United States Court of Appeals
Fifth Circuit
F I L E D
March 13, 2006
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-50704
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

Alec McLeod Boykin,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas
USDC No. 7:05-CR-71-ALL

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:[*]

During a revocation hearing on May 3, 2005, Alec McLeod Boykin admitted violating conditions of his supervised release,[1] relevant to two separate convictions;[2] the district court sentenced Boykin

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under limited circumstances set forth in 5TH CIR.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

[1] Boykin admitted using cocaine, consuming alcohol, and failing to submit to scheduled drug tests—all in violation of the terms of his supervised release.

[2] Boykin pleaded guilty to possession with the intent to distribute less than 50 kilograms of marijuana; on August 14, 2001, the district court sentenced Boykin to a six-month term of imprisonment, followed by two years of supervised release. No. 05-50704. Boykin pleaded guilty to aiding and abetting and transportation of illegal aliens for commercial advantage and financial gain; on April 25, 2002, the district court sentenced Boykin to an 18-month term of

to consecutive eleven-month terms of imprisonment. Boykin asserts error in the calculation of only one of the eleven-month sentences.[3] He contends and the record shows that he had a criminal history category I at the time of his first conviction, resulting in a recommended term of imprisonment up to nine months.[4] Although this term is advisory,[5] Boykin argues that the district court misapplied the guidelines on which it intended to rely, as the sole benchmark for its sentence, by applying a criminal history category III to his first conviction.

As Boykin makes this argument for the first time on appeal, we review for plain error. Under the plain error standard, Boykin must show that (1) there is an error, (2) that is clear or obvious, and (3) that affects his substantial rights.[6] After the defendant has established these factors, the decision to correct the forfeited error rests within our sound discretion, which we will not exercise unless the error seriously affects the fairness,

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imprisonment, followed by three years of supervised release. No. 05-50706.

[3] Boykin challenges his sentence related to case No. 05-50704. The sentence imposed for violating the conditions of his supervised release in case No. 05-50706 fell within the recommended range of five to eleven months because, at the time of his original sentencing for the underlying conviction, Boykin had a criminal history of category III. *See* U.S.S.G. § 7B1.4(a) (stating, in part: "[t]he criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervision").

[4] The Sentencing Commission recommends that defendants with Grade C release violations and a criminal history category I receive sentences within a three to nine-month range. U.S.S.G. § 7B1.4(a).

[5] *United States v. Mathena*, 23 F.3d 87, 93 (5th Cir. 1994); *United States v. Hinson*, 429 F.3d 114, 117 (5th Cir. 2005).

[6] *United States v. Olano*, 507, U.S. 725, 731-37 (1993).

integrity, or public reputation of the judicial proceedings.[7]

In rendering its sentence, the district court stated, "The court has reviewed the policy statements contained in Chapter 7 of the Guidelines and finds they do adequately address the Defendant's repeated violation of the conditions of release." Moreover, the district court said, "The statutory range is 24 months on each of those. The guideline range on each of those is 5 to 11 months on each of those cases." Thus, Boykin argues that the district court sentenced him to a greater term of imprisonment than it had intended since the sentence exceeds that recommended by the Guidelines if the correct criminal history category had been applied to his first conviction. Boykin has demonstrated obvious error. However, he fails to show that the district court would have sentenced him to a lesser term of imprisonment had the correct criminal history category been applied; the record is devoid of any such indication. Therefore, Boykin has not satisfied his burden, failing to demonstrate that the two-month discrepancy in the advisory ranges affected his substantial rights. Moreover, the consecutive eleven-month sentences are neither unreasonable nor plainly unreasonable.[8] We have held that revocation sentences are

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[7] *Id*. at 736.

[8] Prior to *Booker*, this Court held that 'because there are no applicable guidelines for sentencing after revocation of supervised release, this court will uphold a sentence unless it is in violation of the law or plainly unreasonable,' which was consistent with the provisions of section 3742(a) and (e) that applied to sentences 'for which there is no sentencing guideline.' In *Booker*, the Supreme

not unreasonable, particularly, where they do not exceed the statutory maximum.[9] Neither of the district court's sentences exceed the two-year statutory maximum for the violations.[10]

AFFIRMED.

> Court excised subsection 3742(e) and directed appellate courts to 'review for unreasonableness.' We need not decide today whether the 'plainly unreasonable' standard in subsection 3742(a) continues to apply to sentences imposed upon revocation of supervised release or whether *Booker*'s 'unreasonableness' standard governs. Nor is it necessary to decide if there is a difference between the two standards. [The defendant's] sentence passes muster under either and was not imposed in violation of law.

Hinson, 429 F.3d at 120.

[9] *United States v. Esquivel*, 98 Fed. Appx. 995, 996 (5th Cir. 2004) (even if court miscalculated the grade of violation, a 36-month revocation sentence was not plainly unreasonable where the sentence was within the statutory maximum) (unpublished); *United States v. Gonzalez*, 2006 U.S. App. LEXIS 2854 (5th Cir. 2006) (unpublished); *United States v. Green*, 2006 U.S. App. LEXIS 464 (5th Cir. 2006) (unpublished).

[10] 18 U.S.C. § 3583(e)(3) ("[A] defendant whose term is revoked under this paragraph may not be required to serve on any such revocation...more than 2 years in prison if such offense is a class C or D felony....").