

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-8464
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DAVIS JOHN DIAZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

A 92 CR 49 01

(June 28, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

On February 21, 1992, officers executing a warrant to arrest David¹ Diaz for parole violations discovered 2.3 grams of cocaine

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

¹The defendant states that his true name is David Diaz, not John David Diaz or David John Diaz.

in a bag under the passenger seat of his car. The bag also contained identification papers belonging to Diaz' passenger, Theresa Gallardo (Theresa). After being advised of her rights, Theresa signed a consent to search the apartment where she and Diaz lived. During the search, agents discovered the gun on which Count III is based. Later that day, Theresa signed a statement that said that the gun and the cocaine belonged to Diaz, and that she had not known that the cocaine was in the bag. Diaz was charged with possession of a controlled substance and being a felon in possession of a firearm.

Theresa married Diaz on March 10, 1992. She subsequently recanted her statement and gave Diaz' attorney a sworn statement that the gun and the drugs were hers. At Diaz' preliminary detention hearing, Theresa testified that the gun and drugs belonged to her. The magistrate judge immediately advised Theresa of her rights and stopped the proceedings until she had an opportunity to confer with counsel. Theresa appeared at a continuation of the hearing represented by counsel. She testified that the gun belonged to her, but she invoked either the Fifth Amendment or spousal privilege to refuse to answer almost all other questions.

The Government subsequently issued a superseding indictment charging Diaz and Theresa with conspiracy to possess and possession with intent to distribute cocaine. The superseding indictment also included the firearms charge against Diaz. The firearms charge was severed for trial, and Diaz later pleaded guilty to that count.

Shortly before Diaz' trial on the drug charges, Theresa pleaded guilty to misdemeanor possession of a controlled substance pursuant to a plea agreement that required her to testify against Diaz if called to do so. At Diaz' trial, Theresa testified that the gun and the cocaine belonged to Diaz. The jury found Diaz guilty on the drug charges.

The probation officer determined that Diaz was a career offender and that his offense level was 32 and his guideline imprisonment range was 210-262 months, subject to statutory maximum sentences of 20 years for Counts I and II and 10 years for Count III. At the sentencing hearing, Diaz' attorney requested that Diaz be given a two-point reduction for acceptance of responsibility on Count III. The district court granted the reduction for acceptance of responsibility on Count III only. The transcript of the hearing indicates that the court, the attorneys, and the probation officer were all somewhat confused about the effect that the reduction would have on Diaz' sentence. The district court orally sentenced Diaz to concurrent terms of 240 months on Counts I and II and 120 months on Count III. The written judgment issued later that day stated that Diaz was sentenced to concurrent terms of 210 months on Counts I and II. Citing Fed. R. Crim. P. 35, the judgment noted that the 210 month terms of imprisonment reflected a corrected sentence because "[d]uring the sentencing hearing, the original term of imprisonment was imposed as a result of arithmetical error within the determined guideline range."

The Government filed a timely Rule 35 motion to correct the

sentence. Fed. R. Crim. P. 35(c). The district court granted the motion and re-sentenced Diaz to concurrent terms of 240 months on Counts I and II. The court explained that it had not intended that the grant of acceptance of responsibility on Count III reduce Diaz' overall offense level from 32 to 30. The court withdrew the two-level reduction for acceptance of responsibility on Count III and re-sentenced Diaz to the statutory maximum term of 240 months on Counts I and II.

OPINION

Diaz argues that the district court erred by failing to advise Theresa that she could invoke a spousal privilege against testifying. Even though Theresa and Diaz were not married when she signed the consent to search the apartment and made the first statement, Diaz also suggests that perhaps the spousal privilege should extend to these documents because Theresa may have been his common-law wife.² The Court reviews these claims for plain error because Diaz did not raise them at trial. Fed. R. Crim. P. 52(b). Under this standard, the Court will not reverse unless it finds error so fundamental that it caused a miscarriage of justice. United States v. Hernandez-Palacios, 838 F.2d 1346, 1350-51 (5th Cir. 1988).

Absent proof at trial of a common-law marriage, the Court does not extend a testimonial privilege to "situations in which the parties are merely living together." United States v. Snyder, 707 F.2d 139, 147 (5th Cir. 1983). Diaz introduced no proof of a

²Diaz does not suggest that the search was invalid.

common-law marriage at trial. This issue is without merit.

Only the witness-spouse has the right to invoke a privilege not to testify. No authority has been found that suggests that a district court has an affirmative duty to advise a witness-spouse of this right. Assuming, arguendo, that such a duty exists, this case still presents no reversible error. Theresa testified on three occasions after she married Diaz. At Diaz' first detention hearing, she testified that the gun and cocaine belonged to her. The privilege not to incriminate one's spouse is irrelevant to such exculpatory testimony. Theresa's testimony at the second detention hearing also did not incriminate Diaz. Represented by counsel, she testified that the gun belonged to her and invoked the spousal privilege and the Fifth Amendment to refuse to answer other questions. At trial, Theresa testified against Diaz pursuant to a plea agreement in which the Government agreed to drop two counts of felony drug charges pending against her. Theresa was represented by counsel when she entered into the plea agreement, and her testimony at Diaz' trial pursuant to the agreement was obviously in her best interest. Diaz has not demonstrated that the district court committed plain error by failing to advise Theresa of her right to invoke a spousal privilege not to testify against him. See Hernandez-Palacios, 838 F.2d at 1350-51.

Diaz suggests that the district court was without authority to correct his sentence under Fed. R. Crim. P. Rule 35, and he urges that this Court should reimpose the 210-month sentence stated in the original written judgment.

Rule 35(c) provides that within seven days after imposing sentence, the district court may correct a sentence that was "imposed as a result of arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(c). The commentary to Rule 35 characterizes the district court's Rule 35(c) authority as "very narrow" and states that it "extend[s] only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case . . . for further action under Rule 35(a)." Fed. R. Crim. P. 35 advisory committee's note. In relevant part, Rule 35(a) provides that, on remand, a district court shall correct a sentence that is determined on appeal "to have been imposed in violation of law" or "as a result of an incorrect application of the sentencing guidelines." Fed. R. Crim. P. 35(a).

The transcript of the sentencing hearing makes it clear that the district court never intended to grant Diaz a reduction for acceptance of responsibility on Counts I and II and that the court intended to sentence him to concurrent terms of 240 months on those counts. See United States v. McAfee, 832 F.2d 944, 946 (5th Cir. 1987) (an oral pronouncement of sentence with clear provisions controls a contrary, silent, or ambiguous written judgment).

Had the district court not corrected the judgment, this Court would "almost certainly" have remanded the case for resentencing because the 210 month sentence did not correctly reflect the law and it resulted from an incorrect application of the sentencing guidelines. United States v. Lara-Velasquez, 919 F.2d 946, 953-54

and n.9 (5th Cir. 1990). Diaz was not entitled to the reduction for acceptance of responsibility on Count III. U.S.S.G. § 3E1.1(a) and comment. (n.1(a)); United States v. Shipley, 963 F.2d 56, 59 (5th Cir.), cert. denied, 113 S. Ct. 348 (1992) (citation omitted) (a defendant is not entitled to a reduction for acceptance of responsibility unless he accepts responsibility for all relevant criminal conduct).

The correction of the sentencing error was within the authority of the district court because the sentence in the original written judgment reflected an "obvious error or mistake" that "would almost certainly [have resulted] in a remand of the case." Fed. R. Crim. P. 35 advisory committee's note.

AFFIRMED.