

FILED
United States Court of Appeals

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEP 17 1992

ROBERT L. HOECKER
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
REFUGIO CANO-PENA,
Defendant-Appellant.

No. 92-2065
(D.C. No. CR 91-528 JP)
(D.N.M.)

ORDER AND JUDGMENT*

Before SEYMOUR, ANDERSON, BALDOCK, Circuit Judges.

Defendant Refugio Cano-Pena pled guilty to a charge of possession with intent to distribute less than 50 kilograms of marijuana. He appeals the district court's sentence based on a finding that the marijuana weighed 44.6 pounds, or just over 20 kilograms.

The district court must determine by a preponderance of the evidence the amount of drugs involved for purposes of sentencing. See United States v. Molina-Cuartas, 952 F.2d 345, 348 (10th Cir. 1991). We must accept those findings unless we determine them to be clearly erroneous. Id.

Here, the government proffered evidence that an agent weighed the marijuana on a certified, calibrated scale two days after

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

defendant was arrested, and determined the weight to be 44.6 pounds. Although the same marijuana weighed only slightly over 22 pounds when it was reweighed just three months later, the government put on evidence through a chemist that it is not unusual for marijuana to lose over half its weight through dehydration in that amount of time, given the manner in which it was stored. Although defendant questions the reliability of evidence regarding how much weight marijuana "usually" loses through dehydration, there is no evidence to undermine the accuracy of the original weighing of the marijuana. Under these circumstances, we do not have a definite and firm conviction that the district court erred in finding the weight to be 44.6 pounds.

The judgment of the district court is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Stephanie K. Seymour
Circuit Judge