IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8683
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO J. RAMIREZ,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
A 89 CR 80

(May 12, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

I

A

In April 1989, Francisco J. Ramirez negotiated the sale of a kilogram of cocaine with a Drug Enforcement Administration agent and a confidential informant. Ramirez and the informant made an appointment to complete the transaction at Ramirez' apartment. The

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

informant met Ramirez and Jimmy Perez at the apartment, but Ramirez left before the sale was completed, telling the others that he was going to "check out the area for police." The apartment was raided soon after Ramirez left. The officers arrested Perez and seized a kilogram of cocaine and a small quantity of marijuana, but they were unable to apprehend Ramirez, who never returned to the apartment. He managed to evade arrest for three years.

B

Unknown to Ramirez, the informant had recorded all of their conversations. The tapes were apparently mislaid during the delay in prosecution caused by Ramirez' flight, and they were not immediately given to Ramirez' attorney after he was arrested. Ramirez initially pleaded not guilty. Shortly before trial was scheduled to begin, the government discovered the tapes. After listening to the tapes with his attorney, Ramirez negotiated a plea agreement in which he pleaded guilty to one count of the three-count indictment.

II

A

Ramirez first argues that the district court should have granted him a two-level reduction in offense level for acceptance of responsibility. He argues that the court erred by overruling his objection to the PSR recommendation that no reduction be given for acceptance of responsibility because the "only support for the decision [not to recommend a reduction] was a subjective

determination" by the probation officer. Ramirez further contends that he was prejudiced when the probation officer and the district court apparently failed to consider recent amendments to U.S.S.G. § 3E1.1, the guideline governing acceptance of responsibility; accordingly, he argues, the case should be remanded for further consideration under the newly amended guidelines.

B

It is true, as Ramirez points out, that § 3E1.1 was amended effective November 1, 1992, shortly before he was sentenced. The notes to the amendment state that its purpose is to provide an additional one-level reduction to defendants who substantially assist the government in the investigation or prosecution of their own misconduct, to substitute the term "offense" for "offense and related conduct," and to interpret the concept of an "offense." U.S.S.G. App. C, amend. 459 at 283. Ramirez does not suggest that these specific changes would have affected his entitlement to the two-level reduction for acceptance of responsibility. Instead, he relies on another change: he argues that the amendment also substantively changed § 3E1.1 by requiring that the defendant "clearly demonstrate[] acceptance of responsibility for his offense" in order to obtain the two-level reduction. Before the amendment, § 3E1.1 required that the defendant "clearly demonstrate[] a recognition and affirmative acceptance of personal responsibility for his criminal conduct." Ramirez contends that under the less demanding language of the amendment he would have

been entitled to the reduction for acceptance of responsibility if the district court had, as it should have, applied the current amendments in determining his sentence.

We agree that courts should apply the guideline in effect at the time of sentencing unless the amended guideline exposes the defendant to a greater sentence. U.S. v. Suarez, 911 F.2d 1016, 1020-22 (5th Cir. 1990). The amendments to § 3E1.1 in effect at sentencing were not more onerous than the version of § 3E1.1 in effect at the time of the offense, and therefore the amended version should have been applied. Id.; see § 3E1.1 (Nov. 1991) and § 3E1.1 (Nov. 1992).

It is not necessary for us to remand for resentencing, however, because Ramirez would not have been entitled to the reduction for acceptance of responsibility even if the district court had applied the guidelines correctly. See Williams v. U.S., ___ U.S. ___, 112 S.Ct. 1112, 1120-21, 117 L.Ed.2d 341 (1992) (applying harmless-error analysis to district court's misapplication of the guidelines); U.S. v. Thomas, 973 F.2d 1152, 1159 (5th Cir. 1992).

The PSR recommended denying the reduction for acceptance of responsibility because Ramirez had not been forthcoming with authorities. He refused to admit his guilt until he realized that the government possessed incriminating tapes, and he consistently sought to minimize his participation in the offense. Additionally,

the probation officer noted that Ramirez had managed to evade arrest for almost three years.

Two considerations in determining whether a defendant is entitled to a reduction for acceptance of responsibility are whether he has truthfully admitted the conduct comprising the offense of conviction and whether he voluntarily surrendered to authorities promptly after committing the offense. Section 3E1.1, comment. (n.1(a) and (d)). Ramirez' conduct does not meet either criterion. Consequently there was no error by the district court in denying Ramirez the reduction. Furthermore, Ramirez would not have been entitled to the reduction even if the district court had applied the current version of § 3E1.1(a). Williams, 112 S.Ct. at 1120-21; Thomas, 973 F.2d at 1159, and the failure to apply the current version was harmless.

III

Finally, Ramirez urges that he was denied due process because the probation officer did not inform the district court that it should consider adjusting his offense level downward for a mitigating role in the offense. He did not raise this issue in the district court. We will not consider a constitutional issue raised for the first time on appeal "unless it is a purely legal issue and the refusal to consider it would result in a miscarriage of justice." U.S. v. O'Banion, 943 F.2d 1422, 1432 (5th Cir. 1991) (internal quotations and citations omitted). Thus, we will not

consider this argument because the claim that Ramirez was only a minor participant raises a factual rather than a legal issue.

IV

For the reasons given above, the judgment of the district court is

A F F I R M E D.