IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8151
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RANDY STEWART,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-92-CR-120-03)

(December 21, 1993)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Randy Stewart was convicted pursuant to a plea of guilty and was sentenced under the Sentencing Guidelines. On appeal, Stewart advances numerous allegations of reversible

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

error both in his conviction and in his sentencing. Finding none, we affirm.

I

FACTS AND PROCEEDINGS

On August 26, 1992, a search warrant was executed on the residence of Stewart's co-defendant, Derrel Pierce. During the search, 8.2 pounds of phenylacetic acid were discovered in a fax machine box in the bed of a truck located on Pierce's property. Investigating officers had observed Pierce and Stewart talking near the truck on the previous evening. Latent fingerprints belonging to Stewart were discovered on the fax machine box containing the phenylacetic acid.

In October 1992, a search warrant was executed on Stewart's residence, during which 38 pounds of phenylacetic acid were seized, along with chemicals used in the manufacture of "ecstasy," methamphetamine, and glassware used in the manufacture of methamphetamine. Firearms and explosives were also discovered. In the course of the presentence investigation, Stewart admitted that he possessed the 8.2 pounds of chemical found in the truck as well as the 38 pounds of chemicals found at his home.

In calculating Stewart's base offense level of 28, the probation officer relied on U.S.S.G. § 2D1.11(a), which applies to the offense of possession of a precursor chemical. The base offense level was increased by two for Stewart's possession of a firearm, but the probation officer recommended a two-point reduction for acceptance of responsibility, giving Stewart a total

offense level of 28.

Stewart objected to the recommendation that he be held accountable for amounts of the chemical that were not included in the offense of conviction. He objected as well to the increase of his offense level for possession of a firearm, insisting that there was no evidence that he possessed a firearm in connection with the offense of conviction. Stewart also argued that the BATF had agreed that he would not be prosecuted for possession of a firearm if he cooperated with that agency. Stewart complained further that he was entitled to a three-level decrease for acceptance of responsibility because of his cooperation. Finally, he objected to the determination in the PSR that he was capable of paying a fine.

At the sentencing hearing, Stewart argued that he should be held accountable for the chemicals involved in the offense of conviction only, based on the rationale of Hughey v. United States, 495 U.S. 411, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990). The district court overruled the objection, determining that Hughey was not applicable, and that under the guidelines the court was required to consider all relevant conduct. Stewart also argued that he should not be held accountable for the possession of a firearm because the gun was not discovered until two months after the offense of conviction. The district court overruled this objection, finding that the gun had been located at the place where chemicals were found. The district court sustained Stewart's objection concerning a three-point reduction for acceptance of responsibility but overruled the objection to the recommendation that he had the

capacity to pay a fine, regardless of his argument that he was making minimum wage at the time of his arrest.

Defense counsel noted at the sentencing hearing that the possibility of the government's filing a § 5K1.1 departure motion had been included in the plea agreement, but that the government "has not been able to work that out." Counsel did not object to the government's failure to file the motion, but stated "[w]e still hope that they will go ahead and debrief and we will be able to come back to you within the next year for a Rule 35 departure."

The district court sentenced Stewart to a term of imprisonment of eighty-six months, to be followed by a three-year term of supervised release. A fine of $10,000 was imposed, which was below the minimum penalty provided by the guidelines. Stewart timely appealed his conviction and his sentence.

II

ANALYSIS

A. Conditional Plea

Stewart argues that the search of his residence was illegal because the search warrant was not supported by probable cause. He insists that he preserved his objection for appeal.

A defendant wishing to preserve a claim for appeal while pleading guilty must enter a conditional plea. Such a plea must be in writing and must specify the determination intended for review. United States v. Bell, 966 F.2d 914, 915 (5th Cir. 1992); Fed. R. Crim. P. 11(a)(2). A conditional plea is not valid without the consent of the government and the approval of the court.

Stewart's plea agreement does not reflect that he entered a conditional plea; neither did Stewart indicate to the district court at the rearraignment that he understood that the plea was conditional. Under those circumstances, Stewart has waived the right to urge that evidence was illegally seized from his property.

B. Plain Error in Determining Base Offense Level

Stewart argues that the district court committed plain error in determining his base offense level based on a DEA formula converting phenylacetone into methamphetamine. He contends that he should have been sentenced under U.S.S.G. § 2D1.11(d).

Stewart has confused the calculation of his base offense level with that of his co-defendant, Pierce (erroneously citing the sentencing calculation of his co-defendant to support his own argument). Pierce's base offense level was determined under the DEA conversion formula because he pleaded guilty to conspiracy to manufacture methamphetamine. A review of the record shows that Stewart's base offense level was properly calculated under § 2D1.11(1) because he pleaded guilty to possession of a listed chemical. There was no errorsQplain or otherwisesQin the manner in which the base offense level was determined.

