

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1998
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

KAMARDEEN OLATUNJU OGUNLEYE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92 CR 344 T)

March 26, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Kamardeen Ogunleye appeals his sentence following a guilty plea to possession of stolen mail in violation of 18 U.S.C. § 1708. Finding no error, we affirm.

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In calculating Ogunleye's criminal history score, the probation officer considered a prior battery offense. Ogunleye objected to the use of this offense because, as he alleged, there had been no finding of guilt entered against him. The district court overruled the objection and adopted the finding regarding the battery offense.

II.

A.

If a defendant objects to certain matters in a presentence investigation report ("PSI"), as in this case, the district court is required, as to each controverted matter, to make a finding as to the allegation or a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. FED. R. CRIM. P. 32(c)(3)(D). That rule, however, "does not require a catechismic regurgitation of each fact determined and each fact rejected if they are determinable from a [PSI] that the court has adopted by reference." United States v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992).

The district court adopted the findings of the PSI, except as modified by the court's ruling reducing the offense level by one because the evidence did not support a loss in excess of \$40,000. Accordingly, the court adopted by reference all the findings in the PSI concerning the prior battery offense. The court's pronouncement, therefore, satisfies the requirement of rule 32(c)(3)(D).

Sherbak, 950 F.2d at 1099.

B.

A defendant's criminal history category is determined by adding points from prior criminal sentences. U.S.S.G. § 4A1.1. A prior sentence is defined as "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense." Id. § 4A1.2(a)(1). A diversion from the judicial process, however, is not counted. Id. § 4A1.2(f). Nonetheless, one resulting from a finding or admission of guilt or a plea of nolo contendere is counted as a sentence under section 4A1.1(c) even if a conviction is not formally entered. Id.

The PSI reflects that Ogunleye was placed on unsupervised probation for one year for a 1988 battery offense in Maryland. The PSI further reflects that "the defendant was found guilty by the Court."

Although Ogunleye's attorney objected on the basis that Ogunleye had been placed on probation without a finding of guilt, no evidence was offered to support his statement or to suggest that Ogunleye's guilt in the battery offense had been misrepresented. If a defendant objects to a PSI but offers no rebuttal evidence to dispute the facts, the district court is free to adopt the facts in the PSI without further inquiry. United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990). Objections in the form of unsworn assertions are unreliable and should not be considered. United

States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992). The court, therefore, did not err in relying upon the finding in the PSI that the prior battery offense should be used to calculate the criminal history category.

AFFIRMED.