

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7050
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHARLES WILLIAM THOMAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(J91 00078 (B))

November 23, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Charles Thomas appeals his conviction and sentence following a plea of guilty of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

Thomas was observed by officers in a store with a firearm, having entered into the store through the ceiling, triggering an alarm. The presentence investigation report (PSI) reported four prior burglaries, but the burglary conviction reported at paragraph 28 of the PSI later was stricken, as it involved another defendant surnamed "Thomas."

The district court, finding that the three remaining convictions in the PSI were separate convictions sufficient to trigger enhancement provisions under section 924(e), adopted the PSI's recommendations and determined a total offense level of 31, a criminal history category of VI, and a corresponding imprisonment range of 188 to 235 months. The court sentenced Thomas to 210 months' imprisonment.

II.

A.

Thomas argues that he lacked notice of the basis for the government's enhancement under section 924(e). A sentence imposed by the district court will be upheld "unless it is imposed in violation of law." United States v. Garcia, 962 F.2d 479, 480-81 (5th Cir.), cert. denied, 61 U.S.L.W. 3264 (U.S. Oct. 5, 1992) (No. 92-5671). Although we will reverse a sentence imposed through an improper application of the guidelines as a matter of law, findings of fact by the lower court will not be disturbed unless such findings are clearly erroneous in light of the record as a whole.

See United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991).

Pursuant to section 924(e), where a defendant has committed three previous "violent felonies" on different occasions, he must be sentenced to no less than fifteen years and fined not more than \$25,000. "Violent felonies" include "any crime punishable by imprisonment for a term exceeding one year." See § 924(e)(2)(B). The government may prove that the defendant has committed the three felonies required under section 924(e) by adopting the information set forth in the PSI. United States v. Fields, 923 F.2d 358, 360-61 (5th Cir.), cert. denied, 111 S. Ct. 2066 (1991).

The district court may adopt the PSI even where facts are in dispute, so long as the record indicates that the court, at least implicitly, considered the relevant arguments and decided to credit the PSI's position. See United States v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992). Such findings must contain "some minimum indicium of reliability." United States v. Vela, 927 F.2d 197, 201 (5th Cir.), cert. denied, 112 S. Ct. 214 (1991) (citation omitted).

Thomas's argument is grounded principally in the following contentions: (1) Since the government had indicated which crimes it would rely upon for sentencing under section 924(e), Thomas then had no duty to investigate the additional convictions set forth in the PSI until the government similarly chose to rely upon it; (2) the district court allotted too little time to assure that Thomas actually was the man charged in the other convictions, once it was shown that one conviction was erroneous; (3) since the parties agreed, in the sentencing hearing, that one conviction was

incorrect, then notice was deemed generally defective; and (4) the government's "eleventh-hour" disclosure, and reliance upon another conviction, violated Thomas's due process rights. For reasons set forth below, this argument lacks merit.

There is no notice provision in section 924(e). Thomas was sentenced within the range determined by the sentencing guidelines; therefore, his sentence was not an upward departure requiring "reasonable notice." United States v. Williams, 937 F.2d 979, 981 (5th Cir. 1991) (citing Burns v. United States, 111 S. Ct. 2182, 2187 (1991)).

Nonetheless, Thomas did receive "reasonable notice." All convictions listed in the PSI may put a defendant on notice that any one of them may be the basis for a section 924(e) enhancement. Fields, 923 F.2d at 360-61. The government need not specify which individual convictions will be the basis for enhancement under section 924(e) before putting on such proof at the sentencing hearing. Id.

Thomas received a copy of the PSI and its addendum and reviewed them with his attorney before the sentencing hearing. The PSI thus had put Thomas on notice to assure that all information in it was correct. Id.; cf. United States v. Gaudet, 966 F.2d 959, 962 (5th Cir. 1992) (PSI gave clear notice of court's application of pre-guidelines law).

The sentencing hearing was the time for Thomas to raise any objections to the PSI. Fields, 923 F.2d at 360-61. Absent plain error, Thomas may not raise new objections on appeal. United

States v. Navejar, 963 F.2d 732, 734 (5th Cir. 1992). During the sentencing hearing, Thomas did not contest his identity in the other burglary convictions but raised the issue of whether they were "separate" occurrences under section 924(e).

The court found that the convictions did occur on separate occasions, and the government submitted "exemplified copies" of the three convictions; Thomas does not appeal that determination. He did not otherwise oppose the contents of the PSI at the sentencing hearing, and he agreed that the report was "materially true and correct."

Therefore, absent plain error, Thomas's failure to object to evidence contained in the PSI produces two results: (a) The district court had an "adequate basis" for relying upon those facts, Fields, 923 F.2d at 361, and (2) he is barred from raising other objections for the first time on appeal, Navejar, 963 F.2d at 734. Applying the law to the unopposed findings in the PSI, we conclude that the district court did not plainly err when it found that Thomas's prior convictions triggered the enhancement provisions of section 924(e) or when it sentenced Thomas to 210 months' imprisonment, within the range determined by the guidelines.

B.

Thomas argues, for the first time on appeal, that more than thirty days passed from his arrest to the government's filing of the "information or indictment," in violation of the Speedy Trial Act, 18 U.S.C. § 3161(b). This argument lacks merit.

When reviewing such arguments, we apply the general rule that "[w]e may consider an issue raised for the first time on appeal only if it involves a pure question of law and our failure to consider it would result in a miscarriage of justice." United States v. Welborn, 849 F.2d 980, 986 (5th Cir. 1988). Congress has required diligence in raising such claims. "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal" 18 U.S.C. § 3162(a)(2). Thomas did not raise this issue prior to his plea of guilty and therefore waived it.

Thomas contends further that his "due process" rights require that we address that issue and overlook his "excusable neglect." There is no exception under § 3162(a)(2) for "excusable neglect," however, nor does Thomas articulate why his failure to raise the issue at the proper time was "excusable." Thomas raises no other grounds to show why adherence to the statute would otherwise result in a miscarriage of justice. Therefore, this argument is without merit.

The judgments of conviction and sentence are AFFIRMED.