C. Extraneous Conduct

Stewart argues that his base offense level should not have been calculated on the basis of conduct that is extraneous to the offense of conviction. He specifically argues that he should not be held accountable for the phenylacetic acid found at his residence in October 1992 because he pleaded guilty to the

possession of the chemical in August 1992.

We will uphold a district court's sentence as long as it is a correct application of the sentencing guidelines to factual findings that are not clearly erroneous. United States v. Register, 931 F.2d 308, 313 (5th Cir. 1991). A district court is to consider a defendant's involvement with quantities of drugs not charged in the indictment when such conduct was "part of the same course of conduct or common scheme or plan as the offense of conviction." Id. (citation omitted).

Stewart pleaded guilty to possession of precursor chemicals with intent to manufacture methamphetamine. The October search of his residence produced 38 pounds of phenylacetic acid, two ounces of methamphetamine, chemical books, glassware used in manufacturing methamphetamine, and notes containing chemical formulas and processes. A finding that the phenylacetic acid found during the October search was part of the same manufacturing scheme as the previously discovered chemicals is not clearly erroneous.

Stewart insists, though, that he understood he was pleading guilty to possession of 8.4 pounds of phenylacetic acid and would not be accountable for additional wrongdoing. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). In determining whether the terms of a plea agreement have been violated, we must determine whether the government's conduct is

consistent with the parties' reasonable understanding of the agreement. United States v. Hernandez, 996 F.2d 62, 64 (5th Cir. 1993).

The plea agreement did not state that Stewart would be sentenced solely on the basis of the chemicals which were in his possession in August 1992. He stated at the rearraignment that no promises were made to him outside of those contained in the plea agreement and acknowledged that his sentence would be determined in accordance with the sentencing guidelines. Stewart did not present evidence at the sentencing hearing reflecting any promises made to him with respect to the calculation of the drug quantity involved in the case. The district court did not commit error by considering relevant conduct in selecting a punishment within the statutory range for the offense of conviction. United States v. Hoster, 988 F.2d 1374, 1378-79 (5th Cir. 1993).

Stewart also argues that his admissions during the presentence investigation concerning his possession of the chemicals discovered in both searches cannot be used to increase his offense level. He contends that as part of the plea agreement the government promised that any self-incriminating evidence which he provided would not be used against him.

Section 1B1.8(a) specifies that "[w]here a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the

defendant," such information may not be used in determining the applicable guideline range. This provision does not restrict the use of information known to the government prior to entering into the cooperation agreement. § 1B1.8(b)(1). As a result of the August and October searches the government became aware that Stewart was involved in drug activity involving over 46 pounds of phenylacetic acid. As such, the government did not rely on Stewart's subsequent self-incriminating evidence in violation of the plea agreement.

Stewart reurges the argument made in the district court that under Hughey the word "offense" refers to the offense of conviction only and that other conduct cannot be considered in sentencing a defendant. Hughey held that the Victim and Witness Protection Act of 1982 limits awards of restitution to victims of losses caused by the specific conduct that is the basis for the offense of conviction. We have held that the Hughey rationale is not applicable to sentencing guidelines issues. United States v. Thomas, 932 F.2d 1085, 1088-89 (5th Cir. 1991), cert. denied, ___ U.S. ____, 112 S.Ct. 887 (1992). This argument is without merit.

D. Possession of Firearms

Stewart claims that he should not have received a two-level increase based on the fact that guns and explosives were found in his home, as he did not plead guilty to a firearm offense. Stewart also argues that there was no evidence that the firearms found in his residence in October were related to the offense of conviction. Stewart confuses conviction of a substantive crime with enhancement

of a sentence.

If a dangerous weapon was possessed in connection with the drug possession offense, a defendant's offense level is to be increased by two. § 2D1.11(b). This adjustment is to be applied "if the weapon was present, unless it is improbable that the weapon was connected with the offense." § 2D1.11, comment. (n.1). The term "offense" is defined to be "the offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." § 1B1.1, comment. (n.1(1)). Further, in interpreting the identical enhancement provision under § 2D1.1(b)(1), we held that the adjustment is not limited to a situation in which a defendant possesses a gun during the offense of conviction, but includes situations in which a defendant possesses a gun during the course of related relevant conduct. United States v. Vaguero, 997 F.2d 78, 85 (5th Cir. 1993), petition for cert. filed, (U.S. Oct. 25, 1993) (No. 93-6474).

