IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50783
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEON DERYL PINKSTON,

Defendant-Appellant..

Appeals from the United States District Court for the Western District of Texas
(W-90-CR-36(1))

October 30, 1995

Before GARWOOD, WIENER and PARKER, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant Leon Deryl Pinkston (Pinkston) appeals the sentence imposed on him pursuant to his motion for resentencing under to 18 U.S.C. § 3582(c)(2). We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The underlying facts are found in this Court's unpublished opinion in *United States v. Pinkston*, No. 90-8591 (5th Cir. Nov. 6, 1991). In early 1990, Pinkston, Jery Ray Handyside, Robert Edward Towe, and undercover police officers established a clandestine amphetamine laboratory. "After Towe and Handyside manufactured the amphetamine precursor phenylacetone, Pinkston brought to the laboratory the chemicals necessary to complete the final step in the amphetamine synthesis." *Id*. State and federal officers arrested the three men and seized approximately 28.26 pounds of a mixture containing phenylacetone. *Id*.

Represented by appointed counsel, Pinkston pleaded guilty to one count of conspiracy to manufacture amphetamine. The presentence report (PSR) calculated an offense level of 30 based on 28.26 pounds of a mixture containing phenylacetone. Based on 6 criminal history points, the PSR calculated Pinkston's criminal history category as III. The offense level of 30 and criminal history category III produced a guideline sentencing range of 121 to 151 months' imprisonment, 3 to 5 years' supervised release, and a fine of $15,000 to $1,000,000. The PSR recommended denial of Pinkston's requests for reduction of offense level for claimed acceptance of responsibility and for an alleged minor role in the offense. The guidelines as amended November 1, 1989, were utilized. The district court adopted the findings and guideline application of the PSR and on October 12, 1990, sentenced Pinkston to a term of imprisonment of 151 months, a $5,000 fine, and a 5-

year term of supervised release. On appeal, this Court affirmed the sentence.

Pinkston on July 19, 1994, filed in the court below, *pro se*, the instant "Motion and Incorporated Memorandum for Modification of Sentence" pursuant to 18 U.S.C. § 3582(c)(2). He asserted that the 1993 amendment to U.S.S.G. § 2D1.1 redefined "mixture or substance" to exclude "materials that must be separated from the controlled substance before the controlled substance can be used." *See* U.S.S.G. App. C, Amd. 484. The guideline was given retroactive effect; thus, Pinkston requested that his sentence, which was based on the total mixture, be modified. *See* U.S.S.G. § 1B1.10(c), p.s. Pinkston also sought the reduction of his fine to zero and a reduction of the period of supervised release.

Pinkston's motion contended that the 28.26 pounds of mixture containing phenylacetone on which his sentence had been based consisted of 12% phenylacetone and 88% solvents and other elements, but for sentencing purposes had been treated as if it were all phenylacetone; that under the amended guideline only the 12% should be considered, which amounted to 1506 grams of phenylacetone, and, under the Drug Equivalency tables, resulted in 113 kilograms of marihuana, which produced an offense "level of 26 [which] is the

appropriate base offense level."[1] Pinkston's motion was never amended.

The district court appointed counsel to represent Pinkston and ordered the Probation Department to prepare an addendum to the PSR. The district court set the motion for a hearing and possible resentencing, pursuant to Amendment 484.

The PSR addendum used two methods to determine the quantity of controlled substance: a calculation based on phenylacetone and one based on amphetamine. According to the lab report, the 28.26 pounds of substance contained 12% or 3.39 pounds of phenylacetone. This was equivalent to 115 kilograms of marihuana and placed Pinkston's offense level at 26. The PSR addendum also reflected that according to Dr. Deborah Reagan, a chemist for the Department of Public Safety, a combination of all the chemicals could have produced 1.69 pounds of amphetamine. The quantity of amphetamine was equivalent to 153 kilograms of marihuana and placed Pinkston at an offense level of 26.

At resentencing, Dr. Reagan testified that the contents from a 22-liter flask weighed 28.26 pounds.[2] She stated that the mixture was a reaction mixture rather than a wastewater mix.

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[1] Pinkston also contended that "the [recalculated] base offense of 26 should be decreased by 3 levels for acceptance of responsibility, to a level 23." The district court on resentencing denied this relief respecting acceptance of responsibility, and Pinkston makes no complaint on this appeal in regard to that action.

[2] Two 22-liter flasks of substance were seized, but only one was tested. The calculation of the quantity of amphetamine that could have been produced was based on one flask.

