NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued June 6, 2023
Decided June 20, 2023

Before

MICHAEL B. BRENNAN, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 22-2225

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
v.	No. 1:21CR00048-001
DEMETRIUS JACKSON, *Defendant-Appellant*.	Tanya Walton Pratt, *Chief Judge*.

O R D E R

For Demetrius Jackson's drug and firearms convictions, the district court sentenced him to 240 months in prison after finding him responsible for 10 pounds of methamphetamine. Jackson contests this drug-quantity finding because, he says, the district court relied on inconsistent testimony, mistakenly attributed testimony from one witness to another witness, and failed to sufficiently explain the quantity calculation. But although Jackson is correct on some of these points, the errors he identifies did not affect his base offense level or sentencing guidelines range, and the

record contains no indication that the district court relied on inaccurate information when it sentenced him. Because any errors were harmless, we affirm.

In 2021, the Bureau of Alcohol, Tobacco, Firearms and Explosives investigated Jackson for trafficking drugs and guns near Indianapolis. Working with informant Ricky Blythe, agents recorded drug-related phone calls leading to a warrant to search Jackson's home, where they found marijuana, digital scales with methamphetamine residue, and two guns. Jackson was arrested and charged with drug conspiracy and possession with intent to distribute, 21 U.S.C. §§ 841, 846, possessing a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c), and possessing a firearm as a felon, *id.* § 922(g)(1).

At trial, Blythe testified about buying methamphetamine from Jackson. He recounted buying 4 ounces (a quarter pound) in October 2020, and from then until January 2021 a "minimum of 4 ounces, but up to a pound" "several times." Later, on cross-examination, Blythe offered as a typical range a "minimum of 4 ounces to a half [pound]." Yet during redirect, Blythe confirmed his direct-examination testimony that he bought "up to a pound at a time"—and, indeed, bought a full pound on "more than one occasion."

After the jury convicted Jackson on all four counts, a probation officer prepared a presentence investigation report with a base offense level of 32 for estimated quantities of 10 pounds of methamphetamine and 10 pounds of marijuana. *See* U.S.S.G. § 2D1.1(a)(5), (c)(4). Adding two levels for maintaining a drug-related premises, *id.* § 2D1.1(b)(12), and incorporating a criminal history category of III yielded a guidelines range of 248 to 295 months' imprisonment, which included a mandatory 60-month consecutive sentence for Jackson's § 924(c) conviction. Notably for Jackson's case, the threshold methamphetamine quantity for his base offense level (32) was 1.5 kilograms—about 3.3 pounds—without regard for the marijuana quantity. *Id.* § 2D1.1(c)(4).

At sentencing, the government relied on testimony from Todd Bevington, an ATF agent who had worked with Blythe, to establish the amount of methamphetamine for which Jackson was responsible. Bevington confirmed that he spoke to Blythe "on a number of occasions" and corroborated Blythe's information by having him make recorded phone calls to Jackson. When asked whether he had ever found Blythe to provide inaccurate information, Bevington replied, "Absolutely not." Bevington then testified that Blythe had reported purchasing a "usual amount" of "[a] half-pound to a

pound" of methamphetamine from Jackson, and that "according to Mr. Blythe," this happened "10 to 20 times."

After Bevington testified, the court overruled Jackson's objection to the quantity:

> At trial and the agent's testimony today is that Mr. Blythe testified and has told the agent that he purchased—he would purchase one-half pound to a pound of methamphetamine from the defendant 10 to 20 times, and that would be at least 10 pounds of methamphetamine that Mr. Blythe testified he purchased from the defendant.

The court sentenced Jackson to a total of 240 months' imprisonment and five years' supervised release—a "downward variance from the advisory guideline range" (248 to 295 months), "based on [Jackson's] lack of parental supervision" during his youth. This appeal followed.

We review a district court's drug-quantity estimate for clear error—a "highly deferential" standard that allows for a range of "reasonable though imprecise" figures. *United States v. Bozovich*, 782 F.3d 814, 818 (7th Cir. 2015). We will not reverse unless the entirety of the evidence leaves us with the "definite and firm conviction that a mistake has been made." *United States v. Medina*, 728 F.3d 701, 705 (7th Cir. 2013) (quoting *United States v. Hankton*, 432 F.3d 779, 789 (7th Cir. 2005)). And even then, a clear error about a particular fact may nonetheless be harmless (and thus not reversible error) if it did not affect the district court's chosen sentence. *United States v. Jarigese*, 999 F.3d 464, 471–72 (7th Cir. 2021). Similarly, although precedents establish a general constitutional right against sentences that rely on inaccurate information, inaccuracies that do not affect a defendant's sentence do not violate that right. *See United States v. Pennington*, 908 F.3d 234, 239–40 (7th Cir. 2018).

On appeal, Jackson presses three arguments about the methamphetamine estimate. First, he contends, Agent Bevington's report that Blythe bought "one-half pound to a pound" per purchase from Jackson is inconsistent with Blythe's trial testimony that he purchased a minimum of 4 ounces an unspecified number of times. Second, Jackson stresses the district court's tendency, throughout the sentencing hearing, to characterize Bevington's testimony recollecting Blythe's statements as though they were part of Blythe's own trial testimony. Third, he questions why the district court chose a methamphetamine quantity of 10 pounds in particular, given the mix of lower and higher estimates available. So, Jackson urges, the district court's lack

of scrutiny and thin explanation amounted to procedural error and violated his due-process right to be sentenced based on accurate information.

