

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1361
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JORGE RODRIGUEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-458-D)

(November 3, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Jorge Rodriguez appeals his sentence, contending that the district court misapplied the Sentencing Guidelines by including in his criminal history score a Texas conviction for criminal mischief. We **AFFIRM**.

I.

At sentencing on Rodriguez's conviction for being a felon in possession of a firearm, his objection to the assessment of one criminal history point for a prior criminal mischief conviction was

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 Pursuant to that rule, the court has determined that this opinion should not be published.

overruled. The resulting criminal history score of 13 placed Rodriguez in criminal history category VI. With his base offense level of 24, the guideline range was 100-125 months; and he was sentenced to 100 months imprisonment. If the point for the criminal mischief conviction had not been included, Rodriguez would have been placed in criminal history category V, resulting in an imprisonment range of 92-115 months. U.S.S.G. Ch. 5, Part A (Sentencing Table).

II.

"This court will uphold a sentence unless it was imposed in violation of law; imposed as a result of an incorrect application of the sentencing guidelines; or outside the range of the applicable sentencing guideline and is unreasonable". **United States v. Howard**, 991 F.2d 195, 199 (5th Cir. 1993). "Application of the guidelines is a question of law subject to *de novo* review". **Id.** The district court's factual findings are reviewed only for clear error. **Id.** "Therefore, whether a prior conviction is covered under the sentencing guidelines is also reviewed *de novo*, while factual matters concerning the prior conviction are reviewed for clear error". **Id.**

"As a general rule, misdemeanor offenses are to be counted in computing a criminal history score". **United States v. Hardeman**, 933 F.2d 278, 280 (5th Cir. 1991); U.S.S.G. § 4A1.2(c) (1992). The Guidelines, however, provide that certain misdemeanor convictions should be excluded:

Sentences for the *following prior offenses and offenses similar to them*, by whatever name they are

known, *are counted only if* (A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

- Careless or reckless driving
- Contempt of court
- Disorderly conduct or disturbing the peace
- Driving without a license or with a revoked or suspended license
- False information to a police officer
- Fish and game violations
- Gambling
- Hindering or failure to obey a police officer
- Insufficient funds check
- Leaving the scene of an accident
- Local ordinance violations (excluding local ordinance violations that are also criminal offenses under state law)
- Non-support
- Prostitution
- Resisting arrest
- Trespassing.

U.S.S.G. § 4A1.2(c)(1) (emphasis added).²

Through new counsel on appeal, Rodriguez contends that criminal mischief *may be* similar to the listed offenses; and, because the offense does not meet the minimum term and is not similar to the instant offense (felon in possession of a firearm), it should not be included. He asserts that remand for a new

² The Guidelines provide further that other offenses are never included for the criminal history score:

Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

- Hitchhiking
- Juvenile status offenses and truancy
- Loitering
- Minor traffic infractions (e.g., speeding)
- Public intoxication
- Vagrancy.

U.S.S.G. § 4A1.2(c)(2).

sentencing hearing is required, in order for evidence to be presented on this issue. The Government counters that the similarity issue should be reviewed only for plain error.

1.

In his written objections in district court, Rodriguez stated that "the offense of Criminal Mischief is *not* a `similar offense' as listed in Section 4A1.2(c)(1)". (Emphasis added.) In response, the probation officer agreed, and stated that, as a result, the offense should be included. At the sentencing hearing, Rodriguez's counsel objected to the inclusion of another prior conviction (assault), on the ground that it was not similar to the listed offenses. In short, counsel was misinterpreting the section. After the district court explained the proper interpretation of § 4A1.2(c)(1), and overruled Rodriguez's objection as to the assault conviction, Rodriguez's counsel objected to the inclusion of the criminal mischief conviction on the same ground: "We would ... make the same argument, relatively same argument, that we made as to paragraph 24 [(assault conviction)] and would accept the court's ruling". The court overruled that objection as well.

"It was incumbent upon [Rodriguez] to make and factually develop in the district court all arguments concerning application of the guidelines he believed might persuade the judge to alter the sentence he now challenges". ***United States v. Lopez***, 923 F.2d 47, 50 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2032 (1991). Had Rodriguez presented to the district court the similarity contention he raises for the first time on appeal, the Government

would have had an opportunity to present evidence of dissimilarity, and the district court would have had an opportunity to consider it. Because Rodriguez is raising the issue for the first time through new counsel on appeal, we will review it only for plain error. See **Lopez**, 923 F.2d at 49. "`Plain error' is error which, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of judicial proceedings. It is a mistake so fundamental that it constitutes a `miscarriage of justice'". **Id.** at 50 (citations omitted).

