IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1933
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SERGIO CARRILLO-ZAPATA,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:92-CR-243-G (01)

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August 18, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[*]

Sergio Carrillo-Zapata (Carrillo) was convicted in state court for distribution of cocaine and aiding and abetting the same. Carrillo was sentenced to a 210-month term of incarceration as a career criminal.

Carrillo's sole argument on appeal is that the district court erroneously failed to treat four prior state convictions as one sentence under § 4A1.2(a)(2).

"Prior sentences imposed in unrelated cases are to be

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of [determining the criminal history category under] § 4A1.1(a), (b), and (c)." § 4A1.2(a)(2). "Related cases" are defined as offenses that: "(1) occurred on the same occasion, (2) were part of a single common scheme or plan or (3) were consolidated for trial or sentencing." Id. , comment, (n.3). This Court reviews de novo the district court's determination of "relatedness" of prior convictions under § 4A1.2(a)(2). United States v. Fitzhugh, 984 F.2d 143, 146-47 (5th Cir. 1993).

The offenses underlying the convictions at issue occurred on different dates, with five years lapsing between the burglary offense in 1984 and the drug offense in 1989. The imposition of concurrent sentences on February 16, 1990, was precipitated by the state's motions to revoke probation and Carrillo's guilty plea of a 1989 cocaine-possession charge and a separate charge of unlawful-delivery of a controlled substance.

The record does not demonstrate that the separate offenses were part of a common scheme or plan. Nor does he argue or provide evidence that the four cases were consolidated by court order. Carrillo does argue that the cases were "consolidated for trial or sentencing" under the Sentencing Guidelines because he did not object when the cases were heard together.

"[I]mposition of concurrent sentences in a single proceeding, while relevant to the § 4A1.2(a)(2) inquiry, will not

alone support a finding of relatedness." Fitzhugh, 984 F.2d at 147. Whether cases are related is a question of federal law for the district court initially to determine. See United States v. Garcia, 962 F.2d 479, 482-83 (5th Cir.), cert. denied, 113 S.Ct. 293 (1992) (citations omitted). Although the factors may be considered by the district court, neither concurrent sentences nor the fact that the sentences were imposed on the same day mandates a finding that the cases are "consolidated" or "related" under the guidelines. Id. (citations omitted). A district court should not assume that otherwise distinct cases be treated as consolidated if an appellant fails to produce evidence of an actual order consolidating them. United States v. Bryant, 991 F.2d 171, (5th Cir. May 6, 1993, No. 92-4819), 1993 WL 142897 at 6*.

Carrillo argues that Garcia was decided primarily by an improper construction of Texas law and urges this Court to reconsider in light of it. "In this circuit, one panel may not overrule the decision -- right or wrong -- of a prior panel, absent en banc reconsideration or a superseding contrary decision of the Supreme Court." In re Dyke, 943 F.2d 1435, 1442 (5th Cir. 1991). Carrillo's contention that this Court should overrule Garcia is unavailing. Further, the district court is not bound by Tex. Pen. Code Ann. § 3.02 providing that consolidation can occur only if the state is prosecuting the defendant for separate crimes committed under a common scheme or plan or if the offenses

are similar. See United States v. Ainsworth, 932 F.2d 358, 361 (5th Cir.), cert. denied, 112 S.Ct. 346 (1991).

The sentence imposed by the district court comported with the law of this Circuit. Carrillo fails to demonstrate any "close factual relationship" or other "linkage" between the cases sufficient to warrant their treatment as consolidated under the guidelines. Bryant, 1993 WL 142897 at 6*; Fitzhugh, 984 F.2d at 147. For reasons set forth above, Carrillo's conviction as a career criminal is AFFIRMED.