

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30069
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DERRICK L. WISHAM,

Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Louisiana
(CR-93-50-A-M1)

(November 11, 1994)

Before POLITZ, Chief Judge, GARWOOD and PARKER, Circuit Judges.

PER CURIAM:*

Derrick L. Wisham, convicted upon his guilty plea of one count of possession with intent to distribute five grams or more of cocaine base and one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1), appeals the sentences imposed. Finding no error, we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

On January 1, 1993 police officers executed a search warrant at Wisham's house and seized a bag containing approximately 11.6 grams of cocaine base, \$409 in cash found on Wisham's person, 4.3 ounces of cocaine found in a metal box under Wisham's bed, and a 9mm semi-automatic pistol. Wisham was arrested and indicted for possession with intent to distribute more than five grams of cocaine base and possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). He pled guilty to both counts.

The presentence report calculated Wisham's base offense level by including the 11.6 grams of cocaine base and 123.98 grams of cocaine under the counts of conviction, as well as 57.4 grams of cocaine base seized on July 9, 1993 from a car Wisham was driving. The PSR considered the July incident relevant conduct. The law enforcement officers there discovered not only the cocaine base (packaged in 20 small bags), but also a .380 caliber pistol, and \$3000 in cash. In determining that these two incidents were part of the same course of conduct, the PSR also considered an arrest on April 15, 1993, when detectives found a .25 caliber semi-automatic pistol in Wisham's vehicle and \$2200 cash on his person.

Wisham filed written objections to the PSR, contending that the July incident was not relevant conduct. The district court overruled this objection, adopting the facts as set forth in the PSR, and determining that the July incident was relevant conduct.¹

¹Wisham seems to assume that the district court reduced the quantity of cocaine from the July 9 incident to 46.1 grams. The district court, however, adopted the PSR which attributed 57.4

The PSR criminal history computation placed Wisham in category IV. This calculation included three points for a state felony drug offense in which Wisham's probation had been revoked. Wisham objected to the inclusion of these points because the original adjudication of the offense had been deferred under a state statute and the state court had recently withdrawn the revocation of probation. Although the district court granted this objection, it reduced the criminal history score by only two points, rather than the three by which it had originally been increased. Wisham was sentenced to concurrent terms of 152 months imprisonment and four years supervised release on each count. He timely appealed.

Analysis

Wisham contends that the district court erred in classifying the July incident as relevant conduct,² and miscalculated the effect of the deferred adjudication on his total criminal history points. We review the findings of fact for clear error.³

Under the Sentencing Guidelines, act and omissions "that were part of the same course of conduct or common scheme or plan as the offense of conviction" are considered relevant conduct and factor

grams of cocaine to him from that incident.

²We reject the government's contention that Wisham failed to raise this issue in the district court and that it should therefore be reviewed only for plain error. Wisham raised the issue in his objections to the PSR, and the district court specifically found that the incident was relevant conduct under section 1B1.3. The issue is properly raised on appeal.

³**United States v. Shano**, 955 F.2d 291 (5th Cir.), cert. dismissed, 112 S.Ct. 1520 (1992).

into the penalty computation.⁴ We have broadly construed what constitutes "the same course of conduct" or a "common scheme or plan," particularly in drug cases.⁵ To determine whether particular conduct is relevant, we look to factors such as similarity, regularity, and temporal proximity.⁶

We reject Wisham's contention that the July incident was not sufficiently similar to the present offense to support a finding of relevant conduct. Both the January and July incidents involved seizures of cocaine base, large quantities of cash, and a firearm; along with the April arrest and search which revealed a large quantity of cash and a firearm, they indicate Wisham's continuing involvement in drug trafficking. In addition, the seven-month time span separating these incidents does not make them temporally remote.⁷ The district court did not err in adopting the PSR's factual findings and conclusions.

Wisham also claims that the district court erred in adding one point for the state-deferred adjudication sentence. The Sentencing Guidelines direct that deferred adjudication is counted to

⁴U.S.S.G. § 1B1.3(a)(2).

⁵**United States v. Bryant**, 991 F.2d 171, 177 (5th Cir. 1993).

⁶**United States v. Bethley**, 973 F.2d 396 (5th Cir. 1992), cert. denied, 113 S.Ct. 1323 (1993).

⁷**Id.** (defendant's drug-related activities within six-month period considered part of "common scheme or plan"); **United States v. Moore**, 927 F.2d 825 (5th Cir.), cert. denied, 112 S.Ct. 205 (1991) (defendant's drug-related activities five months apart in the same year considered part of "common scheme or plan"); **United States v. Mir**, 919 F.2d 940 (5th Cir. 1990), cert. denied, 113 S.Ct. 105 (1992) (defendant's drug-related activities that were seven months apart considered part of "common scheme or plan").

calculate criminal history if it resulted from judicial determination of guilt or an admission of guilt in open court.⁸ Wisham admitted his guilt to the state offense in open court. The court therefore did not err adverse to Wisham in making the point reduction in his criminal history category; it erred to the contrary.⁹

Finding no clearly erroneous finding of fact or error of law prejudicial to the defendant in the application of the Sentencing Guidelines, the sentences are in all respects AFFIRMED.

⁸U.S.S.G. § 4A1.2(f) & comment (n.9).

⁹U.S.S.G. § 4A1.1(c).