UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 92-2708 and 92-2709
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

HAROLD YOUNG ANDRUS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-89-0425-01)
(CR-H-90-0023-01)

(November 30, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Harold Young Andrus challenges the sentences imposed following his guilty pleas. We **AFFIRM**.

I.

After he pled guilty to possession of cocaine with intent to distribute (H-89-0425-01), Andrus was permitted to remain free on bond pending sentencing in April 1990. Subsequently, concerning another drug offense to which he had pled guilty in state court,

---

[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

he was indicted for possession of a firearm by a felon (H-90-0023-01), but failed to appear for rearraignment in March 1990. Nor did he appear in April for his sentencing in the cocaine case; Andrus had fled. In March 1992, while in Columbia, he was arrested and extradited to the United States. Following extradition, he pled guilty to the possession of a firearm by a felon charge.

A single presentence report (PSR) was prepared. Because the two offenses constituted separate, distinct harms, *see* U.S.S.G. § 3D1.2, the offense levels were calculated separately, and then a combined offense level for the two convictions was calculated pursuant to § 3D1.4. The PSR recommended a two-level increase for obstruction of justice on the cocaine offense. In calculating the base offense level for the possession of a firearm by a felon offense, the PSR recommended that it be determined under § 2D1.1 (relating to drug offenses) because Andrus possessed the firearm during a drug trafficking offense. The PSR also recommended the following upward adjustments from that base offense level: two levels under § 2D1.1(b)(1) for carrying a firearm during a drug trafficking offense; two levels for obstruction of justice; and two levels under § 3B1.1(c) for his aggravating role in the underlying conduct. The PSR also applied the career offender guideline under § 4B1.1.

Andrus lodged a number of objections to the PSR; but, the district court overruled them and adopted the PSR. Andrus was given concurrent sentences of 360 months imprisonment and five years supervised release for the cocaine offense, and 60 months

imprisonment and five years supervised release for the firearms offense.

II.

A.

Andrus challenges the obstruction of justice increase, asserting that he fled because he feared for his life; therefore, he contends that his failures to appear for sentencing on the cocaine charge and rearraignment on the firearms charge were not "willful". *See* U.S.S.G. § 3C1.1 (requiring "willful" obstruction).

Such a challenge is reviewed for clear error, ***United States v. Edwards***, 911 F.2d 1031, 1033 (5th Cir. 1990).[2] The government disputed the veracity of Andrus' explanation for fleeing and failing to contact government officials while remaining a fugitive. The district court also implicitly found that his explanation for his two-year flight was not credible. *See* ***United States v. Sherbak***, 950 F.2d 1095, 1099 (5th Cir. 1992) (ruling that when a district court adopts a PSR the court "implicitly" weighs the positions of the probation department and the defense and credits the probation department's version of the facts). There is no clear error.

[2] The government contends that plain error review should apply because Andrus' claim on appeal differs from his objection to the district court. Because we do not find clear error, let alone plain error, we need not reach this issue.

B.

Concerning his felon in possession offense, Andrus contends that the district court erred in finding that he possessed the firearm in relation to a drug trafficking crime.[3] The drug trafficking offense related to Andrus' negotiations with a Drug Enforcement Agency informant in an attempt to sell that informant five kilograms of cocaine. Because the substance recovered by the DEA was flour, Andrus asserts that he "never intended to produce five kilograms of cocaine; he merely intended to defraud his prospective buyers by selling them five kilograms of flour for approximately $90,000."

Nevertheless, Andrus pled guilty in state court to manufacture and delivery of a simulated controlled substance. Also, his conduct in that transaction would support a conviction for *conspiracy* to distribute five kilograms of cocaine, although it might not support a conviction for distributing it. *See* ***United States v. Murray***, 527 F.2d 401, 411-12 (5th Cir. 1976) (recognizing that a conspiracy charge may arise from the sale of supposed narcotics even if "what the government agents actually received was a non-narcotic substance"); *see also* 21 U.S.C. §§ 841, 846

[3] The district court made this determination, initially, in affixing the base offense level for the firearms charge. Section 2K2.1(c)(1)(A) directs the sentencer to § 2X1.1 if the firearm was used in connection with the commission of another offense. That section, in turn, states that the base offense level (and applicable adjustments) for the substantive offense shall apply. U.S.S.G. § 2X1.1. The district court determined that Andrus possessed the firearm during the commission of a drug trafficking offense; thus, it determined the base offense level by referring to § 2D1.1.

(defining, collectively, the crime of conspiracy to distribute narcotics). Because § 2D1.1 covers conspiracy offenses relating to drugs, the district court neither misapprehended the guidelines nor clearly erred in finding the underlying conduct to be a drug trafficking offense. *Cf.* ***United States v. Leiva***, 959 F.2d 637, 643 (7th Cir. 1992) (holding that district court properly added 28 kilograms of flour to two kilograms of cocaine in determining (for sentencing purposes) that defendants *attempted* to purchase 30 kilograms of cocaine), *cert. denied*, 113 S. Ct. 2372 (1993).

C.

Andrus also contends that the district court impermissibly double counted his possession of a firearm because it was used both to increase the base offense level under § 2D1.1, *see supra* note 3, and as an upward adjustment pursuant to § 2D1.1(b)(1). We disagree. "[T]he Sentencing Guidelines are explicit when double counting is forbidden", ***United States v. Rocha***, 916 F.2d 219, 243 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2057 (1991), and Andrus directs our attention to no provision of the guidelines which would prohibit it here. Moreover, we have held that the guidelines do not prohibit upward adjustment for possession of a firearm when the base offense level already has been enhanced for such possession. ***United States v. Gonzales***, 996 F.2d 88, 94 (5th Cir. 1993) ("guidelines do not expressly forbid the enhancement of [appellant's] base offense level for use of a weapon when his base offense level has already been enhanced for possessing a weapon in

the commission of an offense") (involving application of § 2A4.1(b)(3) and 2K2.1(c)(1)).

IV.

Finally, Andrus contends that the district court erred in finding that he was a career offender. One of the requirements for this finding is that "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1. Andrus asserts that his prior felony convictions (in Texas) were consolidated and should have counted only as one sentence for purposes of applying § 4B1.1.

Texas law requires the State to make a formal motion in order to consolidate cases. ***United States v. Garcia***, 962 F.2d 479, 483 (5th Cir.), *cert. denied*, 113 S. Ct. 293 (1992). Andrus concedes that it did not do so; thus, the cases were not consolidated for sentencing.

Andrus asserts for the first time on appeal that the convictions should have been counted as one because they "were part of a common plan or scheme." Of course, this new claim is reviewed only for plain error. ***United States v. Surasky***, 974 F.2d 19, 20 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1948 (1993).

We find none. Andrus' three prior felony convictions at issue were for arson, burglary of a habitation, and manufacture and delivery of a simulated controlled substance. He contends that the burglary and delivery offenses were part of a common scheme because they occurred in Houston within a few days of each other, and were motivated by the need for money to support a drug habit. But, we

have rejected the proposition that two separate heroin sales are part of a common scheme or plan even when they occur within days of each other in the same vicinity. *See* ***Garcia***, 962 F.2d at 481-82.[4]

III.

For the foregoing reasons, the sentences are

AFFIRMED.

[4] Our not finding plain error is bolstered by the fact that the application of the career offender guideline did not result in an increase in Andrus' sentencing range.