

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8099
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SCOTT WILLIAMS,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(W 92 CR 41 2)

(August 30, 1993)

Before GARWOOD, SMITH, and DEMOSS, Circuit Judges.*

GARWOOD, Circuit Judge:

Defendant-appellant Scott Williams (Williams) pleaded guilty to conspiracy to distribute methamphetamine. In sentencing him, the district court departed upward from the imprisonment range set by the Sentencing Guidelines because the defendant's actions in the conspiracy resulted in a death. On appeal, Williams challenges only this upward departure. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

Beginning as early as April 1, 1991, Raymond Allison, a co-defendant below, manufactured methamphetamine oil in Cameron, Texas.¹ Connie Williams, defendant's wife and co-defendant below, was a small-scale distributor for Allison; she limited her distribution to specific customers whom she contacted by phone. Williams' primary involvement was in using the methamphetamine himself, but he was aware of his wife's distribution activities and he participated in the distribution scheme by directing customers to his wife.

On May 4, 1991,² Phillip Foust (Foust), defendant's step-brother, went to the Williams' residence to obtain some methamphetamine oil. Present at the house were Williams and his wife, their (then) two minor children, and Allison. Foust intended to obtain some of the oil for himself and also some for a friend. While at the house, Foust injected himself intravenously with approximately ten units of methamphetamine oil which had been manufactured by Allison. Connie held the bottle of methamphetamine oil while Foust drew oil out into the syringe and injected himself.

Half an hour after using the oil, Foust passed out. He regained consciousness after a few minutes, but he refused to seek medical attention. The Williamses called Alana Sanders,

¹ Allison preferred not to reduce the oil to powder, as is commonly done in manufacturing methamphetamine, because he believed that procedure reduced the potency of the methamphetamine.

² The record is not clear whether the events precipitating this action occurred on the evening of May 3rd or May 4th.

defendant's half-sister and a former girlfriend of Foust, who lived nearby, to come help with Foust. Foust told Sanders that he had injected the methamphetamine oil; he complained of nausea and a bad headache. He again refused to go to the hospital.

Sanders returned home. Twice that evening, Connie came to the Sanders' house, upset over Foust's condition. During her second visit, Connie received a telephone call from Williams, informing her that Foust had lost consciousness again. Sanders' husband and a friend took Foust to the Scott & White Hospital in Temple, Texas.

At the hospital, Foust was placed on life-support systems. He was unconscious. Medical examinations revealed fixed, dilated pupils and swollen eyes, which are common with brain injuries, according to a treating physician. In addition, a CAT-scan revealed trauma to the temple area of Foust's head. Urine tests disclosed the presence of amphetamines in his body.³ Hospital records indicated the following diagnosis: "Speed hemorrhage. AmphetaminesSOwell known to cause brain hemorrhages of various kinds."

Foust died the next day without regaining consciousness.

In March 1992, a grand jury indicted Williams in both counts of a two-count indictment, charging him with (1) conspiring with his wife and Allison to distribute methamphetamine and (2) distribution of methamphetamine, including aiding and abetting. On October 1, 1992, Williams pleaded guilty to the conspiracy count;

³ Urine samples were also sent to the Texas Department of Public Safety for analysis. The result of the DPS tests revealed the presence of amphetamine and methamphetamine.

as part of the plea agreement, the government agreed to dismiss the distribution count. In addition, the government agreed not to prosecute Williams for other Title 21 violations which he may have committed and of which it was aware at that time.

A presentence report (PSR) was prepared, recommending that Williams be sentenced as a career offender, based upon prior convictions for drug-related offenses. The PSR calculated Williams' base offense level to be 32, using the career offender guideline; the PSR also granted Williams a 2-level reduction for acceptance of responsibility. The resulting offense level of 30, with a criminal history category of VI, yielded an imprisonment range of 168 to 210 months. The PSR suggested that an upward departure from this range would be warranted under U.S.S.G. § 5K2.1 (policy statement), because Williams' offense conduct resulted in Foust's death.

