IN THE UNITED STATES COURT OF APPEALS

for the Fifth Judicial Circuit

No. 94-40438
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BILLIE MARIE TAYLOR, aka B.B.,

Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of Texas
(1:91-CR-86(3)

(September 16, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[1]

Billie Marie Taylor and one of her co-defendants, Benton Miley, were tried by jury on an eight-count indictment. Taylor was found guilty of the following four counts:

(1) count one, conspiring to manufacture methamphetamine, in violation of 21 U.S.C. § 846;

(2) count two, possessing a listed chemical, ephedrine, with the intent to manufacture methamphetamine, in violation of 21 U.S.C. § 841(d)(1);

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(3) count three, possession of a firearm in relation to a drug trafficking crime, in violation of 21 U.S.C. § 924(c); and

(4) count eight, possession of an unregistered firearm, in violation of 26 U.S.C. § 5861.

On February 28, 1992, the district court sentenced Taylor to serve 292 months imprisonment under count one, 120 months consecutive imprisonment for count three, and 120 months concurrent imprisonment for counts two and eight. Taylor appealed. We affirmed her conviction and sentence, and the United States Supreme Court denied her petition for writ of certiorari. U.S. v. Miley, No. 92-4194 (5th Cir. Dec. 23, 1992) (unpublished), cert. denied, 114 S.Ct. 97 (1993).

Taylor then filed a motion to modify her sentence pursuant to 18 U.S.C. § 3582(c)(2), arguing that her sentence should be reduced based on the retroactive application of amendment 484 to the 1993 sentencing guidelines. The district court denied the motion, and Taylor appeals. We affirm.

DISCUSSION

The district court's application of the guidelines

Taylor contends first that the district court erred in applying U.S.S.G. § 2D1.1, the controlled-substance guideline, to her listed-chemical offense, possession of ephedrine (count two). She argues that the court should have applied § 2D1.11 which specifically provides for offenses involving ephedrine and would have yielded a lower base offense level.

A § 3582(c)(2) motion applies only to guideline amendments which operate retroactively, as listed in the policy statement to U.S.S.G. § 1B1.10(d).[2] U.S. v. Miller, 903 F.2d 341, 349 (5th Cir. 1990). Although Taylor refers to retroactive amendment 484, her argument actually challenges the district court's application of the guidelines. Section 3582(c)(2) provides that, on motion by the defendant, the district court may not modify a term of imprisonment once it has been imposed except that, if the sentencing range has subsequently been lowered by the Sentencing Commission,

> the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2). This section does not address a defendant's challenge to the district court's application of the guidelines. Accordingly, the question of whether the district court applied the appropriate guideline is not cognizable under § 3582(c)(2). For this reason, we address neither Taylor's argument that the district court applied the wrong guideline, nor the government's argument that this issue was resolved on direct appeal.

Retroactive application of amendment 484

[2] Part of Taylor's argument discusses a November 1, 1993 amendment to § 1B1.3. This amendment (amendment 439) is not among those listed in § 1B1.10(d) as retroactively applicable; therefore, we do not consider this amendment in our analysis of this 18 U.S.C. § 3582 motion.

At trial, a Drug Enforcement Agency chemist testified that the 55 pounds of ephedrine, which formed the basis for counts one and two, could produce 15 to 20 kilograms of pure methamphetamine. Based upon this testimony, the district court determined that the quantity of pure methamphetamine involved was 14.96 kilograms. The district court then applied U.S.S.G. § 2D1.1(c)(2) (at least 10 KG but less than 30KG of actual Methamphetamine) to find Taylor's base offense level of 40.

Section 2D1.1(a)(3) directs the district court to refer to the § 2D1.1(c) drug quantity table in order to determine the defendant's base offense level. The drug quantity table states that,

> Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.

U.S.S.G. § 2D1.1(c). Amendment 484 changed § 2D1.1, Application Note 1, to explain that the term "[m]ixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used." United States Sentencing Commission Guidelines Manual, Appendix C, amendment 484 (1993).

Taylor argues that her sentence should be reduced based on amendment 484 because the ephedrine should not have been used in calculating the amount of methamphetamine, for purposes of determining the base level for her sentences on counts one and two. Taylor focuses upon the term "mixture or substance," and argues that the district court construed amendment 484 too narrowly in

calculating the amount of methamphetamine that could be produced from 55 pounds of ephedrine.

The issue addressed by amendment 484 has arisen in cases which involve either (1) a controlled substance which is bonded to, or suspended in, another substance but is not usable until it is separated from the other substance (e.g., cocaine mixed with beeswax); or (2) waste produced during the manufacturing process (e.g., waste products which are used to remove impurities or form a precipitate of a controlled substance are not to be used in calculating the base offense level), or chemicals confiscated before the chemical processing of the controlled substance is completed. Id. The chemicals seized before the end of processing are "not usable in that form because further processing must take place before they can be used." Id., citing U.S. v. Sherrod, 964 F.2d 1501 (5th Cir. 1992), cert. denied sub nom., Cooper v. United States 113 S.Ct. 832 (1992), and cert. denied sub nom., U.S. v. Sewell, 113 S.Ct. 1367 (1993). The Sentencing Commission gave amendment 484 retroactive effect. U.S.S.G. § 1B1.10(d).

The instant case involves neither a controlled substance which is bonded to or otherwise mixed with another substance, nor a waste product from the manufacturing process. This ephedrine was not a chemical seized during processing as in Sherrod.[3] Taylor's

[3] U.S. v. Sherrod, supra, involved methamphetamine mixtures which were in the formative stages of the manufacturing process. 964 F.2d at 1511 and at n. 7. The defendants had begun, but had not yet completed, processing the methamphetamine from precursor chemical P2P. The defendants asserted on appeal that the district court erred in using the weight of the mixture in its sentence calculations because it should have used only the amount of

sentence was not based on an amount of "mixture or substance" which contained waste products or unusable chemicals. See and compare, Sherrod, id. Taylor correctly points out that ephedrine is a listed chemical which is a precursor to methamphetamine and which contains no traceable amount of a controlled substance.[4] The district court examined the evidence to determine the amount of methamphetamine which could be manufactured from the seized amount of ephedrine. Taylor's sentence was calculated based on the amount of ephedrine and the conversion ratio between ephedrine and methamphetamine. Thus, we find that amendment 484 does not apply to the district court's use of the weight of ephedrine to calculate the amount of methamphetamine which could have been produced. Accordingly, we hold that this amendment does not apply to Taylor's sentence.

CONCLUSION

Taylor may not challenge the district court's application of the Sentencing Guidelines via a 18 U.S.C. § 3582(c)(2) motion to modify sentence. Therefore, we do not address her argument that

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methamphetamine that could have been produced. We held that the district court did not err in sentencing the defendants on the basis of the entire amount of methamphetamine mixture. Amendment 484 cites Sherrod after its statement that, like waste produced from illicit manufacture of a controlled substance, the chemicals seized before the end of processing are not usable.

[4] We note that, where there is no drug seizure, the court shall approximate the quantity of the controlled substance. U.S.S.G. § 2D1.1, Application Note 12. There was no § 2D1.1 controlled substance seized in this case.

the district court applied the wrong guideline in determining her base offense level.

Amendment 484, which Taylor asserts should apply retroactively to reduce her sentence, does not apply to the facts of her case. Finding no error in the district court's denial of Taylor's 18 U.S.C. § 3582(c)(2) motion, we affirm.

AFFIRMED.