

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3750
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALTER SMITH,

Defendant-Appellant.

Appeal from the United States District Court for
the Eastern District of Louisiana
(CR-93-228-L-5)

(June 24, 1994)

Before REAVLEY, DAVIS and DeMOSS, Circuit Judges.

PER CURIAM:*

Walter Smith was indicted for conspiring to distribute cocaine and for the distribution of cocaine. The conspiracy count read: "Beginning at a time unknown and continuing until on or about May 4, 1993 ... Walter Smith ... did ... conspire ... to distribute an amount of cocaine hydrochloride" Neither count stated a specific quantity of drugs. Smith pleaded guilty

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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 both counts, and at the arraignment hearing, the prosecutor recounted the basis for Smith's guilty pleas:

Beginning at some time prior to the fall of 1991 and continuing until May 4, 1993, Walter Smith and Walter Oquendo conspired with each other to distribute in excess of 500 grams of cocaine hydrochloride in the Eastern District of Louisiana. During April and May of 1993, Smith arranged to sell Raymond White 10 ounces of cocaine on May 4, 1993. In conversations leading up to the May 4 transaction, White and Smith discussed their prior drug activities, including a cocaine deal involving approximately 16 ounces of cocaine. Smith told White that his supplier would be the same for the upcoming deal as it had in the past.

Smith agreed that the prosecutor's summary was an accurate portrayal of his activities, and the court postponed the determination of the actual drug quantity involved until sentencing. The probation officer, using the entire 26 ounces of cocaine, ultimately assigned Smith a base offense level of 26 but suggested a downward departure of 3 levels for Smith's acceptance of responsibility, resulting in a sentencing range of 46 to 53 months. Smith did not object to the factual findings in the PSR nor the recommended guideline range. The court adopted the presentencing report at sentencing, and because a conspiracy conviction involving more than 500 grams requires a statutory minimum sentence of five years, the court sentenced Smith to 60 months on both counts, running concurrently, with 3 years of supervised release.

Smith now complains about the use of the full 26 ounces to invoke the mandatory minimum sentence. Smith argues "that only the offense he was charged with and which he pled guilty to can be used to invoke the statutory mandatory minimum sentence of [21

U.S.C. § 841(b)(1)]." He contends that the 16 ounces should have only been considered as relevant conduct when calculating his base offense level because the conspiracy count only involved the 10 ounces of cocaine, even though the indictment failed to state a specific quantity of drugs.

Because Smith failed to object to the court's determination of the quantity of cocaine, our review is limited to plain error. FED. R. CRIM. P. 52(b). We conclude that the court did not commit plain error for the following reasons: First, a court may impose a statutory minimum sentence even though the indictment fails to allege a specific quantity of drugs. *United States v. Watch*, 7 F.3d 422, 426-27 (5th Cir. 1993). Second, the conspiracy count is broad enough to include the sale of the 16 ounces of cocaine, and Smith agreed with the prosecutor's summary of the facts supporting his guilty pleas, which included the 16 ounces of cocaine.¹ And third, whenever the statutory sentence conflicts with the sentence calculated under the guidelines, the statutory minimum sentence prevails. *Id.* at 427.

AFFIRMED.

¹ Smith's reliance on *United States v. Darmand*, 3 F.3d 1578, 1581-82 (2d Cir. 1993) is misplaced because, here, the conspiracy charge encompasses the sale of both the 16 ounces and the 10 ounces of cocaine.