According to Dr. Reagan, "[a] reaction mixture is something that is in the process of making the desired product, as opposed to wastewater, which actually contains a trace amount of the material that is left over in something that would be thrown away or flushed down the toilet." Using a figure of 12%, Dr. Reagan calculated that 3.39 pounds of the mixture was phenylacetone from which 1.69 pounds of amphetamine could have been produced.

Based on a total offense level of 26, which produced a guideline range of 78 to 97 months, the district court resentenced Pinkston at the bottom of the guideline range to a term of imprisonment of 78 months. The district court declined to address its prior denial of a reduction in offense level for acceptance of responsibility. That portion of the sentence imposing a five-year term of supervised release and fine in the amount of $5,000 remained unchanged.

Pinkston filed a timely notice of appeal.

Pinkston in his appeal presents two challenges to the district court's calculation of the weight of the drugs seized and the use of the calculation to compute his base offense level for resentencing. He argues that (1) the trial court erred in using a different method of calculating the weight of the controlled substance for resentencing and (2) the trial court could not base the offense level on phenylacetone because the amendment excludes chemicals that require further processing from consideration in calculating the base offense level.

Challenges to the district court's decision on a motion to reduce sentence under section 3582(c)(2) are reviewed for abuse of discretion. *United States v. Pardue*, 36 F.3d 429, 430 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1969 (1995). "[F]indings of fact made during a § 3582(c)(2) proceeding are reviewed under the clearly erroneous standard." *United States v. Mimms*, 43 F.3d 217, 220 (5th Cir. 1995).

At the time of Pinkston's original sentence, section 2D1.1 provided that "[u]nless otherwise specified, the weight of a controlled substance set forth in the [drug quantity] 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) (footnote). Amendment 484, adopted in 1993, modified the application note to section 2D1.1:

> "Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include . . . waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted."

U.S.S.G. § 2D1.1(c), comment. (n.1); U.S.S.G. App. C, amend. 484. Reliance on expert testimony is a reasonable method of approximating the weight of the mixture. *Mimms*, 43 F.3d at 221.

Pinkston contends on appeal that the "trial court erred in using a different method to calculate the base offense level where the case was before the court due to a change in the guidelines." He argues that the district court could not rely on the amount of

amphetamine which could have been produced in resentencing him because the district court based his original sentence on the amount of phenylacetone recovered. Pinkston asserts that the district court "went beyond the amendment and applied a different portion of the guidelines" when it resorted to a different method to determine the base offense.

The government asserts that Pinkston did not argue in the district court that the calculation should be based only on the quantity of phenylacetone; therefore, review is for plain error. We agree. Pinkston did not file objections to the PSR addendum. The PSR addendum recommended just what Pinkston's motion—which was never amended—had requested, namely a recalculated offense level of 26 based on the actual amount of phenylacetone (12%) contained in the 28.26 pounds of substance; it also pointed out that the same result—offense level 26—came about if one considered the amount of amphetamine that could be produced with the phenylacetone and other chemicals on hand. The district court's written resentencing judgment expressly "adopts the factual findings and guideline application" of the PSR addendum, finds an offense level of 26, a criminal history category of III, and a resulting guideline imprisonment range of 78 to 97 months, and imposes a 78-month sentence. At the resentencing hearing, Pinkston's counsel contended that "[s]econdly . . .only one of the [two] 22-liter bottles was tested" and accordingly "that the second 22-liter bottle ought not be considered . . . I believe that would put us down to a Level 22 instead of a Level 26." No argument or

complaint on appeal is made in this respect. Later at the resentencing hearing defense counsel stated "[o]ur second objection was to the Acceptance of Responsibility." Prior to defense counsel's mention of the second 22-liter bottle not being tested, defense counsel stated: "First of all, I want to point out to the Court that they were sentenced based on a charge of amphetamine, and the law was retroactively applied in this case. And what they found, Judge, through the testing was P-2-P and not methamphetamine. P-2-P needs to be further processed in order for it to be amphetamine, we'd like to point that out to the Court." Given the general context, this cannot reasonably be construed as an objection to a calculation based on amphetamine (or to use of an offense level of 26 as requested by Pinkston's motion).

Under Fed. R. Crim. P. 52(b), this Court may correct forfeited errors only when the appellant shows the following factors: (1) there is an error, (2) that is clear or obvious, and (3) that affects his substantial rights. *United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc) (citing *United States v. Olano*, 113 S.Ct. 1770, 1776-79 (1993)), *cert. denied*, 115 S.Ct. 1266 (1995). If these factors are established, the decision to correct the forfeited error is within the sound discretion of the court, and the court will not exercise that discretion unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Olano*, 113 S.Ct. at 1778.

