

**UNITED STATES COURT OF APPEALS
For the Fifth Circuit**

No. 92-8615
No. 92-8616
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES B. MITCHELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(DR-89-CR-08 & DR-89-54-CR)

(November 26, 1993)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

On March 20, 1989, James B. Mitchell (Mitchell) pleaded guilty to aiding and abetting aviation smuggling. The organization with which Mitchell had been affiliated had flown 540 pounds 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

marijuana from Mexico to an airstrip near Uvalde, Texas. Mitchell disappeared, however, before he could be sentenced, but was arrested three years later in Las Vegas, Nevada, and was returned to Texas, where he made an initial court appearance on May 18, 1992. Mitchell then pleaded guilty to failing to appear at his sentencing for his prior charge of aviation smuggling.

The probation officer calculated Mitchell's base offense level as 26 on the aviation smuggling charge, to which he added three levels for Mitchell's role in the offense and two levels for obstruction of justice, arriving at a total offense level of 31. The probation officer placed Mitchell in criminal history category II. The probation officer determined Mitchell's base offense level on his failure-to-appear charge as six, to which he added nine levels because the aviation smuggling offense was punishable by more than 15 years imprisonment, and subtracted two levels for acceptance of responsibility. The probation officer thus arrived at a total offense level of 13. Mitchell remained in criminal history category II.

The district judge adopted the provisions of the PSRs at the sentencing hearing, with two exceptions. First, he increased the aviation smuggling offense level by only two levels for Mitchell's role in the offense instead of three levels in the PSR. Second, he decreased Mitchell's criminal history score by one point, which had no effect on Mitchell's criminal history category. The district judge overruled, *inter alia*, Mitchell's objection to the nine-level increase for failing to appear, and his objections to the two-level

increase for obstruction of justice, including his objection that the increase constituted double jeopardy. The court sentenced Mitchell to a 120-month term of imprisonment for aviation smuggling, and a 15-month term of imprisonment for failure to appear. Mitchell was to serve his sentence for failure to appear consecutively to his term for aviation smuggling.

OPINION

Mitchell first contends that, because he was being sentenced separately for his failure to appear, the upward adjustment to his offense level for aviation smuggling constitutes double jeopardy. Mitchell's contention is unavailing.

Mitchell was sentenced for both offenses at the same hearing, and the failure-to-appear conviction resulted from his failure to appear at his sentencing for aviation smuggling. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

The commentary to the failure-to-appear guideline provides:

[I]n the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under § 3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense; and the failure to appear count and the count(s) for the underlying offense are grouped together under § 3D1.2(c). Note that although 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, it does require that any sentence of imprisonment on a failure to

appear count be imposed consecutively to any other sentence of imprisonment. Therefore, in such cases, the combined sentence must be constructed to provide a "total punishment" that satisfies the requirements both of § 5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2).

U.S.S.G. § 2J1.6, comment. (n.3). The commentary to section 3C1.1 provides:

Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of § 3D1.2 (Groups of Closely-Related Counts). The offense level for that group of closely-related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

§ 3C1.1, comment. (n.6). Section 3D1.3 provides that "the offense level applicable to a Group is the offense level . . . for the most serious of the counts comprising the group[.]"

§ 3D1.3(a). The district court calculated Mitchell's offense level for aviation smuggling offense level as 30 and his offense level for failure to appear as 13. The overall offense level therefore should have been 30.

The range of imprisonment terms for a level-30, category II offender, is 108-135 months. § 5A, sentencing table. Under the commentary to § 2J1.6, the district court's consecutive sentences of 120 and 15 months were appropriate, even though they were calculated separately. The aggregate 135-month term of imprisonment is within the limits set by the Sentencing Commission. Additionally, the guideline commentary directs that district courts

should impose separate, consecutive sentences for failure to appear and underlying offenses. Mitchell's sentencing does not violate the Double Jeopardy Clause.

Mitchell next contends that the district judge erred by adding nine levels to his underlying offense, rather than six, to arrive at his offense level for failing to appear. Since the district judge should have considered Mitchell's failure-to-appear conviction according to note six of § 3C1.1 and the guidelines' grouping mechanisms, the district judge erred by calculating separately Mitchell's offense level under the failure-to-appear guideline and imposing sentence based on the resulting sentencing range.

Counsel, however, does not challenge the district court's use of the guideline; he challenges only the nine-level adjustment to the base offense level on the failure-to-appear charge. Mitchell did not object in the district court to the judge's use of the failure-to-appear guideline. The district court's use of the failure-to-appear guideline therefore may serve as a basis for reversal only if plainly erroneous. See U.S. v. Brunson, 915 F.2d 942, 944 (5th Cir. 1990). Plain error is error which "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." U.S. v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993)(citations and internal quotation marks omitted).

As is discussed above, the 135 months of aggregate imprisonment to which Mitchell was sentenced is within the 108-to-

135-month range provided by the guidelines using the proper guideline provisions. Because the total sentence Mitchell received is within the proper guideline range, the district judge's misinterpretation of the guidelines is not plainly erroneous.

AFFIRMED.