IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50556

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERIC DWAIN SHACKLEFORD,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-89-CR-87-3)

(June 5, 1995)

Before REAVLEY, KING, and WIENER, Circuit Judges.

PER CURIAM:[*]

Eric Dwain Shackleford appeals from the district court's denial of his motion for reduction of sentence under 18 U.S.C. § 3582(c)(2). Finding no abuse of discretion, we affirm the decision of the district court.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTUAL AND PROCEDURAL BACKGROUND

Shackleford pleaded guilty to two violations: 1) conspiracy to manufacture more than 100 grams of methamphetamine and to distribute methamphetamine, a violation of 21 U.S.C. §§ 841(a)(1) and 846; and 2) use of a firearm during the commission of a felony, a violation of 18 U.S.C. § 924(c)(1). Shackleford was sentenced to 140 months imprisonment on the methamphetamine count and to sixty months imprisonment on the firearms count. The sentences were to run consecutively.

On January 27, 1994, Shackleford filed a motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2).[1] The government opposed Shackleford's motion, and it filed a response on March 4, 1994, suggesting that the court approximate the quantity of drugs attributable to Shackleford based upon the size and capability of one of Shackleford's drug manufacturing labs.[2] In its response,

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[1] The statute provides in the following relevant part:

> The court may not modify a term of imprisonment once it has been imposed except that --
> . . .
> (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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).

[2] Application note 12 of U.S.S.G. § 2D1.1 states in the following relevant part:

the government stated that "[a] hearing may be necessary to determine the nature of the methamphetamine recovered from the rendering plant lab, and the quantity of any controlled substance that reasonably could have been produced from the chemicals and lab equipment present at the site." The government also noted that:

> [i]f a hearing is held . . . the Government would like to be given the opportunity to put on evidence to demonstrate the amount of methamphetamine that should be considered. At a hearing, a chemist could testify as to the amount of methamphetamine that could have reasonably been produced from the chemicals seized at the Hamilton lab site, and the size and capability of the lab.

On March 9, 1994, the district court entered an order stating, inter alia, "that the Probation Office [will] prepare an addendum to the presentence report under the amended retroactive guideline. The Defendant may file objections to that report within ten (10) days, and the Court will subsequently set a hearing." The addendum was prepared and notice of its availability for inspection was provided to Shackleford's attorney on March 29, 1994. The addendum recommended a new sentence of 120 months on the methamphetamine count, and Shackleford filed no objections.

On April 1, 1994, the district court sent a notice to Shackleford and his attorney stating that the "hearing on

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> Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, ***and the size or capability of any laboratory involved***.

(emphasis added).

defendant's motion for reduction of sentence in this cause will be held at 1:00 P.M. on Friday, May 6, 1994." Subsequently, on May 2, 1994, Shackleford filed a "motion for summary judgment" in which he argued that his motion for reduction of sentence should be granted. In this "motion," Shackleford made reference to the government's request to present the testimony of a chemist, and he argued that the government waived its opportunity to present such testimony because, according to Shackleford, only facts established at the time of the original sentencing determination could be considered.

Apparently, the May 6, 1994 hearing did not take place.[3] Neither Shackleford nor the government requested another hearing date from the court, and there is no evidence that Shackleford even inquired into why the hearing was not held.[4] On June 3, 1994, Shackleford filed a supplement to his "motion for summary judgment" in which he again made reference to the government's request to present a chemist's expert testimony. Shackleford alleged that various constitutional violations would result if such testimony was permitted. The government responded summarily on June 9, 1994, urging that the "motion for summary judgment" be denied.

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[3] The docket sheet indicates that on April 1, 1994, a hearing on Shackleford's reduction of sentence motion was set for May 6, 1994. The next docket sheet entry is dated May 2, 1994, and it indicates that Shackleford filed a motion for summary judgment. The next docket sheet entry is dated June 3, 1994. There is no indication that the May 6 hearing took place.

