APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,	No. 3:13-CR-01128-BEN
v.	February 21, 2018
TRAVIS JOB (11), Defendant.	San Diego, California

TRANSCRIPT OF PROCEEDINGS

(Imposition of Sentence)

BEFORE THE HONORABLE ROGER T. BENITEZ, SENIOR JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
FRED SHEPPARD
MARK REHE
U.S. Attorney's Office
Southern District of California
880 Front Street, Room 6293
San Diego, CA 92101-8893
(619)557-5610

FOR THE DEFENDANT:
TODD BURNS
Burns and Cohan
Attorneys at Law
1350 Columbia Street, Suite 600
San Diego, CA 92101
(619)236-0244

COURT REPORTER:
AMANDA M. LeGORE
RDR, CRR, CRC, FCRR, OCE
U.S. District Court
333 West Broadway, Suite 420
San Diego, CA 92101
amanda_legore@casd.uscourts.gov

MR. SHEPPARD: And what Mr. Rodriguez -- both of them had prior drug trafficking.

Mr. Rodriguez certainly was the boss of certain gang members, et cetera. You know what Mr. Rodriguez didn't have? He didn't have a toddler and an infant at his house. And -- and --

THE COURT: But he did have a gun.

MR. SHEPPARD: Sure. Okay.

THE COURT: And he had violence as to his -- his -- his spouse. And he did have not just one but three prior drug trafficking offenses. Right?

MR. SHEPPARD: You could take away -- you could -- you could give Mr. Rodriguez ten. And you put an infant and a toddler who have no one. He is supposed to look out for them. That's what adults do for children. There's no one for them to go to. They are prisoners in a house where he maintains a meth lab. And there is nothing they can do about it.

And according to Mr. -- defense counsel's argument here, we should just wash those kids. Because those children, now, having gone through childhood circumstances that are horrible, they're a wash, according to that same argument. They have no one. And he knew better.

THE COURT: Okay. Well, you know, sentencing is one of these things that sometimes I feel like you wind up doing over and over again on certain occasions. And so it becomes

kind of difficult for the Court to decide what a just sentence should be when one considers the 3553(a) factors.

One thing that I would prefer not to do is to have the case come back. But, you know, one never knows. If the panel gets it, depending on who the panel is, they'll look at my sentence. They'll decide, we like it/we don't like it. If they don't like it, you'll come back and there will be some reason for it to come back. On the other hand, if they like it, they'll affirm it. Then, you know, I won't see the case again.

I'm going to do the best I can with this. And, you know, that's -- that's -- that's all that I can do. I think that, first of all, as we all know, the guidelines are the starting point for my sentence. So I'm going to go through the guidelines that I believe are applicable.

There's a Base Offense Level 32. I do believe that a two-level increase is appropriate for maintaining the premises, for the manufacturing and/or distribution of methamphetamine. I think the evidence is overwhelming, overwhelming that Mr. Job was using the downstairs portion of that apartment -- as has been conceded where nobody was living -- for the purposes of cocaine cutting and distributing methamphetamine. And if it's not clear and overwhelming in this case, then it will never be clear and overwhelming.

I've pointed out the order from the San Diego County.

I pointed out the report of the people that were actually called upon to do the remediation. We saw the big block of methamphetamine in the refrigerator. We saw the scales, the hot plate. All of that was downstairs, in a place where nobody was living.

So I think that a two-level increase under 2D1.1 -- I'm sorry. I think it's 2L -- it's 2D1.1.

MR. REHE: It's B12, your Honor.

THE COURT: Okay. Just a second. I'm trying to find it.

(Pause, referring.)

THE COURT: 2D1.1B12, which says:

If the defendant maintained the premises for the purposes of manufacturing or distributing a controlled substance, increase by 2 levels.

I looked at the commentary. It certainly sounds to me like that's what he was doing with the downstairs portion of that apartment.

So that leaves us with a total offense level of 34. Criminal history score is 12. Puts him in a Criminal History Category V.

If I'm not mistaken, that yields a guideline range of 235 to 293.

I'll double-check that. Yes. 235 to 293.

I believe that the Government has asked for me to

impose a 365-month sentence. But I think under -- considering the relative culpability of Mr. Job to Mr. Rodriguez, I think a 365-month sentence would be too close to Mr. Rodriguez's sentence. Again, assuming that it withstands appeal.

What I think is that a sentence somewhere in the mid-range of 295 to 293 would be sufficient, taking into account the 3553(a) factors.

So, first of all, I'll note that a minimum mandatory applies, which would be 240 months.

I note that he previously served 100 months, as I recall, for his prior drug trafficking offense. So I think a mid-range sentence of 260 months is reasonable and sufficient but not greater than necessary.

I believe that my sentence takes into account the seriousness of this offense. I'm not going to go through all of the facts. Anybody can read the transcript of this trial and see how serious and aggravating this -- this drug trafficking organization was. I believe that my sentence requires that I consider his history and characteristics. I've done that. I've considered the fact, for example, that in the past he served 100 months in a prior conviction. And I think there's some proportionality to my sentence this time.

