IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5076
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GERALD DUFFY,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1:92CR93-2)

(July 8, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Gerald Duffy appeals the sentence he received following a plea of guilty of conspiracy to possess with intent to distribute five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846. Finding no error, we affirm.

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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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Duffy filed three objections to the presentence investigation report (PSR). First, he asserted that there was no evidence that five and one-half kilograms of crack cocaine should be used to calculate his sentence. The district court overruled this objection. Second, Duffy contended that he should not receive a two-level increase in his offense level for possessing a firearm. The district court agreed and deleted the adjustment. Third, Duffy objected to the inclusion of two convictions in determining his criminal history category. Duffy had been sentenced, but had not begun to serve either of these sentences. The district court overruled this objection and found that Duffy belonged in criminal history category V. The court then sentenced Duffy to 360 months' imprisonment based upon an offense level of 38 and a criminal history category of V.

II.

Duffy contends that the disparate sentencing provisions for crack cocaine and cocaine powder contained in the sentencing guidelines "should be held unconstitutional, as denying equal protection and due process to black individuals." Duffy has not cited any Fifth Circuit precedent addressing this issue.

This court has held that the disparate sentencing provisions for crack cocaine and cocaine powder contained in the sentencing guidelines do not offend constitutional due process guarantees. United States v. Watson, 953 F.2d 895, 897 (5th Cir.), cert.

denied, 112 S. Ct. 1989 (1992). "Even if a neutral law has a disproportionate adverse affect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." United States v. Galloway, 951 F.2d 64, 65 (5th Cir. 1992) (internal quotation and citation omitted).

The classification in U.S.S.G. § 2D1.1 cannot be traced to any discriminatory purpose. As such, it "will survive an equal protection analysis if it bears a rational relationship to a legitimate end." Id. at 66. "[T]he fact that crack cocaine is more addictive, more dangerous, and can therefore be sold in smaller quantities is reason enough for providing harsher penalties for its possession." Watson, 953 F.2d at 898.

III.

Duffy argues that the district court incorrectly included two state offenses when calculating his criminal history category because he had not served any time with respect to the sentences. To support his argument, Duffy cites application note 2 to the commentary following U.S.S.G. § 4A1.2 that states, "To qualify as a sentence of imprisonment, the defendant must have actually have served a period of imprisonment on such sentence (or, if the defendant escaped, would have served time)."

The Eleventh Circuit has specifically rejected this argument in United States v. Rayborn, 957 F.2d 841 (11th Cir. 1992).

> In United States v. Martinez, 931 F.2d 851, 852 (11th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 268,

> 116 L. Ed. 2d 221, this court held that a defendant who had been sentenced but had not begun to serve his sentence at the time he committed a second offense was "under a criminal justice sentence" when he committed his second offense. The court stated that once a sentence has been imposed, the defendant "was subject to the control of that sentence and could have been required to report at any time." Martinez, 931 F.2d at 853.

Rayborn, 957 F.2d at 844. This court has addressed the language in application note 2 in the context of a defendant who had escaped from prison. See United States v. Radziercz, 7 F.3d 1193, 1195 (5th Cir. 1993), cert. denied, 114 S. Ct. 1575 (1994).

In Radziercz, we held that "[t]he commentary further states that criminal history points are based on the sentence pronounced, not the length of time actually served. U.S.S.G. § 4A1.2, comment. (n.2). The guidelines should not be misconstrued to reward a convict for aberrant behavior." Id.

This is exactly the argument that Duffy makes. Under his reasoning, the sentences could be included in his criminal history if they had been imposed concurrently to the federal sentence because he would have been serving time toward them. However, he argues that they should not count because the Mississippi courts imposed a harsher sentence of consecutive terms of imprisonment and he has not begun to serve his sentences. To accept Duffy's interpretation of the application note would be rewarding aberrant behavior by reducing the criminal history category because Duffy had received a more severe state sentence. As such, Duffy's argument on appeal has no merit.

IV.

Duffy argues that the government breached its plea agreement by not filing a motion under U.S.S.G. § 5K1.1 for reduction of sentence based upon cooperation at sentencing. The plea agreement provided that "[i]f the Government determines that [Duffy] has provided substantial assistance . . ., the United States will move that the sentencing court depart from the guidelines in a manner consistent with Section 5K1.1; or alternatively, pursuant to Rule 35(b) . . . ." This issue has become moot, as the government has filed a motion to reduce sentence for changed circumstances pursuant to FED. R. CRIM. P. 35(b). Duffy's brief was filed on March 28, 1994, and the rule 35 motion was not filed until May 5, 1994.

AFFIRMED.