2.

In **Hardeman**, our court adopted a "common sense approach" to determining whether a prior conviction is similar to those listed in § 4A1.2(c)(1):

[This approach] relies on all possible factors of similarity, including a comparison of punishments imposed for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the level of punishment, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct. These factors should assist the district court in determining whether it makes good sense to include the offense in question in the defendant's *criminal history* score.

This standard is consistent with the purpose of this section of the Guidelines: to screen out past conduct which is of such minor significance that it is not relevant to the goals of sentencing. The legislative history to this section reveals that the criminal history score is designed to take into account the seriousness of the past offense and the degree to which it suggests the possibility of future criminality. As a result, if these tests for similarity, taken as a whole, indicate that the offense is, like the listed offenses, neither

particularly serious nor likely to indicate recurring criminal conduct, then the defendant's prior offense should be excluded.

Id. at 281-82 (citations omitted).

Criminal mischief is defined under Texas law as follows:

A person commits [criminal mischief] if, without the effective consent of the owner:

(1) he intentionally or knowingly damages or destroys the tangible property of the owner; or

(2) he intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss or substantial inconvenience to the owner or a third person; or

(3) he intentionally or knowingly makes markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of the owner.

Tex. Penal Code Ann. § 28.03(a) (West Supp. 1993).

Rodriguez was convicted of criminal mischief in June 1990; his sentence included 180 days probation and restitution of \$160. Because the amount of loss was more than \$20 and less than \$200, the offense probably would be classified as a Class B misdemeanor under Texas law. Tex. Penal Code Ann. § 28.03(b)(2) (West Supp. 1993). At the time of Rodriguez's conviction, a Class B misdemeanor was punishable by a fine of not more than \$1,000 and/or confinement in jail for a term of not more than 180 days. Tex. Penal Code Ann. § 12.22 (West 1974).

Of the offenses listed in § 4A1.2(c)(1), "disorderly conduct or disturbing the peace"³ and "trespassing"⁴ are the only offenses

³ Under Texas law, disorderly conduct is the disruption of public peace or order, including the intentional and knowing use of language or gestures which tend to incite an immediate breach of

that even remotely resemble criminal mischief. Under Texas law, the three offenses have similarities and differences: all involve similar penalties, but criminal mischief can be a felony, depending on the amount of pecuniary loss;⁵ all require an intentional or knowing culpable mental state, but a person may commit a trespass through recklessness;⁶ and criminal mischief is a crime against a tangible property right, while trespass violates only an intangible property right, without resulting damage to the property itself. Although not particularly serious, Rodriguez's criminal mischief conviction serves as an indicator of the likelihood of recurring criminal conduct, and thus is relevant to the goals of sentencing.⁷ See *Hardeman*, 933 F.2d at 281; *cf. United States v. Lee*, 955 F.2d 14 (5th Cir.) (upholding upward departure on the basis of

the peace in a public place. Tex. Penal Code Ann. § 42.01 (West 1989).

⁴ In Texas, a criminal trespass is committed when a person "enters or remains on property or in a building of another without effective consent and he: (1) had notice that the entry was forbidden; or (2) received notice to depart but failed to do so". Tex. Penal Code Ann. § 30.05(a) (West 1989).

⁵ At the time of Rodriguez's conviction for criminal mischief, disorderly conduct was a Class C misdemeanor, punishable by a fine of not more than \$200, unless the offense involved a firearm, in which case it was punishable as a Class B misdemeanor. Tex. Penal Code Ann. §§ 12.22 (West 1974) and 42.01(d) (West 1989). Unless a trespass is committed in a habitation or the perpetrator carries a deadly weapon during the commission of the offense, criminal trespass is punished as a Class B misdemeanor. Tex. Penal Code Ann. § 30.05(c) (West 1989).

⁶ See Tex. Penal Code Ann. § 6.02 (West 1974).

⁷ Between May 1988 and July 4, 1992 (the date of the offense of conviction), Rodriguez was convicted of 11 offenses (six before, and four after, the criminal mischief conviction).

convictions for assault, disorderly conduct and criminal mischief which were punishable only by fine), *cert. denied*, ___ U.S. ___, 112 S. Ct. 3010 (1992).

In sum, applying the common-sense approach of *Hardeman*, we conclude that the assessment of the criminal history point for the criminal mischief conviction did not constitute plain error.

III.

The sentence imposed by the district court is

AFFIRMED.