I've noticed the fact that he is a drug addict. Which, you know, some people think it is an aggravating factor. I think sometimes it can be a mitigating factor.

I've considered all of the other factors that -- I don't have time to go through all of them that have been raised by Mr. Burns in his sentencing memorandum. I believe that the sentence that I have imposed is just punishment. I've considered other sentences that I could possibly impose, including what Mr. Burns has recommended, what the Government has recommended. I believe that my sentence would both work as a general and specific deterrent, hopefully, to others from engaging in this type of conduct.

I believe that my sentence would protect the public. It would keep -- if nothing else, it would keep Mr. Job in custody, away from society for a considerable period of time.

With regards to your argument, Mr. Sheppard, again, I would note from looking at the report that there was no evidence that there was contamination upstairs. I could have missed it, I may be wrong. But that leads me to conclude that unless he was taking the children downstairs, there's no indication that they were unnecessarily exposed. So I understand your argument, but I -- I don't think it applies.

So with -- having said that, I am also going to put him on ten years of supervised release. As a condition of supervised release, he will obey all laws, including state, local, and federal. He'll comply with all standard and mandatory conditions of supervised release.

(Pause, referring.)

798 Fed.Appx. 98
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Travis JOB, Defendant-Appellant.

No. 18-50066
|
FILED January 9, 2020
|
Submitted July 12, 2019 * Pasadena, California

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of California, Roger T. Benitez, Senior District Judge, of conspiracy to distribute methamphetamine, and he appealed. The Court of Appeals, Friedman, District Judge sitting by designation, 871 F.3d 852, affirmed in part, vacated in part, and remanded for resentencing. Om remand the District Court, Benitez, Senior District Judge, imposed 260-month sentence. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] defendant could not challenge, for first time on his second appeal, sufficiency of evidence supporting jury's methamphetamine finding;

[2] district court did not clearly err in finding at sentencing that defendant was responsible for at least 150 grams of actual, or pure, methamphetamine; and

[3] sentence enhancement for maintaining a premises for the purpose of manufacturing or distributing a controlled substance was warranted.

Affirmed.

West Headnotes (3)

[1] Criminal Law Subsequent Appeals

Defendant could not challenge the sufficiency of the evidence supporting the jury's finding that more than 50 grams of pure methamphetamine were involved in drug conspiracy, for the first time on his second appeal following his resentencing for conspiracy to distribute methamphetamine after Court of Appeals had remanded for resentencing, where defendant did not argue in his first appeal that the jury's special verdict on drug quantity was based on insufficient evidence, and nothing prevented him from doing so. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846.

[2] Sentencing and Punishment Quantity of drugs and drug-related matter

District court did not clearly err in finding that defendant was responsible for at least 150 grams of actual, or pure, methamphetamine, as required to apply a base offense level of 32 when imposing 260-month sentence for conspiracy to distribute methamphetamine; based on trial evidence, a co-conspirator arranged for defendant to deliver to her 340 grams, or 12 ounces, of "cut" methamphetamine, which he did, all other methamphetamine seized and tested by the government throughout the investigation into the conspiracy was found to have a purity level of at least 79.7 percent, which would result in a pure quantity well above the 150-gram threshold. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.S.G. § 2D1.1(c)(4) (2014).

[3] Sentencing and Punishment Drugs and narcotics

Two-level enhancement under Sentencing Guidelines for maintaining a premises for the purpose of manufacturing or distributing a controlled substance was warranted for

defendant convicted of conspiracy to distribute methamphetamine; defendant's downstairs apartment was uninhabited and had no cooking supplies, no silverware, and no food, but that it did have a microwave, a hot plate, and a fire extinguisher, along with multiple scales, plastic bags, and empty vials, as well as 56.4 grams of pure methamphetamine and several bags of the illegal substance "spice" in the freezer located there, and it also had a computer monitor connected to four surveillance cameras. U.S.S.G. § 2D1.1 (2014).

Attorneys and Law Firms

***99** Mark R. Rehe, Assistant U.S. Attorney, San Diego, CA, for Plaintiff-Appellee.

Todd W. **Burns**, Esq., San Diego, CA, for Defendant-Appellant.

Appeal from the United States District Court for the Southern District of California, Roger T. Benitez, District Judge, Presiding, D.C. No. 3:13-cr-01128-BEN-11

Before: M. SMITH and FRIEDLAND, Circuit Judges, and SIMON,[**] District Judge.

