UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8130
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GREGORY C. NIEMANN,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(W 92 CR 60)

October 1, 1993

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Defendant Niemann was charged with possession of a controlled substance with intent to distribute after a search of his residence produced methamphetamine, laboratory equipment and chemicals to produce methamphetamine.[2] Niemann pled guilty to a superseding information on both counts. He was sentenced under the Sentencing Guidelines both on the basis of the amount of methamphetamine found

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[2] Defendant was also charged with possession of a firearm by a felon.

in his home and on the basis of the equipment and chemicals, which were treated as conduct relevant to the charged offense.

The defendant raises two issues in this appeal of his sentence. First, the defendant argues that the district court should not have considered the equipment and chemicals as relevant conduct to raise his offense level because no evidence existed that the defendant was engaged in production of a controlled substance at the time of the offense. Second, the defendant argues that the district court erred in calculating his offense level. We reject both of defendant's arguments.

I.

The first issue raised on appeal challenges a factual finding relating to the defendant's sentence and thus must be reviewed for clear error. **See United States v. Fitzhugh**, 984 F.2d 143, 146 (5th Cir. 1993). The district court's finding that the defendant intended to and had the capability to produce methamphetamine is not clearly erroneous.

Niemann argues that the equipment was disassembled and packed in boxes and thus could not have been used to manufacture methamphetamine. He also points out that, during preparation of his presentence report he told his probation officer that he did not manufacture methamphetamine, but rather traded the chemicals for finished product.

In response to this argument, the government's narcotics investigator testified that the chemicals and equipment seized were capable of producing approximately 4.5 pounds of methamphetamine. The government's investigator also testified that, although the

laboratory was not functioning at the time of the seizure, all of the equipment and chemicals needed to manufacture methamphetamine were present. Additionally, at his rearraignment, Niemann agreed with the government's factual basis for count two, which included a statement that the defendant was manufacturing methamphetamine.

A district court need only determine its factual findings at sentencing by a preponderance of the relevant and sufficiently reliable evidence. **United States v. Angulo**, 927 F.2d 202, 205 (5th Cir. 1991). In light of the expert testimony and the defendant's statement at rearraignment, the district court's factual finding regarding the manufacture of methamphetamine was not clearly erroneous.

II.

The second issue raised on appeal challenges application of the Sentencing Guidelines and thus is reviewed de novo. **United States v. Fitzhugh**, 984 F.2d 143, 146 (5th Cir. 1993).

The defendant was sentenced based on the amount of methamphetamine and phenylacetone involved in his offense and the amount of phenylacetic acid as conduct relevant to the charged offense. In computing the base offense level, the probation officer converted phenylacetic acid, a precursor chemical listed in section 2D1.11, to 4.5 pounds of methamphetamine based on a chemist's report; the probation officer then converted the methamphetamine to marihuana using the Drug Equivalency Table in Sentencing Guideline section 2D1.1. Defendant contends that the phenylacetic acid should have been converted pursuant to section 2D1.11, which governs offenses involving precursor chemicals,

instead of section 2D1.1, which governs offenses involving controlled substances and immediate precursor chemicals.

As support for his position, defendant cites **United States v. Hoster**, 988 F.2d 1374 (5th Cir. 1993). Both the defendant in **Hoster** and the defendant in this case were sentenced based on the quantity of a controlled substance and on the quantity of phenylacetic acid, which was treated as conduct relevant to the charged offense in both cases. In this case and in **Hoster**, the sentencing court did not utilize section 2D1.11 in converting the phenylacetic acid, but instead converted phenylacetic acid to a controlled substance or an immediate precursor and then applied the Drug Equivalency Table in section 2D1.1.

The **Hoster** court held that the sentencing court erred in converting the phenylacetic acid. In **Hoster**, it was unclear how the probation officer converted the phenylacetic acid to a marihuana equivalent. **Id.**, 988 F.2d at 1377 n.6. The **Hoster** court speculated that the probation officer had arbitrarily treated the phenylacetic acid as phenylacetone; the court criticized this method of conversion because of the absence of a proven relationship between phenylacetic acid and phenylacetone. **Id.**, 988 F.2d at 1382 n.21.

However, in this case there was no unexplained or arbitrary conversion of a section 2D1.11 chemical; an experienced chemist at the Texas Department of Public Safety Laboratory estimated that the phenylacetic acid found in the defendant's home could produce 4.5 pounds of methamphetamine. Furthermore, unlike in **Hoster**, the

search of Niemann's home produced all of the laboratory equipment and chemicals necessary to produce methamphetamine.

In sum, no scientific or physical evidence supported the conversion of phenylacetic acid to phenylacetone in **Hoster**. In this case, defendant had all of the equipment and chemicals necessary to produce methamphetamine and a chemist's investigation provided further support for the conversion of phenylacetic acid to methamphetamine. Moreover, defendant has never alleged that the chemist's estimation that the phenylacetic acid could produce 4.5 pounds of methamphetamine was inaccurate. The sentencing court did not err in concluding that the defendant was capable of producing 4.5 pounds of methamphetamine from the chemicals and equipment seized in the defendant's possession.

For the reasons stated above, the defendant's sentence is AFFIRMED.