[4] On appeal, the parties offer no explanation for why the hearing was not held, and a review of the record and the district court's orders also fails to provide any explanation.

On June 15, 1994, the government filed a supplemental response to Shackleford's motion for reduction of sentence in which it attached the transcript of a chemist's testimony from a co-defendant's hearing. The chemist's testimony corroborated the government's position that the amount of seized methamphetamine did not accurately reflect the scale of Shackleford's offense; indeed, the chemist's testimony established that Shackleford's methamphetamine lab had the capability of producing a drug quantity that would justify Shackleford's original 140-month sentence.

On June 20, 1994, Shackleford filed a response in which he again asserted that his sentence should be reduced and that the chemist's expert testimony should not be permitted. According to the docket sheet, nothing further transpired until July 26, 1994, when the district court denied Shackleford's motion for a reduction in his sentence. The court made the following observations:

> The Government has supplemented its response to Movant's motion with the transcript of a chemist who testified at a hearing on a similar motion filed by one of Movant's co-conspirators. The Government's witness testified that the physical attributes of the seized laboratory were such that five pounds of methamphetamine could have been produced at one time. Using this estimate, which the Court finds to be credible and reasonable, would result in a base offense level of 32, which with a criminal history category of IV would result in a guideline range of 168-210 months. Deducting three points [for] acceptance of responsibility would decrease the guideline range to 121-151 months.
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> . . .
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> The Defendant was part of a very large conspiracy involving a number of Defendants and a large amount of methamphetamine. Defendant was additionally implicated in the operation of other methamphetamine laboratories and the murder of at least one individual. The seriousness of the overall conspiracy is reflected in the fact that one co-conspirator received a life sentence and

> several others received sentences in the range of 200-300 months.
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> . . .
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> [T]he Court is convinced that the 140 month sentence originally imposed is appropriate under either the current guidelines or those in effect in June of 1990. The Court declines to reduce Defendant's sentence.

Shackleford appeals from this determination.

II. ANALYSIS AND DISCUSSION

Shackleford's only argument on appeal is that the district court abused its discretion by ruling on his § 3582(c)(2) motion without holding the previously-ordered hearing. Shackleford notes that the court relied upon the transcript of the chemist, and that the addendum to the presentence report did not contain any reference to this transcript or testimony. Nevertheless, Shackleford contends that he "was never afforded the opportunity to cross-examine the chemist or even address the court on these issues even though the court had set a hearing." According to Shackleford, he "relied on the court's written order affording him a hearing," he "relied on the probation officer's report that the new guideline range would be 120 months," and he was prepared "to present evidence at the hearing concerning the app[ro]priate guideline range." As a consequence, Shackleford maintains that he "was harmed by the court's failure to afford him the opportunity to present any evidence in his own behalf."

Under § 3582(c)(2), the district court has discretion to reconsider a sentence when a change in the guidelines results in the possibility of a lower sentencing range. See United States v. Shaw, 30 F.3d 26, 28 (5th Cir. 1994); United States v. Miller, 903

F.2d 341, 349 (5th Cir. 1990). The change in the guidelines, however, must have been given retroactive effect by the Sentencing Commission. See Shaw, 30 F.3d at 28; United States v. Towe, 26 F.3d 614, 616 (5th Cir. 1994). Denial of a motion for reduction of sentence under § 3582(c)(2) is reviewed for abuse of discretion. See Shaw, 30 F.3d at 28-29.

Shackleford moved for a reduction in his sentence based upon a 1993 amendment to U.S.S.G. § 2D1.1 that excluded waste water used in a controlled substance manufacturing process from the calculation of the weight of a controlled substance. See U.S.S.G. App. C, amend. 484. This particular amendment was given retroactive effect. See U.S.S.G. § 1B1.10. Shackleford argued that his sentence was based upon a quantity of methamphetamine that included waste water, and he contended that a recalculation of the drug quantity would yield a lesser sentence.

