UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7380
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EDELMIRO CHAPA VALDEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-C91-368(01))

(November 24, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Appellant pled guilty to a drug offense, and the Government moved for downward departure in sentencing because of Appellant's cooperation. The able district judge granted the motion and stated his intent to sentence Appellant to **210** months. The presentence report calculated Appellant's offense level at 36, and his criminal history category at III, which established a pre-departure sentencing range of 240 to 293 months which the district court

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

accepted. The sentencing judge stated that in departing he would reduce Appellant's offense level to 35 (which produced a sentencing range of 210 to 262 months). He then stated that his selected sentence of **235** months was at the bottom of that range. The court also noted that this sentence corresponded to the mid-point found if a sentencing range based on a criminal history category of 34 was used (188 to 235 months). The district court's description of the sentence he would impose after departing thus appears to be 210 months, which he originally stated, and not the 235 months he actually imposed. Appellant complains of this on appeal and we agree. Accordingly, we vacate Appellant's sentence and remand for resentencing.

We view this issue as a simple misapplication of the Guidelines addressable on direct appeal. Williams v. United States, 112 S. Ct. 1112, 1119-20 (1992). It appears that the busy district judge simply inadvertently selected from the wrong guideline range which, in turn, affected the sentence actually imposed to Appellant's detriment. Indeed, the Government does not contend that the district court would have imposed the same sentence absent the error. See Williams, 112 S. Ct. at 1120-21; United States v. Williams, 961 F.2d 1185, 1187 (5th Cir. 1992).

Appellant also challenges the constitutionality of Federal Rule of Criminal Procedure 35(b), 11 U.S.C. § 3553(e), and United States Sentencing Guidelines § 5K1.1, claiming that they violate the Equal Protection Clause by impermissibly rewarding defendants who are more culpable and knowledgeable and that they violate the

Separation of Powers Doctrine by lodging the power to move for downward departure in the prosecutor. These issues were not raised in the district court and are, therefore, not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice. United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). There is no manifest injustice here because these issues have been conclusively decided against the Appellant's position. See, United States v. Horn, 946 F.2d 738, 746 (10th Cir. 1991); United States v. Spillman, 924 F.2d 721, 724-25 (7th Cir. 1991); United States v. Campbell, 942 F.2d 890, 893 n.2 (5th Cir. 1991).

Appellant's counsel filed in this Court a brief pursuant to Anders v. California, 386 U.S. 738 (1967), and a motion to withdraw. The motion to withdraw was denied and, pursuant to instructions from this Court, he filed a supplemental brief. In so doing, he discusses three issues inadequately raised by Appellant in Appellant's pro se brief. First, Appellant contends that it was error for the sentencing court to consider information filed by the Government in order to enhance his sentence under 21 U.S.C. § 851. No error occurred. At rearraignment the district court fully informed Appellant that, if the Government proved the prior convictions, the court would impose a life sentence without parole but that if the Government did not prove the prior convictions, the minimum mandatory sentence would be 20 years. The presentence report indicated the applicability of the minimum 20-year sentence.

Appellant also argued he was entitled to a decrease in his

offense level based upon his minimal or minor role. The presentence report did not recommend such an adjustment and Appellant made no objection to that report. This issue was not raised before the district court. An adjustment under § 3D1.2 is not a purely legal question and, therefore, is not reviewable by us since not raised in the district court.

Additionally, Appellant seeks a three-level reduction for acceptance of responsibility pursuant to the amendment to § 3E1.1(b) rather than the two-level reduction granted. However, Appellant was sentenced in May 1992 and that amendment did not become effective until November and retroactive effect cannot be given to it. See U.S.S.G. § 1B1.10, p.s.; U.S.S.G. at App. C, Amendment 459.

Finally, Appellant has moved this Court to substitute counsel contending that, because of counsel's unsuccessful Anders motion, he will not appropriately represent Appellant's interest. We find nothing to substantiate the motion and it is denied.

Sentence VACATED, case REMANDED for resentencing.