Weapon possession is established if the government proves by a preponderance of the evidence "that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant." United States v. Eastland, 989 F.2d 760, 770 (5th Cir.), cert. denied, 114 S.Ct. 246 (1993). "Generally, the government must provide evidence that the weapon was found in the same location where drugs or drug paraphernalia are stored or where part of the transaction occurred." Id. (citation omitted).

Again, the search of Stewart's residence revealed the presence

of additional precursor chemicals and paraphernalia used in manufacturing methamphetamine. The district court's finding that the firearms were used in connection with the offense of possession of precursor chemicals with the intent to manufacture methamphetamine was not clearly erroneous.

Nevertheless, Stewart also argues that he entered into a separate agreement with a representative of the Bureau of Alcohol, Tobacco and Firearms (BATF) under which he would be granted immunity from prosecution for the possession of firearms and explosives found in his home if he debriefed that agency. He posits that this agreement was separate from the subsequent negotiations that he had with the government concerning his plea agreement. As noted above, Stewart was asked by the district court if any representations had been made to him other than those contained in the plea agreement to induce him to plead guilty; and he responded in the negative.

Further, even if the earlier separate agreement would bind the government, Stewart did not present any evidence at the sentencing hearing other than his counsel's unsworn statement that a separate agreement had been reached with the BATF relative to immunity. Counsel's unsworn assertions cannot serve as an evidentiary basis for a significant factual finding in the sentencing determination. United States v. Alfaro, 919 F.2d 962, 966 n.18 (5th Cir. 1990). Stewart did not bear his burden of showing by a preponderance of the evidence that the government breached an agreement with respect to consideration at sentencing of the explosives and firearms

seized during execution of the warrant. See United States v. Watson, 988 F.2d 544, 548 (5th Cir. 1993), petition for cert. filed, (U.S. July 29, 1993) (No. 93-5407) (defendant has the burden of proving the underlying facts establishing a breach of a plea agreement by a preponderance of the evidence).

E. Acceptance of Responsibility

Stewart urges that he was entitled to a three-level reduction for timely acceptance of responsibility. As the district court indeed gave Stewart the three-level reduction at the time of the sentencing hearing, there is nothing left for our consideration on this issue.

F. Ability to Pay Fine

Stewart contends that the district court erred in assessing a $10,000 fine because he is unable to pay the fine. He argues that the fine should be waived under § 5E1.2(f). The defendant has the burden of proving his inability to pay a fine. United States v. Fair, 979 F.2d 1037, 1041 (5th Cir. 1992). A fine may be appropriate even if it constitutes a "significant financial burden." United States v. Matovsky, 935 F.2d 719, 723 (5th Cir. 1991) (citation omitted).

The PSR reflected that Stewart's total monthly income was $1700 and that he had necessary expenses of $1060. The probation officer noted that Stewart's accessible income was limited, but pointed out that Stewart was healthy and had recently completed a college paralegal course. The probation officer stated his belief that Stewart was capable of paying the minimum guideline fine which

was $12,500.

Stewart counters by insisting that his stated income was exaggerated in the PSR and that the probation officers should not have taken into account child support payments of $200 per month received by his wife from her first husband. "[E]ven if [a defendant] had a negative net worth at the time of sentencing, the sentencing judge could base his sentencing determination on [the defendant's] future ability to earn." United States v. O'Banion, 943 F.2d 1422, 1432 n.11 (5th Cir. 1991). The court did not commit reversible error regarding the fine or Stewart's ability to pay it.

Stewart completed high school and has obtained a paralegal certificate. He is 42 years old and in good health. Stewart has not borne his burden of showing that he is incapable of earning an income in the future which would enable him to pay the fine on an installment plan.

G. Downward Departure for Substantial Assistance

Finally, Stewart complains that the government failed to comply with its promise under the plea agreement to give him the opportunity to provide substantial assistance thereby justifying a motion for downward departure at sentencing. Although Stewart raised this issue in his objections to the PSR, he abandoned the argument at sentencing and represented to the court that subsequently he would be seeking a sentence reduction under Rule 35. As resolution of this question will require factual findings concerning Stewart's actions and those of the government, the issue is not now reviewable on appeal. United States v.

Hatchett, 923 F.2d 369, 376 (5th Cir. 1991) (issues raised for the first time on appeal are not reviewable unless they involve purely legal questions and failure to consider them will result in manifest injustice).

III

CONCLUSION

Finding no reversible error by the district court, Stewart's conviction and sentence are, in every respect,

AFFIRMED.