylacetic acid would yield a base offense level of 28, U.S.S.G. § 2D1.11(d)(1) (20 KG or more of phenylacetic acid), considerably lower than the base offense level of 42 the PSR assigned Kubosh. Section 2D1.11 does not, however, apply.

Section 2D1.11(c)(1) indicates that the court properly applied § 2D1.1, which governs conspiracy to manufacture or possess methamphetamine. Section 2D1.11(c)(1) provides: "If the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance unlawfully, apply § 2D1.1 . . . if the resulting offense level is greater than that determined above."

Kubosh argues that subsection (c)(1) is inapplicable because he was convicted of conspiring to manufacture, distribute, and possess methamphetamine, which is not listed in § 2D1.11(c)(1). The Ninth Circuit rejected this same argument in United States v. Myers, 993 F.2d 713, 715-16 (9th Cir. 1993). The court explained:

> The Guidelines better support sentencing Myers pursuant to 2D1.1, rather than 2D1.11. Section 1B1.2 states that the offense of conviction is to be used to determine the guideline for sentencing. This is done so that defendants convicted under the same statute are sentenced in a consistent manner. Appendix A lists 2D1.1

> as the guideline applicable to 21 U.S.C. § 841(a), the offense of conviction here. Section 2D1.11 even cross references 2D1.1 as the correct guideline when the offense involves the manufacturing of controlled substances. Myers pled guilty to conspiracy to manufacture methamphetamine with intent to distribute, and there is no reason the offense of his conviction should not determine the guideline used to calculate his sentence.

Id. at 716.

Further, Kubosh erroneously relies on United States v. Hoster, 988 F.2d 1374, 1380 (5th Cir. 1993), to require application of the lower drug quantity specified by § 2D1.11. Hoster is distinguishable for two reasons.

First, Hoster did limit its holding, as the Government contends, by stating: "The Guidelines do not provide an express method for combining section 2D1.11 precursor chemicals with section 2D1.1 controlled substances or immediate precursors where, as here, the presence of the precursor chemical is merely conduct relevant to possession of a controlled substance." Hoster, 988 F.2d at 1381. Here, Kubosh pleaded guilty to conspiring to manufacture, distribute, and possess methamphetamine with the intent to distribute. Thus, his attempted purchase of phenylacetic acid was an integral part of the offense conduct, rather than merely relevant conduct as in Hoster.

Further distinguishing this case from Hoster is the fact that the district court did not attempt to combine the phenylacetic acid with the methamphetamine that had been seized to establish Kubosh's base offense level. Rather, using an estimate provided by a DEA chemist, the PSR simply determined the base offense level

based on the amount of methamphetamine that could be produced from 1,500 kilograms of phenylacetic acid. Accordingly, the problem with combining different types of substances that necessitated grouping in Hoster is absent here.

Kubosh next contends that the district court erred by using the amount of phenylacetic acid his co-defendant negotiated to purchase because the Government had previously delivered four drums of it. Thus, since there had been a completed distribution, Kubosh asserts that using the amount under negotiation was error. This contention is a factual one, relating to the scope of the conspiracy and Kubosh's reasonable ability to complete the deal, that we may not reverse unless it is clearly erroneous.

The PSR concluded that the 1,500 kilograms of phenylacetic acid under negotiation could be considered to compute Kubosh's base offense level, pursuant to U.S.S.G. § 2D1.1, comment. (n.12), because the amount of drugs seized did not reflect the scale of the offense. The district court agreed with and adopted the PSR's findings, and Kubosh offered no contrary evidence.

This court rejected a similar argument in United States v. Garcia, 889 F.2d 1454 (5th Cir. 1989), cert. denied, 494 U.S. 1088 (1990). There, the defendant pleaded guilty to distributing eight ounces of cocaine. But, even though the defendant only delivered eight ounces, the district court attributed sixteen ounces of cocaine to him for the purpose of calculating his base offense level because he had agreed to sell an undercover agent that amount. Id. at 1455-56. This court affirmed, reasoning that

the defendant had been convicted of an offense involving negotiation to traffic in a controlled substance, and the record revealed that he was reasonably capable of producing the sixteen ounces under negotiation. Id. at 1456-57.

