

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-50104
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

TAMMY DIANE BAKER,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

(W-88-CR-10-3)

(October 14, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Tammy Diane Baker was convicted of (1) manufacture of methamphetamine and (2) conspiracy to manufacture and to possess with intent to distribute methamphetamine, and is serving a 135-month term of imprisonment in federal custody. Baker was sentenced

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

at the bottom of the guideline range on the basis of the total weight of liquid methamphetamine seized in connection with the conspiracy. Baker's sentence was affirmed on direct appeal. United States v. Baker, 883 F.2d 13, 14-16 (5th Cir.), cert. denied, 493 U.S. 983 (1989). The Court rejected Baker's argument that the use of the total solution weight violated her right to equal protection.

This is an appeal from the denial of Baker's post-conviction motion for reduction of her sentence. Baker filed an untimely notice of appeal. This Court remanded for a determination whether there was excusable neglect for the untimely filing. The district court found that Baker's untimely filing was excusable. The Government does not challenge the district court's finding.

Baker contends that the district court violated the Ex Post Facto Clause in denying her post-conviction motion for reduction of her sentence. "The guidelines in effect at the time of sentencing are the appropriate source for determining a sentence absent an ex post facto problem." United States v. Gonzales, 988 F.2d 16, 18 (5th Cir.), cert. denied, 114 S. Ct. 170 (1993). "A criminal law is ex post facto if it is retrospective and disadvantages the offender by altering substantial personal rights." Id.

Prior to November 1993, § 2D1.1 provided that "[u]nless 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." § 2D1.1(c) (footnote to drug quantity table) (Nov.

1993). Amendment 484 changed an application note to § 2D1.1 by explaining that a mixture or substance generally "does not include materials that must be separated from the controlled substance before the controlled substance can be used." U.S.S.G. App. C, amend. 484. An example of such a material that is excluded from determining the weight of the mixture or substance is "waste water from an illicit laboratory used to manufacture a controlled substance." Id. Chemicals seized before the end of processing are likewise excluded from consideration at sentencing. Id. (citing United States v. Sherrod, 964 F.2d 1501 (5th Cir.), cert. denied, 113 S. Ct. 832, cert. dismissed, 113 S. Ct. 834 (1992), and cert. denied, 113 S. Ct. 1367, 1422 (1993)). The Sentencing Commission gave this amendment retroactive effect. U.S.S.G. § 1B1.10(d).

In her motion to reduce her sentence, filed pursuant to 18 U.S.C. § 3582(c)(2), Baker argued that 34.7 pounds (15.77 kilograms) of liquid waste by-product should be excluded from the calculation of her base offense level under amendment 484. The district court determined that subtracting the quantity attributable to the liquid waste would have had no effect on Baker's sentence. In reaching this conclusion, the district court applied the version of the guidelines in effect at the time of its ruling on the post-conviction motion.

Baker was sentenced on the basis of 26.84 kilograms of methamphetamine. See Baker, 883 F.2d at 14. The 1993 guidelines call for an offense level of 36 for quantities of between 10 and 30 kilograms of methamphetamine. See U.S.S.G. § 2D1.1. Because the

exclusion of 15.77 kilograms would leave a quantity of 11.07 kilograms and would not affect Baker's base offense-level, the district court denied relief.

Baker contends that the version of the guidelines in effect at the time she was originally sentenced in 1987 should be used to calculate her offense level. Baker argues that the resulting offense level, after adjustments, would be reduced from 33 to 31 with a resulting imprisonment range of 108-135 months. See Baker, 883 F. at 14; see also U.S.S.G. App. C, amend. 125. Because she was initially sentenced to serve 135 months at the bottom of the guideline range, she argues that it is reasonable to assume that her sentence would be reduced if the district court applied the 1987 version of the guidelines.

OPINION

This Court recently affirmed the district court's denial of relief in the post-conviction motion of Baker's co-defendant Patricia Shaw. See United States v. Shaw, ____ F.3d ____ (5th Cir. August 10, 1994, No. 94-50186), 1994 WL 416465. The same issues were raised in Shaw.

We find no basis upon which to distinguish Shaw from this case; and we conclude that we are bound by the holdings in Shaw.

AFFIRMED.