Plain error is one that is "clear or obvious, and, at a minimum, contemplates an error which was clear under current law at

the time of trial." *Calverley*, 37 F.3d at 162-63 (internal quotation and citation omitted). "[I]n most cases, the affecting of substantial rights requires that the error be prejudicial; it must affect the outcome of the proceeding." *Id*. at 164.

Pinkston has failed to carry his burden at the first step of the *Olano* analysis because he has not shown that there was an error. "The guidelines instruct the court that '[i]n determining whether a reduction in sentence is warranted for a defendant eligible for consideration under . . . § 3582(c)(2), the court should consider the sentence that it would have originally imposed had the guidelines, *as amended*, been in effect at that time.'" *United States v. Shaw*, 30 F.3d 26, 28 (5th Cir. 1994) (quoting § 1B1.10(b)).[3] Note 12 of section 2D1.1 provides that if "the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance."

The district court relied on the expert's testimony because the exact amount was not known and had to be approximated. The district court reminded the defendant that the manufacturing process did not have to be complete because the conviction was for conspiracy to manufacture amphetamine, not for possession with intent to distribute the drug. It is not clear which substance was used to calculate the offense level because the district court stated orally at the resentencing that it adopted "the amount of amphetamine or controlled substance" set forth in the PSR addendum. Whether the district court used the potential quantity of

[3] Pinkston's motion expressly recognized this.

amphetamine or the quantity of phenylacetone, the result is the same. As stated in the PSR addendum, the quantity of each substance produced a base offense level of 26. Moreover, Pinkston sought a base level offense of 26 in his never amended motion. The district court did not abuse its discretion, and there is no error.[4]

Pinkston next asserts on appeal that the district court erred in considering the precursor chemical phenylacetone in calculating his base offense level. Relying on *Shaw*, 30 F.3d at 28, he argues that the district court was required to exclude from consideration chemicals seized before the end of processing. Because no amphetamine was produced and phenylacetone is a substance seized before the process of manufacturing amphetamines is complete, Pinkston contends that the district court must exclude the entire amount. If Pinkston's argument is read in conjunction with his first argument, he contends that the district court had no basis for calculating his offense level.

Again, Rule 52(b) bars relief. Pinkston did not make this contention below; indeed, his never amended motion contended that his resentencing should be based on the amount of phenylacetone (12%) contained in the 28.26 pounds of substance mixture and that this would produce the appropriate base offense of 26 for resentencing.

[4] Even if there were error, we would conclude that it was neither clear nor obvious.

Moreover, Pinkston has demonstrated no error in this respect.[5] Phenylacetone is a controlled substance. 21 C.F.R. § 1308.12(g)(1)(i) (listing "Phenylacetone" as a Schedule II controlled substance); U.S.S.G. § 2D1.1 (Drug Equivalency Tables); *United States v. Johnson*, 12 F.3d 1540, 1546 (10th Cir. 1993) (referring to "Schedule II controlled substances, such as P2P," which is phenylacetone). *See also United States v. Towe*, 26 F.3d 614, 617 (5th Cir. 1994) (in the case of Pinkston's co-defendant, assumes a sentence on remand may be properly based on a reasonable estimation of the actual amount of phenylacetone). Pinkston does not argue that the processing of the phenylacetone in this case had not been completed. At all events, it is clear that the district court could have based its calculation on phenylacetone because phenylacetone is a controlled substance, not liquid waste.[6] Phenylacetone is considered "as a methamphetamine rather than an amphetamine precursor." *United States v. Stephenson*, 887 F.2d 57, 62 (5th Cir. 1989), 493 U.S. 1086 (1990).[7] Because "[t]ypes and quantities of drugs not specified in the count of conviction may be

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[5] And, certainly no clear or obvious error.

[6] There are reasons for the disparate treatment of liquid waste and the liquids involved in the manufacture of amphetamine. *See United States v. Palacios-Molina*, 7 F.3d 49, 53 (5th Cir. 1993). Liquids involved in manufacturing are "either precursor chemicals or by-products of the manufacturing process." *Id*. They are not innocuous liquid, and because they are necessary to the manufacturing, they are necessary to the ultimate distribution of the controlled substance. *Id*. (citing *United States v. Robins*, 967 F.2d 1387, 1390 (9th Cir. 1992)).

[7] *Stephenson* refers to P2P, and phenylacetone is listed as P2P in the Drug Equivalency Tables. U.S.S.G. § 2D1.1.

considered in determining the offense level," the district court did not abuse its discretion if it based the calculation on phenylacetone. U.S.S.G. § 2D1.1, comment. (n.12).

Pinkston demonstrates no valid basis for reversal. The judgment of the district court is AFFIRMED.