UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-20878

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CARLOS ELDONISE BERGMAN,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR H 89 0182 01)

September 20, 1995

Before HIGGINBOTHAM, DUHÉ, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Defendant Carlos Eldonise Bergman appeals an order of the district court denying two motions filed pursuant to 18 U.S.C. § 3582(c)(2) to have his sentence reduced in light of Amendment 484 to the United States Sentencing Guidelines. We vacate and remand.

Bergman plead guilty to attempting to manufacture in excess of one kilogram of methamphetamine, in violation of 21 U.S.C.

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

§ 841(a)(1), (b)(1)(A), and 21 U.S.C. § 846. The district court sentenced Bergman to 188 months in prison, five years of supervised release, and a $50 special assessment.[1] Bergman did not file a direct appeal. Bergman subsequently filed two § 3582(c)(2) motions to have his sentence reduced. Bergman contends that retroactive changes in the sentencing guidelines should be applied in his case, and that his sentence should be reduced accordingly. The district court denied both motions without a hearing. Bergman now appeals, contending that the district court erred in denying his § 3582(c)(2) motions.[2]

Section 3582(c)(2) allows for reduction of a defendant's sentence where a court based the term of imprisonment on a guideline range that is subsequently lowered, and where the reduction would be consistent with the applicable policy statements in the guidelines. *United States v. Towe*, 26 F.3d 614, 616 (5th Cir. 1994). Amendment 484 to § 2D1.1 of the guidelines effectively reduced certain sentencing ranges by excluding from a controlled substance's weight those substances, such as waste water or precursor chemicals, that must be separated out before the drug can be used. Amendment 484, U.S.S.G. App. C (1993); U.S.S.G. § 2D1.1, comment. (n.1) (1994). The Sentencing Commission gave this

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[1] The district court found Bergman to be in possession of two gallons of P2P, a precursor to methamphetamine and a Schedule II controlled substance. The Sentencing Guidelines equate two gallons of P2P with 1.26 kilograms of heroin, resulting in a base level of 32. U.S.S.G. § 2D1.4 (1987). After a reduction for acceptance of responsibility, Bergman's resulting guideline range was 151 to 188 months.

[2] The decision to reduce a sentence under 18 U.S.C. § 3582(c)(2) is discretionary and therefore we review the district court's decision for abuse of discretion. *United States v. Shaw*, 30 F.3d 26, 28 (5th Cir. 1994). We review factual findings made in a § 3582(c)(2) proceeding for clear error. *United States v. Mimms*, 43 F.3d 217, 220 (5th Cir. 1995).

amendment retroactive effect. U.S.S.G. § 1B1.10(d) (1994); *Shaw*, 30 F.3d at 28. Accordingly, if Bergman's sentence was based in part on waste or precursor chemicals that Amendment 484 now mandates should be excluded from the two gallons used for calculating his sentence, then his sentence may be improper. *Towe*, 26 F.3d at 616-17.

After careful review of the record, we find the district court abused its discretion in denying Bergman's § 3582(c)(2) motions. Although the record is silent as to Bergman's claim that the DEA analyzed the two-gallon mixture and found it to contain only 13% P2P, the record supports his contention that chemicals besides P2P were present in the two-gallon mixture.[3] The presentence report ("PSR") lists several chemicals which were used in creating the two-gallon mixture and, as was the case in *Towe*, fails to specify the extent to which these other chemicals were present in the mixture. Where the amount of actual P2P in a mixture is in doubt, and where the amount of P2P was the primary factor in determining the defendant's sentence range, it is an abuse of discretion to deny a § 3582(c)(2) motion without further factual inquiry. *Id*. at

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[3] Bergman argues that Amendment 484 applies to his case because DEA analysis showed that the actual amount of P2P in the two gallon mixture was only 13% of the total volume, and thus the district court abused its discretion by not reducing his sentence under § 3582(c)(2). Alternatively, Bergman contends that the record is ambiguous as to whether the court sentenced him based on waste products that should now be excluded from the calculations, and thus he should be entitled to a hearing to determine the amount of P2P which resulted in his guideline range.

Bergman also argues that the district court abused its discretion by failing to analyze his motion in light of the statutory factors listed in 18 U.S.C. § 3553(a). In light of our decision to remand this case to determine the amount of P2P present, we need not decide whether § 3582(c)(2) compels a district court to examine the statutory factors listed in 18 U.S.C. § 3553(a) before granting or denying a motion for sentence reduction.

617; *see also Mimms*, 43 F.3d at 220-21 (vacating and remanding denial of a § 3582(c)(2) motion on the grounds that the district court's determination of the amount of P2P was in doubt). The district court should have determined whether the two-gallon mixture was indeed 100% P2P, or a combination of P2P and non-countable materials, in order to determine whether Bergman was entitled to a sentence reduction.

Accordingly, we VACATE the district court's order and REMAND for further proceedings.