Pursuant to § 3582(c)(2), the district court properly considered the various factors set forth in § 3553(a)[5] before

[5] Section 3553(a) includes the following as factors to be considered in imposing a sentence:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed --
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;

denying Shackleford's motion. After describing the extent of the methamphetamine operation that Shackleford was involved in, the court noted that "[i]n considering whether to exercise the Court's discretion in this matter, the Court considers the factors set forth in § 3553, particularly paragraphs (1), (2) and (6). Having done so, the Court is convinced that the 140 month sentence originally imposed is appropriate . . . ."

The government is correct in its assertion that § 3582(c)(2) is silent regarding the right to a hearing. Our resolution of the issue before us, however, does not compel us to decide whether § 3582(c)(2) requires a hearing per se, and we explicitly do not reach this question. Instead, we only address whether the district court abused its discretion by denying Shackleford's § 3582(c)(2) motion on these particular facts -- when Shackleford failed to

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> (4) the kinds of sentence and the sentencing range established for --
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> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;
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> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;
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> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;
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> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
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> (7) the need to provide restitution to any victims of the offense.

request another hearing date, when he was given ample opportunity to respond to the chemist's testimony, and when he responded but never disputed the factual accuracy of the chemist's testimony. We conclude that, in these circumstances, the district court's denial of Shackleford's motion was not an abuse of discretion.

We glean some guidance from the practices involved in the initial sentencing determination. In United States v. Landry, 903 F.2d 334, 340 (5th Cir. 1990), we noted that a court may base its sentence on matters outside of the presentencing report. We also noted, however, that if the district court intends to rely on such outside matters in making its sentencing determination, the court must provide defense counsel with an opportunity to address the court on the issue. See id.; see also United States v. Otero, 868 F.2d 1412, 1415 (5th Cir. 1989) ("If, however, the court intends to rely on any such additional factor to make an upward adjustment of the sentence, defense counsel must be given an opportunity to address the court on the issue."). In addition, § 3582(c)(2) requires the court to consider the factors set forth in § 3553(a), and one of those factors to be considered in imposing a sentence is "any pertinent policy statement issued by the Sentencing Commission . . . that is in effect on the date the defendant is sentenced." The policy statement found at U.S.S.G. § 6A1.3(a) states that "[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor."

The government's supplemental response (including the chemist's testimony) was filed on June 15, and the court denied Shackleford's motion on July 26. The government contends, therefore, that Shackleford "had substantial time and opportunity to contest the information in the transcript," and it points out that Shackleford did not challenge the accuracy of the chemist's testimony in the district court or on appeal. We agree with the government's position.

First of all, we are not convinced that Shackleford relied on the district court's hearing order. Despite the court's setting of a May 6 hearing, the hearing date passed without any objection from Shackleford, and he made no attempt to request another hearing when the government submitted the chemist's testimony on June 15 or at any other time before the court's July 26 ruling. Moreover, Shackleford did respond in writing on the issue of the chemist's testimony.

Second, consistent with the case law and the guidelines, Shackleford was given ample opportunity to respond to the chemist's testimony that was presented by the government. Over a month passed from the time of the government's submission of the testimony to the district court's ruling, and Shackleford raised no objections during this period of time.

Third, Shackleford ***did*** respond to the issue of the chemist's testimony on at least three occasions -- in his May 2, 1994 "motion for summary judgment," in his June 3, 1994 supplement to the "motion," and, ***after*** the government's submission of the chemist's

transcript, in his June 20, 1994 response. These responses, however, only raised legal issues, and Shackleford never challenged the factual accuracy of the chemist's testimony such that a hearing to resolve factual disputes would be necessary. Simply put, Shackleford had more than ample opportunity to respond to the issues considered by the district court, and we find no abuse of discretion in the court's denial of his § 3582(c)(2) motion.

III. CONCLUSION

For the foregoing reasons, the district court's order denying Shackleford's motion for reduction of sentence is AFFIRMED.