[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 14-11767
Non-Argument Calendar

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D.C. Docket No. 9:13-cr-80245-KLR-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MARVIN WELLINGTON HEPBURN,
a.k.a. Troy Ferguson,

Defendant - Appellant.

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Appeal from the United States District Court
for the Southern District of Florida

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(April 8, 2015)

Before JORDAN and JULIE CARNES, Circuit Judges, and GOLDBERG, [*] Judge.

PER CURIAM:

Marvin Wellington Hepburn, a.k.a. Troy Ferguson, appeals his 57-month sentence of imprisonment, imposed after he pled guilty to being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922 (g)(1). Mr. Hepburn stipulated in the district court that he was previously convicted of three felonies: (1) shooting into an occupied dwelling; (2) possession of cocaine; and (3) possession of cocaine with intent to sell within 1,000 feet of a school. Over defense objections, the district court set the base offense level at 24 under § 2K2.1(a)(2) of the Sentencing Guidelines because Mr. Hepburn was previously convicted of a crime of violence and of a "controlled substance offense," as defined by § 4B1.2(b) of the Guidelines.

On appeal, Mr. Hepburn argues that the district court erred in setting his base offense level at 24 because his conviction for possession of cocaine with intent to sell, under Fla. Stat. § 893.13(1)(c), did not require the State to prove that he knew about the illicit nature of the substance he possessed. He argues that a conviction lacking this particular knowledge element cannot qualify as a "controlled substance offense" under the Sentencing Guidelines.

[*] Honorable Richard W. Goldberg, United States Court of International Trade Judge, sitting by designation.

We review *de novo* whether a prior conviction is a "controlled substance offense" under § 4B1.2(b). *See United States v. Frazier*, 89 F.3d 1501, 1505 (11th Cir. 1996). Mr. Hepburn's argument—that the § 893.13(1)(c) conviction is not a "controlled substance offense"—is squarely foreclosed by our recent opinion in *United States v. Smith*, 775 F.3d 1262, 1266-68 (11th Cir. 2014). As a result, the district court did not err by considering Mr. Hepburn's conviction under § 893.13(1)(c) as a "controlled substance offense," and we affirm Mr. Hepburn's 57–month sentence of imprisonment.

**AFFIRMED.**[1]

[1] The government's motion for summary affirmance is denied as moot.