

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-4238
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ARNOLD G. THOMAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(93-CIV-239)

(September 23, 1993)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

DAVIS, Circuit Judge:¹

Arnold G. Thomas (Thomas) challenges the district court's judgment denying his motion to vacate or modify his sentence under 28 U.S.C. § 2255. We find no error and affirm.

I.

After Thomas's partner Ed Belunek (Belunek) contacted a chemical company inquiring about purchasing large quantities of phenylacetic acid and methylamine, the Drug Enforcement Agency

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(DEA) organized a reverse sting operation. The DEA agents then began dealing directly with Thomas and his partner and negotiated for the sale of a large quantity of these chemicals. The DEA agents, as part of the same transaction, arranged to obtain methamphetamine from Thomas and his partner.

In November of 1989, DEA agent Castaneda met Thomas and Belunek at a secluded area near Cleveland, Texas, to complete the transaction. After the agent showed Thomas the chemicals in the bed of his truck, they entered Thomas's vehicle. Thomas instructed Castaneda to open a small metal box on the floorboard, which contained the \$30,000 for the chemicals. After Castaneda received the money, Thomas was arrested. During the ensuing search, DEA agents discovered two loaded automatic pistols in a jean jacket located on the front seat of the vehicle. They found a third loaded revolver in a pouch on the driver's side of the vehicle.

After Thomas's release on bond, he was arrested at a methamphetamine laboratory site in San Jacinto, Texas. He stated that he and Belunek owned the property on which he was arrested. Thomas also stated that he had cooked methamphetamine there three times. A large supply of firearms and ammunition, anti-surveillance equipment, and some methamphetamine oil were confiscated at the site.

Thomas pled guilty to conspiracy to manufacture methamphetamine in violation of 21 U.S.C. § 846 and carrying a firearm in relation to a drug trafficking crime in violation of § 946(c)(1). The court sentenced Thomas to ten years of imprisonment

on the conspiracy count and to five years on the firearm count to run consecutively. He was also sentenced to serve two concurrent three year terms of supervised release. His attempted direct appeal was dismissed as untimely.

Thomas then filed a motion to vacate his sentence under 28 U.S.C. § 2255 raising the claims which he now presents to this court.

Following report and recommendation from a magistrate judge, the district court denied petitioner's claims. The district court filed an additional memorandum order giving reasons for its judgment.

II.

The petitioner challenges the ruling of the district court on the following claims asserted in his § 2255 petition: (1) whether the district court erred in concluding that there was a sufficient factual basis to support Thomas's guilty plea to using or carrying a firearm during a drug trafficking crime; (2) whether amendment 371 which added U.S. Sentencing Guidelines § 2d1.11 relative to the base offense level of drug offenses is retroactively applicable to Thomas's case; and (3) whether Thomas was denied the effective assistance of counsel.

With respect to Thomas's challenge to claims (1) and (2), we agree with the disposition made by the district court on those two claims and, for reasons assigned by the district court in its memorandum order of February 17, 1993, we affirm the district court's rejection of those claims.

Thomas contends that his attorney failed to provide effective assistance to him in several respects. To obtain relief on this ground, he must show both (1) that his counsel's performance was deficient, falling below an objective standard of reasonableness, and (2) that the deficient performance prejudiced his defense. **Strickland v. Washington**, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." **Id.** at 690. Having pleaded guilty, Thomas "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." **Hill v. Lockhart**, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Thomas first contends that his counsel was ineffective for allowing him to plead guilty to having violated 18 U.S.C. § 924(c)(1) when there was insufficient evidence that he was guilty of that offense. We agree with the district court that there was a sufficient factual basis in the record to support Thomas's conviction of using a firearm during a drug-trafficking offense. This argument is without merit.

Second, Thomas complains that his attorney negotiated a plea agreement for 71.5 kilograms of methamphetamine, although Thomas could not have reasonably foreseen that that much could be manufactured from the chemicals. This lacks merit because his knowledgeability was shown by statements he made and because he was sentenced, pursuant to § 2D1.4, as if the object of the conspiracy,

the manufacture of methamphetamine, had been completed.

Thomas told Agent Castaneda that he "had enough ether to make 10 to 15 pounds of methamphetamine at the time." He told Castaneda that he received \$13,500 per pound for the drug. Thomas also admitted that he cooked methamphetamine three times in Sheppard, Texas.

The Government was prepared to introduce the testimony of a DEA chemist that 550 pounds of phenylacetic acid would produce between 33 and 71.5 kilograms of methamphetamine. Thomas's sentence was properly based on at least 30 kilograms of methamphetamine because that was the minimal, likely amount of the drug which would have been produced if the conspiracy had been completed. **See United States v. Stephenson**, 887 F.2d 57, 62 (5th Cir. 1989), **cert. denied**, 493 U.S. 1086 (1990).

Thomas next contends that he was erroneously sentenced to a three-year term of supervised release for the violation of 18 U.S.C. § 924(c)(1). Thus, he asserts, his attorney was ineffective when he negotiated the plea agreement which provided for a supervised-release term on that count.

Thomas relies on **United States v. Allison**, 953 F.2d 870 (5th Cir.), **cert. denied**, 112 S.Ct. 2319 (1992), which supports his contentions. On rehearing, however, the **Allison** panel held that a supervised-release term is imposable upon a defendant's conviction of a § 924(c)(1) violation. 986 F.2d 896, 897 (5th Cir. 1993). This accords with **United States v. Wangler**, 987 F.2d 228, 231 (5th Cir. 1993), and forecloses Thomas's contentions.

Finally, Thomas contends that his attorney was ineffective because he did not know that methamphetamine is a Schedule III controlled substance, not a Schedule II controlled substance, resulting in an illegal sentence. This lacks merit because Schedule II was amended in 1974 to include all forms of methamphetamine. **Allison**, 953 F.2d at 873-74, amended on other grounds, 986 F.2d 896 (5th Cir. 1993). The district court properly rejected Thomas's claim for relief predicated on ineffective assistance of counsel.

III.

Thomas contends that his "conviction should be barred as a matter of law" because he was charged with attempting to buy contraband provided by a government agent. He argues that this "is a Due Process violation of the 'most basic sort.'"

Thomas's own statements to Agent Castaneda show that he and Belunek were involved in an ongoing enterprise to produce large quantities of methamphetamine. Thomas attempted to buy the precursor chemicals he needed by the hundreds of pounds and by the 55-gallon drum. The DEA did not become involved until after the two men contacted the chemical supply company.

The infiltration of illicit drug-related operations by undercover agents, accompanied by "the supply of some item of value that the drug ring requires," is a "recognized and permissible means of investigation." **United States v. Russell**, 411 U.S. 423, 432, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). A reverse sting operation is an acceptable method of investigation as long as the

defendant who was investigated had the predisposition to commit a crime. **United States v. Knight**, 917 F.2d 1, 1-2 (5th Cir.), **cert. denied**, 498 U.S. 991 (1990). Thomas had such a predisposition.

IV.

Thomas has requested the appointment of counsel. This Court will appoint counsel for a prisoner relative to his § 2255 appeal "when the interests of justice require" it. Fifth Circuit Plan under the CJA, part 2. Because Thomas's appeal lacks arguable merit, his motion for appointed counsel is denied.

AFFIRMED.