

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2589

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARY E. ONWUASOANYA,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
CR H 91 0218 02

(June 28, 1993)

Before GOLDBERG, GARWOOD and WIENER, Circuit Judges.*

GARWOOD, Circuit Judge:

Defendant-appellant Mary E. Onwuasoanya (Onwuasoanya) was convicted, on her guilty plea pursuant to a plea agreement, of one count of conspiracy to import in excess of one kilogram of heroin into the United States in violation of 21 U.S.C. §§ 952(a), 960, 963. The district court sentenced Onwuasoanya to a term of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

imprisonment of 120 months, a 5-year term of supervised release, and imposed a \$50 special assessment and a \$25,000 fine that was probated as long as Onwuasoanya's prison earnings were applied to her daughter's support. Onwuasoanya now appeals her sentence on the sole ground that the district court erred in imposing a probated fine.

Facts and Proceedings Below

On January 17, 1992, Onwuasoanya was charged by a superseding two-count indictment with conspiracy to import in excess of one kilogram of heroin into the United States (Count One), and with attempted importation of in excess of one kilogram of heroin into the United States (Count Two), both in violation of 21 U.S.C. §§ 952(a), 960, 963. Onwuasoanya, who was twenty-two years old and unemployed when arrested, was found to be eligible for appointed counsel.

On March 9, 1992, Onwuasoanya pleaded guilty to Count One, pursuant to a plea agreement whereby the government promised to recommend the minimum sentence within Onwuasoanya's guideline range, not to oppose an adjustment for acceptance of responsibility, and to dismiss Count Two of the indictment. The plea agreement also provided that if Onwuasoanya provided substantial assistance, the government would file a U.S.S.G. § 5K1.1 motion for departure below the minimum sentence.

The probation officer then prepared the Presentence Report (PSR), and computed Onwuasoanya's sentence according to the sentencing guidelines. Concerning Onwuasoanya's financial condition, the PSR stated:

"The defendant advised that she has a savings account with a balance of approximately \$700 and household possessions worth approximately \$3,000. She reported liabilities totaling over \$9,000 for outstanding medical bills. Mary Onwuasoanya estimated necessary monthly living expenses for her and her family of \$1200. Neither the defendant nor her husband have a history of stable employment."

Prior to sentencing, Onwuasoanya filed written objections to the PSR. The portion of this document headed "Defense Counsel's Recommendation For Sentencing" included a statement that Onwuasoanya had "no present or future ability to pay a fine or the costs of her imprisonment and supervision" and that the court should therefore sentence Onwuasoanya to, among other things, "no fine."

At the sentencing hearing, the government submitted a written section 5K1.1 motion for downward departure. Prior to considering the motion, the district court calculated Onwuasoanya's adjusted base offense level to be 37.¹ With no criminal history, her guideline range was calculated to be between 120 to 262 months' imprisonment, and a possible fine between \$20,000 and \$4,000,000. 21 U.S.C. § 960(b)(1)(A); U.S.S.G. § 5E1.2(c). During the hearing, the district court learned from the defendant that her seven-year-old daughter was living with her brother and she did not know how long he could take care of the child. Therefore, the district court determined that the fine would be:

"probated on the condition that during your prison stay that the principal portion of your earnings be devoted to the support of your daughter, nobody else's. And the

¹ The district court adopted the findings of the PSR in all respects except for the recommendation of a two-level enhancement for firearms recovered at Onwuasoanya's apartment.

reason I say principal part is because if I say all of them, then they won't let you buy a hair brush or something and I mean that you should be able to have reasonable human comforts while you are in prison. But the excess needs to go to your daughter and, conditioned on during the five-year period of supervised release, that you support your daughter as reasonably as you can under whatever your circumstances are then."

In accordance with the government's motion for downward departure per section 5K1.1, the district court sentenced Onwuasoanya to 120 months' imprisonment followed by a 5-year term of supervised release, a \$50 special cost assessment and a \$25,000 probated fine. Onwuasoanya timely appeals the imposition of the probated fine.

Discussion

Onwuasoanya argues that the district court imposed an illegal sentence, and in any event it did not make the appropriate fact findings to support the imposition of a fine. Concerning challenges to a defendant's sentence, we "will affirm sentences imposed by district judges who make factual findings that are not clearly erroneous, and who apply the guidelines to those findings." *United States v. Mejia-Orosco*, 867 F.2d 216, 221 (5th Cir.); cert. denied, 109 S.Ct. 3257 (1989). "[W]e review de novo the district court's interpretation of the sentencing guidelines." *United States v. White*, 945 F.2d 100, 101 (5th Cir. 1991).

