

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

March 30, 2022

Lyle W. Cayce
Clerk

No. 21-50519
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DON SMILEY,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
No. 7:21-CR-2-1

Before SMITH, STEWART, and GRAVES, *Circuit Judges.*

PER CURIAM:*

Don Smiley appeals the sentence imposed for his conviction of possession with intent to distribute five grams or more of actual methamphetamine (“meth”). The district court assessed a base offense level of 32 under U.S.S.G. § 2D1.1(c)(4) after finding that Smiley was responsible for no less

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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than 344 grams of actual meth, a total that included 6.5 grams that were seized in a controlled buy. Smiley challenges the district court's extrapolation of the purity level of the 337.5 grams of unseized meth.

We review for clear error the district court's finding regarding purity. *See United States v. Lucio*, 985 F.3d 482, 485 (5th Cir.), *cert. denied*, 142 S. Ct. 177 (2021). Based on Smiley's statements in his police interview, it was reasonable for the court to infer that depending on availability, he interchangeably obtained a comparable purity of meth from his two sources. *See id.* at 488; *United States v. Rodriguez*, 666 F.3d 944, 947 (5th Cir. 2012). Additionally, there is no evidence indicating that the purity level of the unseized meth actually was dissimilar to the 97% purity of the meth in the controlled buy. Based on the record as a whole, it was plausible for the district court to find that the disputed 337.5 grams of meth had a level of purity sufficient to support a base offense level of 32 under § 2D1.1(c)(4). Thus, the finding was not clearly erroneous. *See Lucio*, 985 F.3d at 485–88; *Rodriguez*, 666 F.3d at 947.

AFFIRMED.