***100** MEMORANDUM[***]

Travis Job appeals from his conviction for conspiracy to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846 and from the 260-month sentence imposed by the district court on resentencing after remand. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

[1] 1. In this second appeal, Job raises four arguments. First, Job challenges the sufficiency of the evidence supporting the jury's finding that more than 50 grams of pure methamphetamine were involved in the drug conspiracy. Although nothing prevented him from doing so, Job did not argue in his first appeal that the jury's special verdict on drug quantity was based on insufficient evidence. We reject this belated challenge. *See United States v. Nagra*, 147 F.3d 875, 882 (9th Cir. 1998) ("When a party could have raised an issue in a prior appeal but did not, a court later hearing the same case need not consider the matter."); *see also United States v. Radmall*, 340 F.3d 798, 802 (9th Cir. 2003) ("[I]mplicit in the *Nagra* rule is the requirement that [an appellant] assert all of his available claims on his direct appeal or first collateral attack ... [He] cannot now use the serendipitous fact of reversal on [one count] to refashion his defaulted claims on [the other counts]."). [1]

[2] 2. Second, Job argues that the district court erred in applying the United States Sentencing Guidelines ("U.S.S.G.") when, based on the quantity of methamphetamine involved in the conspiracy, it calculated a base offense level of 32. "The determination of drug quantity involved in an offense under the Sentencing Guidelines is a factual finding reviewed for clear error." *United States v. Mancuso*, 718 F.3d 780, 796 (9th Cir. 2013). The method adopted by the district court to approximate the relevant drug quantity is reviewed de novo. *Id.* at 796-97. We have expressly endorsed the extrapolation method of calculating the purity of a drug quantity attributable to a defendant based on the purity of other drugs seized from co-conspirators. *United States v. Lopes-Montes*, 165 F.3d 730, 731-32 (9th Cir. 1999) ("We agree with our sister circuits that using the purity of drugs actually seized to estimate the purity of the total quantity of drugs the defendant agreed to deliver is an appropriate method of establishing the base offense level.").

Under the then-applicable Sentencing Guidelines, the district court was required ***101** to find that Job was responsible for at least 150 grams of actual, or pure, methamphetamine in order to apply a base offense level of 32. *See* U.S.S.G. § 2D1.1(c)(4) (2014). Based on the trial evidence, a co-conspirator arranged for Job to deliver to her 340 grams, or twelve ounces, of "cut" methamphetamine on September 2, 2012, which Job did. The record shows that all of the other methamphetamine that was seized and tested by the Government throughout the investigation into the drug-trafficking conspiracy with which Job was affiliated was found to have a purity level of at least 79.7 percent, which would result in a pure quantity that is well above the 150-gram threshold. [2] Moreover, by basing Job's drug quantity finding only on the 340 grams that he cut and delivered to the co-conspirator on September 2nd, and ignoring the additional quantities that Job delivered the following day or the drugs found in Job's freezer, the district court erred "on the side of caution." *United States v. Culps*, 300 F.3d 1069, 1076 (9th Cir. 2002). Thus, the district court did not clearly err in applying a base offense level of 32.

[3] 3. Third, Job contends that the district court erred in imposing a two-level enhancement under the U.S.S.G. based on its finding that Job maintained a premises for the purpose of manufacturing or distributing a controlled substance. We review Job's challenge to the district court's application of the two-level premises enhancement for abuse of discretion, and any associated findings of fact for clear error. *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc). For the two-level premises enhancement to apply, "[m]anufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises." U.S.S.G. § 2D1.1 n.17 (2014). The district court found that Job's downstairs apartment was uninhabited and had no cooking supplies, no silverware, and no food, but that it did have a microwave, a hot plate, and a fire extinguisher, along with multiple scales, baggies, and empty vials. In addition, law enforcement officers found 56.4 grams of pure methamphetamine and several bags of the illegal substance "spice" in the freezer located there. The downstairs apartment also had a computer monitor connected to four surveillance cameras. The district court's factual findings were not clearly erroneous, and amply supported the application of the two-level premises enhancement here.

4. Finally, Job argues that the entire sentencing enhancement regime in § 851, which increased his mandatory minimum sentence from ten to twenty years based on his prior felony drug conviction, violates his constitutional rights under the Fifth and Sixth Amendments for the reasons stated in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). But "[w]e have repeatedly acknowledged that *Apprendi* carves out an exception for the fact of a prior conviction," ***102** *United States v. Quintana-Quintana*, 383 F.3d 1052, 1053 (9th Cir. 2004), and Job recognizes that his requested relief is foreclosed by the Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Therefore, we reject this argument.

AFFIRMED.

All Citations

798 Fed.Appx. 98

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

*** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1 Job appears to argue that his failure to raise insufficiency of the evidence in his first appeal amounts at most to a forfeiture, rather than a waiver, and that "forfeited claims are reviewed for plain error, while waiver precludes appellate review altogether." *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019) (en banc). In *Depue*, we noted that "[w]hereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a *known* right." *Id.* (quotation marks omitted) (emphasis in original). We need not decide whether Job forfeited or waived his sufficiency challenge. Even if he only forfeited it, Job cannot show that the jury plainly erred because there was overwhelming evidence to support its quantity finding.

2 As explained in the Sentencing Guidelines: "The terms 'PCP (actual)', 'Amphetamine (actual)', and 'Methamphetamine (actual)' refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater." U.S.S.G. § 2D1.1(c) n.(B) (2014).

FILED

MAR 20 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TRAVIS JOB, Defendant-Appellant.	No. 18-50066 D.C. No. 3:13-cr-01128-BEN-11 Southern District of California, San Diego ORDER

Before: M. SMITH and FRIEDLAND, Circuit Judges, and SIMON,* District Judge.

The petition for panel rehearing is **DENIED**.

* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.