

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-7128
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CLARENCE THORTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(CR J92-00097-B-C)

(August 29, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:¹

Appellant, Clarence Thorton, pled guilty to conspiring to possess with intent to distribute two kilograms of cocaine in violation of 21 U.S.C. §§ 841, 846. The district court accepted his guilty plea and ordered the probation officer to prepare a presentence report (PSR).

The PSR determined that Thorton had two prior felony convictions for controlled substance offenses, making him a career

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

offender under U.S.S.G. § 4B1.1. The first conviction was for an attempt to possess a controlled substance with the intent to sell, and the second conviction was for a felony sale of cocaine. At sentencing, Thorton objected to the use of the conviction for attempted possession of a controlled substance with intent to distribute as a basis for career offender designation. The court overruled his objection to the career offender designation based on U.S.S.G. § 4B1.2, cmt. n.1. Thorton appeals. We vacate and remand for resentencing.

DISCUSSION

I.

Appellant challenges his designation as a career offender under U.S.S.G. § 4B1.1² on that grounds that the sentencing commission exceeded its statutory authority by including conspiracy and attempt convictions within the definition of "controlled substance offense" under § 4B1.2. Appellant did not raise the argument regarding conspiracy convictions at the sentencing hearing, but we will review it nonetheless because it concerns a legal issue and the failure to address it would result in "manifest injustice." See United State v. Sherbak, 950 F.2d 1095, 1101 (5th Cir. 1992).

² Section 4B1.1 provides:

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

The question of whether the sentencing commission exceeded its authority by including conspiracy convictions within the definition of "controlled substance offense" has been answered in our recent case United States v. Bellazerius, No. 93-3157, slip op. (5th Cir. June 17, 1994). In Bellazerius, we concluded that because the enabling statute, 28 U.S.C. § 994(h), does not include the offense of conspiracy to commit controlled substance offenses, the sentencing commission exceeded its authority by including that offense within the ambit of the guidelines. Id.

Because Appellant's instant conviction is not a "controlled substance offense" under § 4B1.1, Appellant fails to meet one of the prerequisites for career offender status. Accordingly, Appellant is not a career offender under the guidelines, and we need not address Appellant's second point of error.

CONCLUSION

For the foregoing reasons, we VACATE the sentence imposed on Appellant and REMAND for resentencing.