

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-60264
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FRED DIETZ, a/k/a
Alfred P. Nolan,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(93-CR-197-1)

(April 17, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Appellant pled guilty to conspiracy to possess with intent to distribute 439 kilograms of marijuana. 21 U.S.C. § 846. He was sentenced as a career offender pursuant to § 4B1.1 of the Sentencing Guidelines because he was over 18 years of age, the offense of conviction involved conspiracy to possess with intent to distribute 439 kilograms of marijuana, and he had two prior convictions of using a telephone to conspire to possess cocaine with intent to distribute and conspiracy with intent to distribute

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

cocaine. Appellant appeals his sentence. We vacate and remand.

Appellant's prior conviction for using a telephone to facilitate a felony should not have been designated as a controlled substance offense under § 4B1.1. United States v. Bellazerius, 24 F.3d 698, 702 (5th Cir.) cert. denied, 115 S. Ct. 375 (1994). Additionally, the offense of conviction (conspiracy to possess with intent to distribute marijuana) is not a controlled substance offense. Bellazerius, 24 F.3d at 702; see also United States v. Wallace, 32 F.3d 921, 931 (5th Cir. 1994).

The Government concedes this result but urges that we revisit Bellazerius. This panel is, of course, unable to consider that request.

Sentence VACATED, case REMANDED.