IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 94-40285
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRY W. BRAXTON,

Defendant-Appellant.

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Appeal from the United States District Court for the
Eastern District of Texas
(4:93-CR-53)

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(August 29, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Terry W. Braxton appeals the sentence imposed and we affirm.

I

Braxton pleaded guilty to possession with intent to distribute a controlled substance containing a detectable amount of crack cocaine within 1000 feet of a school. The court sentenced him to a prison term of 46 months, imposed a six-year term of supervised

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

release, and ordered him to pay a special assessment of $50. The district court adopted the findings of fact and recommendations concerning application of the guidelines contained in the presentence report (PSR).[1]

II

A

Braxton argues that the district court erred in sentencing him for possessing with intent to distribute 3.5 grams of crack cocaine when the undercover officer purchased only 1.44 grams of crack cocaine from him. Braxton was not arrested at the time of the purchase. The officer, however, observed additional drugs in his possession. A district court's findings concerning the quantity of drugs that form the basis of a sentence is a finding of fact reviewed only for clear error. United States v. Smith, 13 F.3d 860, 865 n.11 (5th Cir. 1994). "If quantities of drugs outside the offense of conviction are considered in calculating the offense level, they must be supported by a preponderance of the evidence." United States v. Sherbak, 950 F.2d 1095, 1100 (5th Cir. 1992). Information relied upon for sentencing purposes must "have some minimal indicium of reliability and bear some rational relationship to the decision to impose a particular sentence." United States v.

[1]Braxton's notice of appeal was filed late, but the district court ruled that it should be deemed timely. This ruling was in effect a finding that Braxton demonstrated excusable neglect, and the appeal is deemed to be timely. See United States v. Winn, 948 F.2d 145, 153 n.24 (5th Cir. 1991).

Montoya-Ortiz, 7 F.3d 1171, 1180 (5th Cir. 1993)(internal quotations and citation omitted). The defendant bears the burden of demonstrating that information to be relied on for sentencing purposes "is materially untrue, inaccurate or unreliable." United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991).

At the sentencing hearing, the undercover officer testified that he purchased a $100 rock of crack cocaine from Braxton. The crack that he bought weighed about 1.44 grams. The officer explained that, prior to making the purchase, Braxton told him "that he had just received a bolo" and pulled a piece of crack cocaine out of his pocket. According to the officer, Braxton broke the piece he sold him off this larger rock. The rock was at least twice the size of the piece the officer purchased, and comparable to rocks weighing three-and-a-half grams, which he had purchased in the past. Although the officer did not recognize the term "bolo," two cooperating individuals told him that a bolo was equivalent to an "eight ball"; other officers told him that an eight ball was equivalent to about three-and-a-half grams.

During allocution, Braxton told the court that the officer "didn't tell the truth about the whole thing, about what he had seen me break off, because he didn't get what he said he got." According to Braxton, the officer received "a $50 rock for $100, and he hadn't see [sic] nothing but that piece."

The PSR attributed 3.5 grams of crack cocaine to Braxton in calculating his base offense level. At least three grams but less

than four grams of cocaine base results in an offense level of 22. The PSR further determined that the 3.5 grams of crack cocaine were all located at the protection location, the school, giving right to a two-point increase under § 2D1.2(a)(1) of the Sentencing Guidelines.

Braxton argues on appeal that the evidence was insufficient to show that he possessed more than 1.44 grams of crack cocaine. This argument fails, however, because the evidence adduced by the government was certainly entitled to be credited and given greater weight than Braxton's denial that he possessed three grams of crack cocaine. In determining that Braxton did possess three grams of crack cocaine, the court relied on an officer's approximation of the weight of unrecovered drugs, which it is permitted to do. See United States v. Angulo, 927 F.2d 202, 204 (5th Cir. 1991). In short, the district court's finding was not clearly erroneous.

B

Braxton next argues that the district court should have applied § 2D1.2(a)(2) instead of § 2D1.2(a)(1) of the Sentencing Guidelines. The district court's application of the guidelines is a question of law reviewed de novo. United States v. Howard, 991 F.2d 195, 199 (5th Cir. 1993).

The guidelines instruct the sentencing court to select the highest offense level from among: (1) the drugs located at the protected location plus two levels; (2) the total quantity of drugs under relevant conduct from both the protected location and away

from the protected location plus one level; or (3) offense level 13. The district court found that Braxton possessed the entire 3.5 grams of crack cocaine near the protected location. Braxton's argument would require a finding that, although he did at one time possess that amount, he had with him only 1.44 grams that he sold to the officer when he was near the school. Braxton, however, did not satisfy his burden of demonstrating that the information relied upon by the court for sentencing was "materially untrue, inaccurate, or unreliable." Angulo, 927 F.2d at 205. Therefore, the district court did not err in applying § 2D1.2(a)(1).

III

For the foregoing reasons, the judgment is

A F F I R M E D.