Following an evidentiary sentencing hearing, the district court found by a "clear preponderance of the evidence" that Foust's death was the result of a subarachnoid hemorrhage brought about by the ingestion of methamphetamine oil. The court rejected Williams' objection that Foust's death not be attributed to him personally because of his alleged minor role in the actual event,⁴ finding that Foust's ingestion of the methamphetamine was "part and parcel" of the conspiracy to distribute methamphetamine, to which Williams had pleaded guilty.

⁴ Williams argued below that he should not be held responsible for Foust's death, claiming that he (Williams) was unaware of Foust's use of the methamphetamine until after it occurred.

In sentencing Williams, the district court adopted the recommendations of the PSR, rejecting Williams' objections. The court departed upward from the range of 168 to 210 months to impose a sentence of 240 months, the statutory maximum for Williams' offense. In addition, the court imposed a 3-year term of supervised release, a \$1,000 fine (a downward departure), and a \$50 mandatory special assessment.

Williams appeals, challenging only the upward departure.

Discussion

On appeal, Williams does not challenge the amount of the upward departure, nor does he deny his connection with Foust's injection of the methamphetamine oil. He argues only that the evidence was insufficient to support the district court's finding that the use of the methamphetamine oil was the cause of Foust's death.

The government bore the burden of proving facts in support of the upward departure by a preponderance of the evidence. *United States v. Ihegworu*, 959 F.2d 26, 30 (5th Cir. 1992); *United States v. Carpenter*, 963 F.2d 736, 742-743 (5th Cir.), *cert. denied*, 113 S.Ct. 355 (1992).

A departure from the Guidelines is generally within the discretion of the district court. *Ihegworu*, 959 F.2d at 28. On appeal, our review of the district court's decision to depart upward from the Guideline range is two-fold: (1) whether the departure was in violation of law or a misapplication of the Guidelines, 18 U.S.C. § 3472(f); and (2) whether the departure was unreasonable. *United States v. Moore*, No. 92-2536, slip op. at

5724 (5th Cir. June 30, 1993).

The Guidelines anticipate special or atypical situations in which the recommended punishment range may be deemed insufficient, such as where aggravating or mitigating circumstances exist of a kind, or to a degree, not already incorporated in the Guidelines. In those instances, "the sentencing court may impose a sentence outside the range established by the applicable guideline" U.S.S.G. § 5K2.0 (policy statement). The district court must state, at the time of sentencing, the reasons for its imposition of a sentence outside the Guideline range. 18 U.S.C. § 3553(c)(2); *United States v. Ford*, No. 92-8396 (5th Cir. July 12, 1993).⁵

The Guidelines expressly contemplate an upward departure where death results from the conduct of offense. U.S.S.G. § 5K2.1 (policy statement).

We faced a similar fact situation in *United States v. Ihegworu*. There, the defendant, Ihegworu, gave heroin to an Elnora Wilson, a woman to whom he had previously sold heroin, asking her to deliver it to an Elizabeth Love. 959 F.2d at 27. Wilson did so and learned, several hours later, that Love had died of an overdose. We upheld the district court's upward departure in that case, finding that there was sufficient connection between Ihegworu's distribution of the heroin and Love's death from its ingestion to justify the departure. *Id.*, at 30-31.

The case before us presents an even stronger basis for

⁵ The district court stated in open court at Williams' sentencing: "Because of the death in this case, the Court believes an upward departure to the statutory maximum would be appropriate."

concluding that death resulted from ingestion of the drug distributed in or pursuant to the offense of conviction. In *Thegwor*, no medical evidence was proffered to establish the connection between the victim's death and the defendant's offense of possession of heroin with intent to distribute same. Here, however, the record contains ample evidence supporting the district court's conclusion that Foust died as a result of his ingestion of the methamphetamine oil he had obtained at Williams' home pursuant to the charged conspiracy.

