UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1208
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DAVID VICTOR SALAZAR,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:92-CR-150-Y)

(December 9, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

David Victor Salazar challenges the sentence imposed following his guilty plea. We **AFFIRM.**

I.

Salazar pled guilty to obstruction of commerce by robbery.[2] In calculating Salazar's sentence, a probation officer recommended

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

[2] Salazar entered a shoe store, displayed a semi-automatic pistol, and told the store clerk that she was being robbed. He took $60 in cash.

that Salazar's offense level be enhanced under U.S.S.G. § 4B1.1, which addresses the computation of the offense level for career criminals. The Presentence Report (PSR) stated that Salazar had committed the following offenses, among others: 1) delivery of a controlled substance (heroin) in July 1985; 2) aggravated robbery with a deadly weapon on April 18, 1987; and 3) aggravated robbery with a deadly weapon on April 25, 1987. Salazar pled guilty to the three offenses on the same day, and received a 12 year sentence for each; he asserts that the sentences were to run concurrently.

Salazar objected to the application of the career offender guideline.[3] The probation officer responded, defending the recommendation. Salazar then pursued his objection at the sentencing hearing, but the district court overruled it. He was sentenced, *inter alia*, to 151 months in prison.

II.

Consistent with his objection in district court, Salazar contends that he did not have "at least two prior felony convictions of either a crime of violence or a controlled substance offense." *See* U.S.S.G. § 4B1.1. Thus, he maintains that he should not have received a sentence enhancement as a career offender.

A.

Salazar asserts that the three cases should be considered "related cases", and thus should not count as separate convictions

[3] As discussed *infra*, Salazar objected to the application of this guideline section because he alleged that his prior offenses should count as only one conviction.

for § 4B1.1 purposes.[4] Specifically, he claims that the cases were "consolidated" for plea and sentencing, and that he received concurrent sentences at the same hearing before the same judge.

We assume *arguendo* that a district court's finding regarding whether prior convictions are related is reviewed *de novo*. *See* ***United States v. Garcia***, 962 F.2d 479, 481 (5th Cir. 1992) (assuming *de novo* standard of review applies, but recommending en banc consideration in appropriate case), *cert. denied*, ___ U.S. ___, 113 S. Ct. 293 (1993). Salazar does not contend that the State filed a motion to consolidate the cases, as is required by Texas law to formally consolidate. *See* ***id.*** at 483. Thus, there was no consolidation.

To the extent that Salazar can be said to have raised the issue of "informal consolidation", *see* ***id.***, we see no basis for finding it. Although the imposition of concurrent sentences on the same day may be a factor to consider in evaluating whether cases have been consolidated, there must be additional evidence of consolidation. *See* ***id.*** We agree with the district court's finding that these cases were not related. Each judgment had a different case number and was separately entered; the crimes were not temporally related; and there was no allegation of a common plan or scheme. *See* ***id.*** ("the state court treated the two convictions

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[4] Section 4B1.1 applies when: 1) the defendant was at least 18 when he committed the instant offense; 2) the instant offense is a felony and is either a crime of violence or drug-related; and 3) "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense". U.S.S.G. § 4B1.1.

separately, entering separate sentences, judgments and plea agreements"); *see also* ***United States v. Paulk***, 917 F.2d 879, 884 (5th Cir. 1990) ("The convictions in question were the result of two separate criminal acts .... Simply because sentences run concurrently and were imposed on the same day does not require the sentences to be consolidated for guideline purposes absent a showing of a close factual relationship between the convictions."); ***United States v. Flores***, 875 F.2d 1110, 1114 (5th Cir. 1989) ("Simply because two convictions have concurrent sentences does not mean that the crimes are `related'").[5]

B.

In the alternative, Salazar relies on § 4B1.2(3) from the 1991 edition of the guidelines, which provided, in pertinent part:

> The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions .... *The date that a defendant sustained a conviction shall be the date the judgment of conviction was entered*.[6]

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[5] Salazar also contends that the offenses should be treated as a single conviction because he was not arrested between the commission of the offenses. Although an intervening arrest would preclude a finding that the offenses are related, *see* U.S.S.G. § 4A1.2 comment. (n.3), the guidelines do not state or imply that the absence of an intervening arrest means that the cases are related. To the contrary, the offenses are considered related only if they meet the criteria listed in the commentary to § 4A1.2. *See* ***id.*** The offenses do not meet the criteria because they neither occurred on the same date nor were part of a single, common plan. *See* ***id.***

[6] Although the 1992 edition of the guidelines was in force at the time of sentencing, Salazar contends that the 1991 edition must be applied because that edition was in force at the time the offense was committed, and amendments to § 4B1.2(3) in the 1992 edition would operate to his detriment. *See* ***United States v. Suarez***, 911 F.2d 1016, 1021-22 (5th Cir. 1990) (recognizing possible ex post facto problem in applying guidelines not in force

U.S.S.G. § 4B1.2(3) (emphasis added). Because the date of conviction for the three Texas offenses was the same, Salazar contends that they could not be separate convictions under the last sentence of § 4B1.2(3).[7]

This contention is mistaken. A reading of the section plainly demonstrates that the last sentence is intended to define the word "sustained" from the first sentence. The purpose of the last sentence is thus to guide a court in determining whether a conviction was *sustained* before the offense for which a defendant is being sentenced; if it was, it may be included in determining whether the defendant was a career offender. *See generally* ***Deal***, 113 S. Ct. at 1996 ("meaning of a word ... must be drawn from the context in which it is used"); ***United States v. Chen***, 913 F.2d 183, 189 (5th Cir. 1990) (words in a statute are to be given their common meaning unless otherwise defined). The sentence simply does

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at time of crime's commission). Because we do not believe the 1991 edition of the guidelines benefits Salazar, as discussed *infra*, we need not address the differences between the 1991 and 1992 editions.

[7] Salazar also asserts that, even assuming that we disagree with this contention, the term "conviction" must be deemed ambiguous and the rule of lenity should be applied. In light of our discussion *infra*, we do not hold that Salazar's contention highlights any ambiguity in the guidelines, and the rule of lenity is not applicable when there is no ambiguity. *See* ***Liparota v. United States***, 471 U.S. 419, 427 (1985) (rule of lenity applicable to ambiguous criminal statutes). Also, we find Salazar's citation to ***Deal v. United States***, ___ U.S. ___, 113 S. Ct. 1993 (1993), unavailing. While the ***Deal*** Court noted that the term "conviction" is susceptible to several meanings, it recognized that the term cannot be read outside of the context of the relevant statute. ***Id.*** at 1996. Reading "conviction" in light of the guidelines' provisions, we find no ambiguity of the sort asserted by Salazar.

not speak to the issue of whether prior convictions may be counted separately.

In addition, Salazar's interpretation of the last sentence of § 4B1.1(3) ignores comment 4 to the same subsection. *That* comment explains when convictions are to be counted separately by directing one to § 4A1.2; indeed, we have referred to the commentary to § 4A1.2 in determining whether various convictions are related and thus not to be counted separately. *See*, *e.g.*, ***Garcia***, 962 F.2d at 480; *see also* U.S.S.G. § 4A1.2 comment. n.3 (discussing what constitutes a "Related Case[]").

III.

For the foregoing reasons, the sentence is

AFFIRMED.