

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-5098  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TAJ KAREEM BASS,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 1:92CR166-3  
- - - - -  
(March 22, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Taj Kareem Bass was convicted of possession with intent to distribute cocaine and cocaine base and was sentenced to 151 months' imprisonment and five years' supervised release. Bass argues that cocaine base is not a listed controlled substance under Schedule II as provided in 21 U.S.C. § 812 and that 21 U.S.C. § 841 does not make it a crime to possess cocaine base. He argues that because the courts have treated cocaine base as the same substance as cocaine for purposes of guilt, but have

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

held that they are different substances for purposes of sentencing, that the statute is unconstitutionally vague as applied to him and that his conviction violates the prohibition against ex post facto laws.

The premise for Bass's entire argument is incorrect. Cocaine base is included by 21 U.S.C. § 812(c) as a schedule II controlled substance because it is a derivative form of cocaine. Cocaine base and cocaine are treated distinctly by the penalty section of 21 U.S.C. § 841(b)(1)(B). See United States v. Catchings, 922 F.2d 777, 780 (11th Cir.), cert. denied, 499 U.S. 980 (1991). As the district court correctly noted, this Court has held that § 841's treatment of cocaine and cocaine base as two different substances for penalty purposes without defining the difference between cocaine and cocaine base does not make the statute unconstitutionally vague. United States v. Thomas, 932 F.2d 1085 (5th Cir.), cert. denied, 112 S.Ct. 264, 428 (1991), 112 S.Ct. 887 (1992). The statute does not violate the prohibition against ex post facto laws because it does not criminalize any conduct which was not already illegal. See United States v Barnes, 890 F.2d 545, 552 n.7 (1st Cir. 1989), cert. denied, 494 U.S. 1019 (1990).

Bass makes the same argument with regard to the application of § 2D1.1(a)(3)(C)(5), which provides for a base offense level of 34 for 150 grams to 500 grams of cocaine base. This argument fails for the same reasons as his previous argument. If the penalty provision of § 841 distinguishing between cocaine and cocaine base is not unconstitutionally vague, then the sentencing

guidelines implementing that distinction are not unconstitutionally vague. See Thomas, 932 F.2d at 1090.

Bass argues that the district court should have granted his motion for downward departure under § 5K2.0 because of an unreasonable disparity between his sentence and that of his codefendants. This Court specifically rejected Bass's argument in United States v. Ives, 984 F.2d 649, 650-51 (5th Cir.), cert. denied, 114 S.Ct. 111 (1993), holding that disparity of sentences among codefendants is not a proper basis for departure.

Bass argues that the sentencing guidelines are discriminatory because the majority of cocaine base cases involve black defendants, and the majority of cocaine cases involve white defendants. He argues that the district court erred in failing to take judicial notice of this disparity. He contends that this disparity violates the Fifth, Eighth, and Fourteenth Amendments. This Court has previously rejected Bass's argument. In United States v. Galloway, 951 F.2d 64, 65-66 (5th Cir. 1992), this Court held that there was no evidence of discriminatory intent in the adoption of § 2D1.1, and that there was a rational basis for providing harsher penalties for cocaine base. In United States v. Watson, 953 F.2d 895, 897-98 (5th Cir.), cert. denied, 112 S.Ct. 1989 (1992), this Court held that the sentencing guidelines provision for higher punishment for cocaine base did not violate due process or equal protection. This Court stated that even if the defendant could prove disparate impact upon black defendants, the defendant had not asserted discriminatory intent on the part of the Sentencing Commission, and that the guidelines met the

rational basis test due to the fact that cocaine base was more addictive and dangerous. Id. at 898.

AFFIRMED.