Although the guidelines do not expressly give district courts the discretion to impose a probated fine, they do provide that the district court upon the proper findings may impose an alternative sentence. One such finding is a determination that "imposition of a fine would unduly burden the defendant's dependents." U.S.S.G. § 5E1.2(f); see also 18 U.S.C. § 3572(a)(2). Once the district

court makes such findings, it "shall consider alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive. Although any additional sanction not proscribed by the guidelines is permissible, community service is the generally preferable alternative in such instances." U.S.S.G. § 5E1.2(f). This language suggests that a probated fine may be an alternative sanction since it is not proscribed by the guidelines. In fact, several courts have imposed probated fines. See, e.g., *United States v. Reilley*, 948 F.2d 648 (10th Cir. 1991); *United States v. Vasarajs*, 908 F.2d 443 (9th Cir. 1990); *United States v. Stafford*, 896 F.2d 83 (5th Cir. 1990).

A probated sentence generally may not be imposed if the criminal statute that the defendant is convicted under precludes probation. 18 U.S.C. § 3561(a)(2). Onwuasoanya was convicted under 21 U.S.C. § 960, which states in pertinent part that "the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph." 21 U.S.C. § 960(b)(1)(A). This language would usually preclude the district court from assessing a probated fine, since a fine is a type of sentence. See 18 U.S.C. § 3572. However, in this case, the government submitted to the district court a motion for departure pursuant to section 5K1.1. Based upon the substantial assistance the defendant provides the government, this motion may justify "a sentence below a statutorily required minimum sentence." *Id.*, comment. (n.1); see also 18 U.S.C. § 3553(e) (allowing that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence"); *United*

States v. Santa Lucia, 991 F.2d 179, 180 (5th Cir. 1993) (holding that "upon appropriate motion by the government, the court may depart downward from . . . a statutory minimum sentence"). A probated sentence is, in effect, below such a minimum. *Cf. Wasman v. United States*, 104 S.Ct. 3217, 3223 (1984) (noting that where a defendant originally received two years of imprisonment, all but six months of which the district court suspended in favor of three years' probation, and upon resentencing the defendant received two years of imprisonment, the defendant had "in effect received a greater sentence of confinement following retrial than he had originally received"). Here the applicable guideline fine range was \$20,000 to \$4,000,000. Section 960(b)(1)(A) authorizes a fine (of not more than \$4,000,000), but precludes probation of the sentence. However, based on the section 5K1.1 motion, the district court had the authority to impose a probated fine even though the statute prohibited probation.²

Both the facts in the PSR (to which the government did not

² Onwuasoanya also argues that the probated fine is not punitive because the condition for probation requires the defendant to provide support for her dependant, and this is an activity which, in most instances, would not be viewed as a form of punishment. Certainly, the district court must assess a fine that "taken together with other sanctions imposed, is punitive." U.S.S.G. § 5E1.2(e). However, it is the fine itself, not the conditions for probation attached to it, which makes the fine punitive. Otherwise, a probated sentence of imprisonment would not be punitive because the conditions for probation require the defendant to engage in such nonpunitive activities as to refrain from committing another crime or possessing illegal controlled substances. 18 U.S.C. § 3563(a). We also note that the first discretionary condition of probation listed in the statute is that the defendant "support his dependents and meet other family responsibilities." 18 U.S.C. § 3563(b)(1). Probation conditions do not erase the punitive nature of the probated penalty.

object) and the district court's decision to impose a probated fine, demonstrate that the district court made an implied finding that Onwuasoanya did not have the ability to pay a nonprobated fine.³ The unobjected to facts in the PSR show that Onwuasoanya has both a negative net worth, and, based partly on the expenses for raising her daughter, a negative current and anticipated cash flow. She was unemployed when arrested, and was represented by appointed counsel. These factors indicate a present inability to pay. See U.S.S.G. § 5E1.2, comment. (n.3).⁴ Furthermore, the PSR notes that she has few marketable skills and has difficulty finding stable employment. Also, the length of her term of incarceration militates against a finding that the defendant will be able to pay a fine in the foreseeable future. Finally, during sentencing, the district court alluded to Onwuasoanya's poor financial condition when it imposed the probated condition to cover only the "principal portion" of her earnings so she could have "reasonable human comforts." All of these factors support the imposition of the minimal type of fine that the district court ordered. See *United*

³ At least one circuit has held that if a district court acts upon the government's section 5K1.1 motion for downward departure, then "a defendant's challenge to the extent of the district court's downward departure from the guidelines is unreviewable." *United States v. Knapp*, 955 F.2d 566, 568 (8th Cir. 1992). This rule is stated to also extend to a defendant's challenge "that the district court did not adequately state its reasons for imposing sentence, which included a downward departure." *Id.* We believe there is much merit to this rule, but we need not adopt it here because, as explained *supra*, we feel that the facts below adequately support the probated fine.

⁴ Inability to pay does not preclude imposition of a fine. See *United States v. Voda*, No. 93-1166, slip op. at ____ n.13 (5th Cir. June 16, 1993), and authorities cited therein.

States v. Matovsky, 935 F.2d 719 (5th Cir. 1991). In any event, the actual dollar amount imposed is near the minimum end of the guideline range, and we do not believe that the condition of probation has substantially injured the defendant.

Conclusion

For the reasons stated above, Onwuasoanya's sentence is

AFFIRMED.