Kubosh cites United States v. Bryant, 987 F.2d 1225 (6th Cir. 1992), as support for his position. Bryant held that the district court erred by using a drug quantity that had been under negotiation to calculate the defendant's base offense level because the defendant had actually delivered a lesser amount. Id. at 1229. But the Sixth Circuit distinguished Garcia on the ground that "there was no showing here that the defendant was capable of producing" the undelivered amount. Id. at 1229-30 n.4. Bryant is thus distinguishable because the record here indicates that Kubosh's operation was capable of using the 1,500 kilograms of phenylacetic acid under negotiation to produce 420 kilograms of methamphetamine. In the district court, Kubosh raised the question of puffing or bragging in connection with this negotiation. Wayne Fitch, a Fort Worth police officer assigned to the drug enforcement task force, testified that he was involved in the investigation that led to Kubosh's arrest, and that Charles Kubosh and the informant discussed a deal for 1,500 kilograms of phenylacetic acid. Fitch testified that, based on his knowledge of the Kubosh operation, they could have used 1,500 kilograms in a reasonable period of time. In response to a question from the court, Fitch testified that he did not believe that Charles Kubosh was bragging

or puffing when he stated that he needed and could dispose of 1,500 kilograms of phenylacetic acid.

Kubosh's final contention is that the district court clearly erred by attributing the 1,500 kilograms of phenylacetic acid under negotiation to him because he could not have reasonably foreseen that Charles Kubosh would attempt to purchase such a large amount. "In order to attribute to a particular defendant amounts of a controlled substance that was the subject of a conspiracy, the sentencing court must determine the quantity of controlled substance that the defendant knew or should reasonably have foreseen the conspiracy would have involved." United States v. Puma, 937 F.2d 151, 159-60 (5th Cir. 1991), cert. denied, 112 S. Ct. 1165 (1992). The quantity of controlled substances reasonably foreseeable to Kubosh is also a question of fact. See United States v. Pofahl, 990 F.2d 1456, 1479 (5th Cir.), cert. denied, 114 S. Ct. 266, and cert. denied, 114 S, Ct. 560 (1993).

The district court found that Charles Kubosh's negotiations for the 1,500 kilograms of phenylacetic acid were in the furtherance of jointly undertaken criminal activity reasonably foreseeable to Ora Kubosh. The court observed that the PSR revealed the existence of an audiotape recording of a conversation involving Charles, Doyle, and an informant on February 6, 1992, during which Charles and Doyle told the informant that they needed large quantities of phenylacetic acid. Accordingly, the court rejected appellant's claim that he could not have foreseen that

Charles would negotiate to purchase such a large amount of phenylacetic acid two weeks later.

The court's finding is supported by the PSR. See PSR ¶ 14. "A defendant challenging information presented at sentencing bears the burden of demonstrating its untruth, inaccuracy, or unreliability." United States v. Gracia, 983 F.2d 625, 630 (5th Cir. 1993). Kubosh offered no evidence at either sentencing hearing to dispute the accuracy of the information in the PSR concerning the negotiation. Therefore, the district court properly relied on the PSR to make its determination as to the drug quantity attributable to Kubosh's participation in the conspiracy.

Alternatively, Kubosh argues that he should be held responsible for only 10 drums (500 kilograms) of the phenylacetic acid because Charles told the informant that he planned to distribute 10 drums to Doyle and 10 drums to David Kubosh. PSR ¶ 14. This argument ignores that Doyle was a member of a conspiracy, and that, due to his membership in the conspiracy, he may be held responsible for the acts of coconspirators which were reasonably foreseeable to him. See Puma, 937 F.2d at 159-60.

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