

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1651
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

CHARLES L. SIMMONS,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:91-CR-0122-A

- - - - -
March 18, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Charles L. Simmons, Jr. pleaded guilty to one count of distribution of cocaine and was sentenced to twelve months imprisonment, three years supervised release, and a \$3000 fine. The Government filed a petition to revoke supervised release alleging that Simmons had violated the conditions of his supervised release by using cocaine on six occasions. Simmons pleaded true to the allegations, and the district court revoked his supervised release and sentenced him to 24 months imprisonment.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Simmons argues that the district court violated 18 U.S.C. § 3583(e)(3) by not sentencing him pursuant to the applicable sentencing guideline, U.S.S.G. § 7B1.4. This Court rejected Simmons's argument in United States v. Headrick, 963 F.2d 777, 780 n.3 (5th Cir. 1992). In Headrick this Court stated that the policy statements in Chapter 7 of the sentencing guidelines are merely advisory; the district court must consider the applicable guideline range but is not bound by it. Headrick, 963 F.2d at 780-82; 18 U.S.C. § 3553(a)(5). The issue was squarely addressed by the Tenth Circuit in United States v. Lee, 957 F.2d 770, 772-73 (10th Cir. 1992), where the Court held that under 18 U.S.C. § 3583, the policy statements regarding revocation of supervised release in Chapter 7 of the United States Sentencing Guidelines are advisory rather than mandatory.

The district court considered the applicable guideline range of 3-9 months, see § 7B1.4(a), but held that it would not follow the policy statement in sentencing Simmons. The court noted that Simmons's violation was not a one-time event but was a series of violations extending over a one-year period, and after considering the factors in § 3553(a), sentenced him to 24 months imprisonment. The court considered the policy statement in § 7B1.4(a) and rejected it in light of the other factors in § 3553(a). See Headrick, 963 F.2d at 782. Simmons's sentence is AFFIRMED.