IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1850

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

ERIC NELSON BERTRAM,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
2 82 CR 5 01

May 6, 1993

( )

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

I.

On December 15, 1981, convicted felon Eric Nelson Bertram purchased two handguns, a 9mm and a 357 magnum, from a Montgomery Ward's store. Prior to the purchase, he completed a separate ATF Form 4473 for each gun. In those applications, he stated that he

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[*]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

was not a convicted felon. After submitting the forms, Bertram received the two firearms.

Purchasers and sellers of firearms must complete Form 4473 so that the purchaser's eligibility to receive firearms may be determined. U.S. v. Ortiz-Loya, 777 F.2d 973, 976 n.1 (5th Cir. 1985). The complete form is set out in Ortiz-Loya, 777 F.2d at 984.

For submitting the fraudulent forms, Bertram was indicted in Counts 1 and 2 for making false statements in relation to the acquisition of a firearm, which was a violation of 18 U.S.C. §§ 922(a)(6), 924(a). Each count related to a separate form. Counts 3 and 4 charged the receipt of a firearm by a convicted felon, which was a violation of 18 U.S.c. §§ 922(h), 924 (a). Each count related to a separate firearm. Count 5 charged possession of a firearm, which was a violation of 18 U.S.C. § 1202(a)(1), Appendix. Count 5 related to a different date and an unrelated transaction.

In 1982, a jury found Bertram guilty on all five counts. He was sentenced to serve five years imprisonment on each of the first four counts and two years on the fifth count. The sentences on Counts 1 and 3 were made concurrent with each other; the sentences on Counts 2, 4, and 5 were made concurrent with each other; and the concurrent terms on Counts 2, 4, and 5 were made consecutive to the concurrent terms on Counts 1 and 3. This court affirmed. U.S. v. Bertram, 719 F.2d 735 (5th Cir. 1983).

In 1984, Bertram filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The district court denied relief. This court affirmed. U.S. v. Bertram, No. 85-1006 (5th Cir. Nov. 22, 1985).

In 1989, Bertram filed a motion to correct an illegal sentence pursuant to Fed. R. Crim. P. 35. The district court denied the motion. This court affirmed. U.S. v. Bertram, No. 89-1720 (5th Cir. Mar. 15, 1990).

In 1992, Bertram filed a second Rule 35 motion claiming that the consecutiveness of the sentences is illegal. Bertram claimed that the sentences on Counts 2, 4, and 5 should not run consecutively to the sentences on Counts 1 and 3. The district court granted the motion in part and denied it in part, vacating the conviction on Count 3, which left the ten-year total sentence intact. The instant appeal followed.

While on release from federal custody, Bertram committed other crimes for which he was convicted. See U.S. v. Bertram, No. 92-1221 (5th Cir. Dec. 3, 1992). Those other convictions are not at issue in this appeal.

II.

A district court's decision on a Rule 35 motion will be disturbed only for illegality or gross abuse of discretion. U.S. v. Castillo-Roman, 774 F.2d 1280, 1283 (5th Cir. 1985). Bertram challenges the decision on three grounds.

Bertram argues that his trial counsel was ineffective for failing to object to the multiplicity of the indictment. He did

not make this claim in the instant Rule 35 motion, and he did not move the district court to reconsider its order in light of his belated allegation. His failure raises the question whether the allegation was before the district court at all and, consequently, whether it is properly before this court.

Even if the claim is cognizable, it is unavailing. Bertram has failed to show that he suffered any prejudice because, as discussed below, his sentence would have been the same, with or without counsel's allegedly deficient performance. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Bertram argues that none of the sentences should be consecutive and the district court erred in not fully granting his Rule 35 motion. In vacating the conviction on Count 3 (one of the receipt counts), the district court noted that, even if either of Counts 1 and 2 (the false statement counts) was to be vacated, the total sentence would still be ten years. The only way that Bertram could receive a sentence of less than two consecutive five-year terms would be if the sentence on Count 4 (the remaining receipt count) could not run consecutively to the sentence on Count 1.

As to Counts 1 and 2, which charge the completion of two false ATF forms, Bertram argues that, by sentencing him consecutively, the court has twice punished one occasion on which he made false statements. The government argues that the court punished the making of two false statements and their coincidence in time is irrelevant.

Consecutive sentences violate the double jeopardy clause if they impose multiple punishments for the same offense. U.S. v. York, 888 F.2d 1050, 1058 (5th Cir. 1989). The test to determine if double jeopardy exists is whether each conviction required proof of a fact that the other did not. Blockburger v. U.S., 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). We need not decide, however, whether the contemporaneous completion of two false ATF forms is one offense or two. See U.S. v. Evans, 854 F.2d 56, 57 n.2 (5th Cir. 1988). Compare United States v. Soloman, 726 F.2d 677, 679 (11th Cir. 1984) and United States v. Williams, 685 F.2d 319, 321 (9th Cir. 1982) with United States v. Mason, 611 F.2d 49, 52 (4th Cir. 1979).

Bertram's sentence presently stands as ten years because the five-year sentence on the first false statement count (Count 1) runs consecutively to the five-year concurrent sentences on the second false statement count (Count 2) and the only receipt count left (Count 4). The possession count, which resulted in a two-year sentence, is not at issue in this appeal. If Counts 1 and 2 required proof of any fact that Count 4 did not, the sentences may be consecutive even if Count 2 were vacated. Blockburger, 284 U.S. at 304; York, 888 F.2d at 1058. Where the Blockburger test is met and no ambiguity concerning congressional intent remains, no resort to the rule of lenity is necessary. Evans, 854 F.2d at 58.

Counts 1 and 2 charged violations of 18 U.S.C. § 922(a)(6). That section required the government to prove that the defendant made a false statement or provided false identification in

connection with the acquisition of a firearm. Evans, 854 F.2d at 60. Count 4 charged a violation of 18 U.S.C. § 922(h). In 1982, § 922(h) prohibited the receipt of a firearm by a convicted felon. 18 U.S.C.A. § 922(h) (West 1976). The substance or prior § 922(h) is contained in current § 922(g). That section required the government to prove receipt of a firearm by a convicted felon. U.S. v. Thomas, 810 F.2d 478, 479 (5th Cir.), cert. denied, 482 U.S. 930 (1987). Because the two sections required proof of different facts, the sentence on Count 4 may run consecutively to the sentence on Count 1. For this reason, Bertram's sentence would remain unchanged. Accordingly, we hold that the sentence as modified is neither illegal nor an abuse of discretion.

Finally, Bertram argues that he was improperly denied the right to be present when the court partially granted his Rule 35 motion. A defendant, however, has no right to be present for a modification that does not make the sentence more onerous. U.S. v. Moree, 928 F.2d 654, 655-56 (5th Cir. 1991).

III.

The district court's judgment is AFFIRMED.