UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-11159
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GARY ALLEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(3:94 CR 102 R)

August 4, 1995

Before DAVIS, BARKSDALE and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

In a two-count indictment, Gary Allen was charged with making a false statement in a matter within the jurisdiction of the United States Food and Drug Administration ("FDA"), in violation of 18 U.S.C. § 1001, and with distributing a misbranded drug, gamma

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

hydroxybutyrate ("GHB"), with the intent to defraud and mislead, in violation of the Federal Food, Drug, and Cosmetic Act ("FFDCA"), 21 U.S.C. §§ 331(a) and 333(a)(2). Allen moved the district court to dismiss the indictment on the ground that the word "drug," as it is defined in the FFDCA, is unconstitutionally vague. The motion was denied. Allen was found guilty on both counts. Allen has appealed.

Allen was president of JDI Enterprises, a general partnership, which was in the business of selling food supplements to body-builders. Beginning in August 1990, Allen marketed and sold GHB. In his promotional literature, Allen represented that GHB would cause the release of growth hormone, induce sleep, act as an aphrodisiac, and produce a psychotropic "high".

During an inspection of JDI in January 1991 an FDA investigator asked Allen whether he had received any GHB-containing products from any other source or supplier other than three bottles of GHB he had received from Amino Discounters in Tucson, Arizona. Allen said that he had not. This statement was false because, as Allen knew, he had previously purchased large quantities of GHB from other sources. By late 1990 or early 1991, Allen had learned that GHB was an illegal and dangerous drug. Allen continued to distribute GHB. In February 1993, Allen sold 50 bottles of GHB to Bruce Brenner, a confidential informant.

Allen argues that the indictment should have been dismissed because the definition of the term "drug" in the FFDCA is unconstitutionally vague. The district court's legal conclusions

are reviewed de novo and any fact findings are reviewed for clear error. See United States v. Deshaw, 974 F.2d 667, 669 (5th Cir. 1992).

"A penal statute is void for vagueness unless it `define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" Buckley v. Collins, 904 F.2d 263, 266 (5th Cir.), cert. denied, 498 U.S. 990 (1990) (alteration in original) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). "A conviction may be unconstitutional if it is obtained under a statute so vague that it does not provide adequate notice of what conduct will be deemed criminal." Springer v. Coleman, 998 F.2d 320, 322 (5th Cir. 1993). The indictment stated that substances known collectively as GHB:

> were drugs within the meaning of Title 21, United States Code, Section 321(g)(1)(C), in that they were intended to affect the structure and any function of the body of man, and within the meaning of Title 21 United States Code, Section 321(g)(1(D), in that they were intended for use as a component of any article to affect the structure and any function of the body of man.

Allen contends that §§ 321(g)(1)(C) and (D) are unconstitutionally vague, facially and as applied in this case. Any of the substances he sold, Allen argues, including vitamins and protein powders, would have been "drugs" under the statutory definition because all were "intended to affect the structure and any function of the body of man." Even water could be considered a drug under this definition.

If a vagueness challenge does not involve First Amendment issues, the sufficiency of notice provided by the statute must be examined in light of the conduct for which the defendant is charged. United States v. Mazurie, 419 U.S. 544, 550 (1975); United States v. National Dairy Products Corp., 372 U.S. 29, 33 (1963). A court may sustain a facial challenge to the vagueness of a law:

> only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

Home Depot, Inc. v. Guste, 773 F.2d 616, 627 (5th Cir. 1985) (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982)); see Home Depot, Inc. v. Guste, 777 F.2d 1063, 1064-65 (5th Cir. 1985) (opinion denying petition for rehearing).

As the Government argues, Allen was subjectively aware that GHB was a "drug" under the FFDCA. Allen was faxed an "ALERT" by the National Nutritional Foods Association that warned of adverse reactions to GHB. Allen was advised in January 1991 by an FDA agent that the GHB was an unapproved drug. A reasonable person would have known that his conduct was proscribed under the circumstances. See Maynard v. Cartwright, 486 U.S. 356, 361 (1988) ("Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case

where reasonable persons would know that their conduct is at risk.").

Allen's argument implicates whether the statute is overbroad. "A statute will survive an overbreadth challenge unless it reaches a substantial amount of constitutionally protected conduct. Overbreadth analysis has been used primarily to invalidate statutes affecting freedoms of expression and association protected by the first amendment." United States v. Wicker, 933 F.2d 284, 287-88 (5th Cir.) (internal quotations and citation omitted), cert. denied, 502 U.S. 958 (1991); see also Hoffman Estates, 455 U.S. at 497 ("overbreadth doctrine does not apply to commercial speech"). Because Allen's challenge does not implicate First Amendment expression or other constitutionally protected conduct, we conclude that the statute was not unconstitutionally overbroad as applied to him. See Hoffman Estates, 455 U.S. at 496 (a government may regulate or ban speech proposing an illegal transaction); United States v. Article of Drug ... Bacto-Unidisk ..., 394 U.S. 784, 793 (1969) (construing precursor to § 321(g) -- "we think it plain that Congress intended to define `drug' far more broadly than does the medical profession").

Because Allen's vagueness and overbreadth challenges to the definition of the term "drug" in the FFDCA are without merit, the court will not consider the government's argument that Allen lacks standing to challenge the constitutionality of the definition in the context of a conviction under 18 U.S.C. § 1001. The convictions are **AFFIRMED**.