At the sentencing hearing, the government introduced the testimony of David Lindzey, the general internist at Scott & White Hospital who coordinated the medical treatment of Foust when he was admitted to the hospital. Lindzey testified that the most likely cause of Foust's death was a subarachnoid hemorrhage induced by the use of amphetamines. Lindzey stated that no autopsy had been performed after Foust's death, and he agreed that an autopsy might have helped determine more conclusively the cause of death. Lindzey discussed causes of subarachnoid hemorrhage other than amphetamine ingestion, including trauma, berry aneurysm, arterial-venous malformations, or brain tumors, but testified that the doctors treating Foust found no evidence of those other causes.

Lindzey conceded that the tests done at the hospital did not reveal the amount of amphetamine in Foust's body. In addition, he admitted that the doctors had not excluded the possibility that other conditions caused the subarachnoid hemorrhage. However, these factors did not change his opinion that Foust most likely died from the methamphetamine ingestion. He noted in this

connection that the CAT-scan "did not call into question any abnormality within the actual brain itself." He further explained:

"When a young individual presents with a subarachnoid hemorrhage and amphetamine is present in the blood or urine, the overwhelming . . . preponderance of inference would be that that substance, which is well known to spontaneously induce a subarachnoid hemorrhage in a health individual, is the likely [culprit]."

Dr. S.M. Bunn, who testified on behalf of the defense at the sentencing hearing, conceded on cross-examination by the government that the cause of Foust's death was more likely than not a subarachnoid hemorrhage brought on by use of amphetamine or methamphetamine.

In support of Williams' contention of insufficient evidence is Dr. Bunn's testimony that the medical records did not *definitively* show that the use of amphetamine or methamphetamine caused the hemorrhage that killed Foust. In addition, the defense introduced the testimony of Randy York, a private investigator appointed by the district court to perform investigative services for Williams. York testified that he had interviewed Joe Ocannos, Foust's best friend, who told York that Foust had been complaining of headaches for the two months prior to his death.

We are aware that the evidence was not absolutely conclusive regarding the cause of Foust's death. However, the record as a whole, including the sequence of events, the testimony of Dr. Lindzey, Dr. Bunn's concession on cross-examination, and the fact that the hospital records of Dr. Christoff, the neurologist who signed the death certificate and examined the CAT-scan, gave the diagnosis "speed hemorrhage," constitutes more than sufficient

evidence to support the district court's upward departure on the grounds that Foust's death resulted from his ingestion of the methamphetamine oil Foust received at Williams' house.

Furthermore, the departure in the instant case was not unreasonably great. The applicable guideline range anticipated terms of imprisonment from 168 to 210 months. The district court sentenced Williams to 240 months, the statutory maximum for his offense. The additional 30 months represents a 14 percent increase from the upper range of the Guidelines. Our Court has found departures of much greater magnitude to be reasonable. See *United States v. Billingsley*, 978 F.2d 861, 866 (5th Cir. 1992) (increase of approximately 600 percent), *cert. denied*, 113 S.Ct. 1661 (1993); *United States v. Carpenter*, 963 F.2d at 742 (increase of over 35 percent); *Ihegworu*, 959 F.2d at 28 (300 percent departure).⁶ See also *United States v. Kikumura*, 918 F.2d 1084, 1094, 1098 (3d Cir. 1990) (increase of over 1000 percent, departure from range of 27-to-33 months to sentence of 30 years).

⁶ *Ihegworu* involved departures on two different grounds: the death resulting from the offense conduct (U.S.S.G. § 5K2.1) and the unusually high purity of the heroin involved (U.S.S.G. § 2D1.1, application note 9). 959 F.2d at 28.

We note that *Billingsley* expressly reserved the question of whether "clear and convincing evidence" should be required to sustain a "departure of great magnitude." *Id.*, 978 F.2d at 866. We do not address whether such a high standard in cases of that sort would be appropriate or consistent with pre-*Billingsley* decisions of this Court, because the departure here was not "of great magnitude" (and Williams has not contended for such a standard on appeal). In so stating, we do not suggest that the evidence here was not clear and convincing or that the district court did not find it so.

Conclusion

The district court did not abuse its discretion in departing from the applicable Guideline range. The sentence imposed by the district court is

AFFIRMED.