

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-4923

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HENRY HORDGE,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(6:92-CR-69)

(December 27, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Henry Hordge was convicted, pursuant to his guilty plea, of possessing with intent to distribute 3.1 grams of cocaine base (or crack cocaine), in violation of 21 U.S.C. § 841(a)(1) (1988). Hordge appeals his sentence of fifty-seven months imprisonment, contending that his sentence violated the Equal Protection Clause of the Constitution, as well as the Eighth Amendment. Finding no merit to these contentions, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

At sentencing,¹ Hordge was assessed a base offense level of 22, pursuant to U.S.S.G. § 2D1.1(c)(11). This offense level ultimately yielded a sentencing range of 57-71 months imprisonment. Had Hordge been convicted of possessing with intent to distribute the same quantity of plain cocaine (or cocaine powder), he would have been assessed a base offense level of 12, pursuant to U.S.S.G. 2D1.1(c)(16). This offense level would have yielded a sentencing range of 21-27 months imprisonment. Section 2D1.1's different treatment of crack cocaine and cocaine powder forms the basis of Hordge's appeal.

Hordge first contends that his actual sentence of fifty-seven months imprisonment, derived from treating crack cocaine more seriously than cocaine powder, denied him his right to equal protection under the Fifth Amendment. Hordge argues that § 2D1.1's distinction between crack cocaine and cocaine powder has a disparate impact upon African-Americans since most crack cocaine users are African-American. He therefore argues that the distinction between crack cocaine and cocaine powder for sentencing purposes constitutes unlawful discrimination. "Even if a neutral law has a disproportionate adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."² We review the district court's factual finding of no discriminatory intent

¹ The facts underlying Hordge's offense of conviction are not relevant to this appeal, and therefore will not be discussed.

² *United States v. Galloway*, 951 F.2d 64, 65 (5th Cir. 1992) (per curiam) (attribution omitted).

for clear error.³ Aside from his use of statistics, Hordge presented no evidence suggesting that the United States Sentencing Commission intended to discriminate against African-Americans when it enacted § 2D1.1. We therefore hold that the district court did not clearly err in finding no discriminatory purpose.

Because § 2D1.1's classification cannot be traced to any discriminatory purpose, § 2D1.1 "will survive an equal protection challenge if it bears a rational relationship to a legitimate end."⁴ Because § 2D1.1's distinction between crack cocaine and other forms of cocaine is rationally related to the legitimate end of protecting the public welfare,⁵ we reject Hordge's equal protection challenge.

Hordge also contends that his sentence of fifty-seven months violated the Eighth Amendment because his sentence was disproportionate to his offense of possessing with intent to distribute 3.1 grams of crack cocaine. "[T]he Eighth Amendment does not require strict proportionality between crime and sentence.

³ See *id.* at 66.

⁴ *Id.*

⁵ See *id.* ("Applying the rational basis test to [U.S.S.G. § 2D1.1], the district court properly found that the [distinction between crack cocaine and other forms of cocaine] in the sentencing guidelines is rationally related to [the Sentencing Commission's] objective of protecting the public welfare."); see also *United States v. Haynes*, 985 F.2d 65, 70 (2d Cir. 1993) (stating that the purpose behind the enhanced penalties for crack cocaine "is obvious)) crack cocaine is the most addictive and destructive form of cocaine"); *United States v. Buckner*, 894 F.2d 975, 978 (8th Cir. 1990) (finding a rational basis for requiring more severe penalties for crimes involving crack cocaine because "of crack's potency, its highly addictive nature, its affordability, and its increasing prevalence.").

Rather it forbids only extreme sentences that are 'grossly disproportionate' to the crime."⁶ "[O]utside of the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare."⁷ Given Congress' recognition that the use and distribution of crack cocaine is a problem of national concern, we cannot conclude that Hordge's sentence of fifty-seven months imprisonment under the guidelines was grossly disproportionate to his offense.⁸ We therefore reject Hordge's Eighth Amendment challenge.⁹

⁶ *Harmelin v. Michigan*, 111 S. Ct. 2680, 2705 (1991) (Kennedy, J., concurring) (citing *Solem v. Helm*, 103 S. Ct. 3001, 3008 (1983)). We assume, for purposes of this opinion only, that *Solem's* prohibition against grossly disproportionate sentences remains viable law. See *Harmelin*, 111 S. Ct. at 2702 (Kennedy, J., concurring) ("*[S]tare decisis* counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years."). But see *Harmelin*, 111 S. Ct. at 2686 (plurality opinion) (Scalia, J.) ("We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.").

⁷ *Solem*, 103 S. Ct. at 3009 (attribution omitted) (citation omitted).

⁸ See, e.g., *Buckner*, 894 F.2d at 980-81 (finding a sentence imposed under § 2D1.1 of the guidelines was not grossly disproportionate to the offense of possession with intent to distribute crack cocaine, given Congress' rational conclusion that crack cocaine posed a serious danger to society much greater than that posed by cocaine powder).

⁹ Because we conclude that Hordge's sentence was not grossly disproportionate to his offense, we need not compare the sentences imposed on other criminals in the same jurisdiction or compare the sentences imposed for commission of the same crime in other jurisdictions. See *Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., concurring) ("A better reading of our cases leads to the conclusion that intra- and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.").

Accordingly, the district court's judgment is AFFIRMED.