

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9011
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DAVID LEE BOLIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:91-CV-258 (CR4:88-123-K))

July 6, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

David Lee Bolin, appearing pro se, appeals the district court's denial of his 28 U.S.C. § 2255 motion. We **AFFIRM**.

I.

Bolin was charged in a 14-count indictment with, *inter alia*, conspiracy, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (count 1); possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (count 2); and unlawful use of

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.

a communication facility, in violation of 21 U.S.C. § 843(b) and (c) (counts 7-14). He pleaded guilty to counts 13 and 14, which charged that on December 4, 1987 (count 13), and December 7, 1987 (count 14), he "used said telephone to transmit a communication to an individual for the purpose of arranging payment for materials furnished by [him] to manufacture a controlled substance".

The court sentenced Bolin to, *inter alia*, two consecutive four year terms of imprisonment (the maximum penalty for each violation of § 843), together with a one year term of supervised release on each count. Pursuant to the plea agreement, the government dismissed the remaining counts at sentencing.

Subsequent to filing an untimely direct appeal, Bolin filed a § 2255 motion, which the court allowed Bolin to supplement. The court rejected all issues presented in both the original motion and supplement. Bolin timely appealed.

II.

Broadly construing the motion to supplement, Bolin presents two issues for review: (1) whether the imposition of consecutive sentences subjected Bolin to double jeopardy; and (2) whether the imposition of supervised release resulted in a sentence that exceeded the statutory maximum.² We address these issues in turn.

² Bolin raised a number of other issues in his § 2255 motion and its supplement; however, he wholly failed to brief those issues on appeal. Accordingly, we consider them waived. See Fed. R. App. P. 28(a)(4); *Weaver v. Puckett*, 896 F.2d 126, 128 (5th Cir.), *cert. denied*, 498 U.S. 966, (1990). We similarly refuse to consider Bolin's contention that the district court violated Fed. R. Crim. P. 32 by failing to rule upon several factual issues pertinent to sentencing. This issue was raised for the first time in Bolin's reply brief, and our failure to consider it will not result in manifest injustice. See *United States v. Prince*, 868 F.2d 1379, 1386 (5th Cir.), *cert. denied*, 493 U.S. 932 (1989).

A.

Bolin contends that the court's imposition of consecutive terms of imprisonment subjected him to double jeopardy. Citing **United States v. Broce**, 488 U.S. 563 (1989), the district court held that Bolin waived this issue by pleading guilty to both counts. The waiver issue, especially in the context of this collateral attack, need not detain us, because Bolin's contention clearly fails on the merits.

As stated, Bolin received two consecutive four year terms based on his use of a telephone, on two separate days, to facilitate the same underlying drug transaction. According to Bolin, the two communications should be treated as one because they were in furtherance of the same underlying transaction, and because the first use was an "indispensable step" in the commission of the second use. We disagree.

"[T]he double jeopardy clause imposes no restraints on the power of Congress to define the allowable unit of prosecution and punishment where all the charges are brought in one suit." **United States v. McDonald**, 692 F.2d 376, 377 (5th Cir. 1982), cert. denied, 460 U.S. 1073 (1983). Accordingly, our "sole question" is "whether Congress intended to provide for multiple punishments". **Id.**

Section 843(b) provides in pertinent part:

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. *Each separate use*

of a communication facility shall be a separate offense under this subsection.

21 U.S.C. 843(b) (emphasis added). The plain language of the statute reflects the intent of Congress to create a separate unit of prosecution for each use of a communication facility that furthers a single drug trafficking offense ("act"), or a number of offenses ("acts"). We are hard-pressed to conceive of statutory language that would more clearly manifest congressional intent. Accordingly, the imposition of consecutive sentences did not expose Bolin to double jeopardy.

B.

Bolin contends that the imposition of a one year term of supervised release extended his sentence beyond the maximum sentence permitted under § 843(c). This contention is foreclosed by *United States v. Butler*, 895 F.2d 1016 (5th Cir. 1989), cert. denied, 498 U.S. 826 (1990), in which this court held that "[t]he addition of a period of supervised release to a maximum jail sentence does not extend a party's imprisonment; therefore, it cannot create a violation of the maximum prison sentence allowed by statute". *Id.* at 1018³

³ In addition, Bolin contends, for the first time on appeal, that the court erred in imposing supervised release because § 843(b) does not so provide. A term of supervised release may be imposed under 18 U.S.C. § 3583(a), even though the statute defining the offense of conviction does not provide for the imposition of supervised release in its penalty provision. *United States v. Allison*, 986 F.2d 896, 897 (5th Cir. 1993). Accordingly, Bolin fails to assert error, much less the requisite plain error for an issue raised so belatedly.

III.

For the foregoing reasons, the denial of the § 2255 motion is

AFFIRMED.