But as the government points out, any reasonable estimate from the evidence would lead to the same base offense level. And there is no suggestion in this record that the district court would have varied further below the guidelines range if a different quantity above the threshold for Jackson's base offense level had been selected.

To start, Blythe's trial testimony revealed at least two 1-pound sales. Moreover, the most conservative estimate of the remaining transactions—eight sales of quarter-pound amounts—still would yield a minimum of 4 pounds, above the 3.3-pound threshold for an offense level of 32. None of the asserted errors, then, affected Jackson's sentencing range, which would have been the same even under the most conservative estimate reasonably supported by the evidence.

To be sure, when witnesses provide a range of weights per sale and numbers of sales, "arriving at sentencing determinations through averaging"—i.e., picking a point between the high and low ends of the ranges—"can be problematic." *United States v. Krasinski*, 545 F.3d 546, 552 (7th Cir. 2008). We therefore have encouraged conservative estimates to avoid sentencing defendants based on "nebulous eyeballing." *United States v. Miller*, 834 F.3d 737, 741 (7th Cir. 2016) (quoting *United States v. Durham*, 211 F.3d 437, 444 (7th Cir. 2000)). Even so, averaging is not forbidden. *Krasinski,* 545 F.3d at 552–53. And again, even a mistaken use of averaging does not require reversal if it does not affect the defendant's sentence.

Here, the sentencing court's 10-pound figure is below the 11.25 pounds that would result from multiplying the midpoints of Agent Bevington's reported drug weights and sales (.75 pounds x 15 sales). Other averages above 10 pounds are plausible, too. The range based on Bevington's report of Blythe's statements runs from 5 to 20 pounds, and the midpoint of that range is 12.5 pounds. On the other hand, the district court could have made plausible estimates below 10 pounds. For example, assuming just ten sales of .75 pounds yields 7.5 pounds. The same goes for assuming 15 sales at a half-pound each. None of these different estimates would change Jackson's guidelines range, however, because the quantity would still be above the 3.3-pound threshold for his base offense level. Alternatively, focusing on Blythe's trial testimony could yield lower numbers. That testimony supports a minimum of two 1-pound sales; if we then assume ten sales total and assign Blythe's 4-ounce figure to the remaining eight sales, the methamphetamine quantity would be just 4 pounds (two 1-pound +

eight quarter-pounds sales). Again, however, the guidelines range would be the same, given the 3.3-pound threshold.

In short, on this record we are satisfied that the salient point for the district court was that Jackson was responsible for something more than 3.3 pounds. Absent any reason to think that naming some number between 3.3 pounds and 10 pounds would have led to a greater departure below the guidelines range, any shortcoming in the district court's explanation of the 10-pound figure was harmless error.

Jackson next argues that the district court wrongly attributed some of Bevington's testimony to Blythe. True, at times the judge appeared to conflate Blythe's trial testimony with Bevington's recounting of Blythe's out-of-court statements. But this apparent misattribution does not leave us with a "definite and firm conviction" of error. *Medina*, 728 F.3d at 705. We see no real probability that the district court would discredit Bevington's report if asked to distinguish more neatly between the trial testimony and sentencing testimony. Further, even if these inconsistencies did amount to error, that error would have been harmless because the evidence firmly supported the minimum required for Jackson's base offense level of 32—specifically, 3.3 pounds of methamphetamine. *See id.* at 704 (district court explained that evidence supported quantity "between 15 and 50 kilograms" with reference to resulting base offense level and guidelines range). And the fact that Jackson was sentenced below the guidelines range (240 months' imprisonment, with a range of 248 to 295 months) indicates that he was not unjustly penalized for an unduly high estimate of the quantity.

As for the dynamic between Blythe and Agent Bevington, the court was entitled to rely on the agent's hearsay testimony about Blythe's report of his "usual" purchases, even if some other purchases fell below the usual range. *See United States v. Hankton*, 432 F.3d 779, 789–90 (7th Cir. 2005). Jackson did not object to the reliability of this testimony, and the court could reasonably have concluded that the testimony was reliable: Bevington was the primary ATF agent investigating Jackson, worked directly with Blythe "on a number of occasions," and corroborated Blythe's information by having him make recorded calls to Jackson.

Finally, Jackson argues that the sentencing court's mischaracterization of Blythe's trial testimony violated his due-process right to be sentenced without judicial reliance on demonstrably inaccurate information. *See Pennington*, 908 F.3d at 239. But even if the court conflated Bevington's account of Blythe's statements with Blythe's own trial testimony, this technical misattribution was not material to the court's quantity finding.

Nothing in the two witnesses' testimonies was materially inconsistent. *Cf. United States v. Miller*, 900 F.3d 509, 513–14 (7th Cir. 2018) (finding procedural error where district court relied on mistaken understanding of defendant's number of prior felony convictions in selecting sentence). Thus, there was no violation of Jackson's due-process right.

AFFIRMED