UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8171
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DERREL PIERCE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-92-CR-120-2)

(November 12, 1993)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Pierce appeals his conviction and sentence following his plea of guilty to conspiracy to manufacture methamphetamine. We affirm.

I.

Derrel Pierce pleaded guilty pursuant to a plea agreement to conspiracy to manufacture methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. In exchange for his plea, the Government agreed to dismiss the remaining three counts against him. The

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court sentenced Pierce to 108 months in prison based upon the court's application of § 2D1.1.

In August 1992, agents with the Drug Enforcement Administration (DEA) executed a search warrant at Pierce's residence and seized 8.2 pounds of phenylacetic acid (PA). At Pierce's sentencing hearing, the probation officer testified that he had used a formula supplied by the DEA to convert 8.2 pounds of PA to 1.3 kilograms of methamphetamine. He then applied § 2D1.4 (Nov. 1991) to determine Pierce's base offense level of 32.

Section 2D1.4, Attempts and Conspiracies, was deleted and consolidated with the guidelines applicable to the underlying substantive offenses effective November 1, 1992. Pierce was sentenced on February 23, 1993. When asked by the Government to determine Pierce's base offense level using the guidelines in effect on the date of sentencing, the probation officer applied § 2D1.1, which resulted in the same base offense level of 32.

The district court accepted the probation officer's recommendation of a base offense level of 32. The court then added two points to Pierce's base offense level because he possessed a dangerous weapon and granted him a three- point reduction for acceptance of responsibility, yielding a final offense level of 31. This called for a sentencing range of 108-135 months. The district court sentenced Pierce to 108 months.

II.

Pierce first challenges the district court's denial of his motion to suppress, which he filed before he entered his guilty plea. He argues that the affidavit requesting the search warrant failed to demonstrate probable cause.

We do not reach this argument, however, because Pierce's unconditional guilty plea waived all nonjurisdictional defects in the proceedings leading to conviction. **United States v. Smallwood**, 920 F.2d 1231, 1240 (5th Cir.), **cert. denied**, 111 S.Ct. 2870 (1991). Because he entered an unconditional guilty plea, Pierce is barred from challenging the district court's denial of his motion to suppress.

Pierce next argues that the district court erred by calculating his base offense level under § 2D1.1 rather than § 2D1.11. He contends that the court should have applied § 2D1.11 because this section specifically lists PA. He concedes that if he "manufactured or attempted to manufacture methamphetamine the district court could properly apply 2D1.1,". . . . He contends, however, that "the proper reference for [PA] is still 2D1.11 because [2D1.11] provides the only reference to [PA] in the Guidelines."

Pierce's argument, however, overlooks Section 1B1.2(a) which provides that the offense of conviction is to be used to determine the guideline for sentencing. Pierce was convicted of conspiracy to manufacture methamphetamine. Section 2D1.11 applies to the unlawful distribution or possession of a listed chemical, not the

manufacture of a controlled substance. Section 2D1.1 covers the unlawful manufacture of a controlled substance. Because Pierce was convicted of conspiracy to manufacture methamphetamine, the district court properly calculated his base offense level pursuant to § 2D1.1.

In **United States v. Myers**, 993 F.2d 713, 716 (9th Cir. 1993), the Ninth Circuit, addressing a similar argument, held that the defendant was properly sentenced pursuant to § 2D1.1 rather than 2D1.11. The court noted that Appendix A listed 2D1.1 as the guideline applicable to 21 U.S.C. § 841(a), and that § 2D1.11 cross-references § 2D1.1 as the correct guideline when the offense involves the manufacturing of controlled substances. **Id.** The court concluded that because the defendant pleaded guilty to conspiracy to manufacture methamphetamine with intent to distribute, there was "no reason the offense of his conviction should not determine the guideline used to calculate his sentence." **Id.**

Pierce further argues that the use of the DEA conversion formula to determine his base offense level was plain error. Although this Court questioned the use of the same DEA formula in **United States v. Surasky**, 974 F.2d 19, 21 n.10 (5th Cir. 1992), **cert. denied**, 113 S.Ct. 1948 (1993), it found no plain error in the district court's adoption of the conversion formula. The Court expressed no opinion as to the result that it might have reached had the defendant objected to the formula at trial. **Id.** Although Pierce urged the application of § 2D1.11 rather than § 2D1.1, he

did not specifically object to the district court's adoption of the DEA formula at the sentencing hearing. As in **Surasky**, the use of the conversion formula in Pierce's case did not amount to "'error so obvious that [this Court's] failure to notice it would seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings and result in a miscarriage of justice.'" **Id.** at 21 (citation omitted); **see United States v. Olano**, ___ U.S. ___, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993).

AFFIRMED.