IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1402

Summary Calendar

United States of America,

Plaintiff-Appellee,

versus

Billy Dean Speaks,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:91-CR-108-E & 4:92-CR-47-E)

(November 8, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Billy Dean Speaks did not appear for sentencing after entering a plea of guilty to a drug offense.[1] After his apprehension, he

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1]Speaks was indicted for the offense of possession of a phenylacetic acid, a listed chemical, with intent to manufacture amphetamine, in violation of 21 U.S.C. §§ 841(d)(1) & 841(d)(2). He pled guilty to a separate information charging him with unlawful use of a communications facility in committing the felony charged in the indictment, in violation of 21 U.S.C. § 843(b).

pled guilty to a charge of failing to appear.[2] We affirm the sentence imposed by the district court.

In the PSR the probation officer increased Speaks's offense level for the underlying drug offense by two levels for obstructing justice by not appearing for sentencing. That increase brought his adjusted base offense level to 30. U.S.S.G. § 3C1.1. The officer then calculated Speaks's base offense level for the failure-to-appear conviction as 6. Because the failure-to-appear offense level was more than nine levels less serious than the drug offense, the officer disregarded it in determining the combined offense level. U.S.S.G. § 3D1.4(c). Applying a total offense level of 30 to a criminal history category of II yielded a guideline imprisonment range of 108-135 months. <u>See</u> U.S.S.G. Sentencing Table & § 5C1.1(f). The district court adopted the PSR recommendations. It sentenced Speaks to 48 months on the underlying conviction and 60 months on the failure to appear conviction, to run consecutively for a total of 108 months.

Speaks first argues that the Guidelines did not authorize the trial court's upward adjustment of his sentence for obstructing justice. Speaks correctly contends that the probation officer erred in determining his sentence. When a defendant is found guilty of both an obstruction offense and an underlying offense, those two counts constitute one Group for purposes of determining an offense level. <u>See</u> U.S.S.G. § 3C1.1 (comment 6); <u>United States</u>

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[2]The indictment he pled to charged a violation of 18 U.S.C. § 3146(a)(1), punishable under 18 U.S.C. § 3146(b)(1)(A)(ii).

v. Winn, 948 F.2d 145, 162 (5th Cir. 1991), cert. denied, 112 S.Ct. 1599 (1992). The highest offense level of the counts in that Group becomes the offense level for the Group. U.S.S.G. § 3D1.3. Then an analysis of the different Groups under U.S.S.G. § 3D1.4 determines a combined offense level.

The probation officer in this case skipped a step. Instead of consolidating the two offenses into one Group under sections 3C1.1 and 3D1.3, the officer treated the offenses as separate Groups and derived a combined offense level under U.S.S.G. 3D1.4. Because the offense level for the obstruction offense was so much lower than that of the underlying offense, it had no effect on the officer's combined offense level analysis and the court imposed the proper sentence. We have no reason to reverse. See United States v. Kings, 981 F.2d 790, 796 n.11 (5th Cir.), cert. denied, 113 S.Ct. 2450 (1993). However, if the offense levels had differed, the analysis used might well have resulted in an excessively high sentence. See United States v. Lacey, 969 F.2d 926, 930 (10th Cir. 1992), vacated and remanded on other grounds, 113 S.Ct. 1233 (1993).

Speaks also contends that the upward adjustment for obstruction constituted double punishment for failing to appear and violated the Double Jeopardy Clause. When only one sentencing proceeding takes place and the sentence imposed falls within the limits intended by the legislature, the Double Jeopardy Clause does not bar cumulative punishment. See Albernaz v. United States, 101 S.Ct. 1137, 1145 (1981); United States v. Gonzales, 996 F.2d 88, 93

(5th Cir. 1993). The district court simultaneously set the sentences for Speaks's two offenses, and did so within the limits of the underlying statutes and the Guidelines. No double jeopardy problem arose.

Speaks next argues that the district court erred in not adjusting his offense level down two levels for acceptance of responsibility. See U.S.S.G. § 3E1.1(a). The only evidence Speaks offered to demonstrate his acceptance of responsibility was his guilty pleas. These pleas do not entitle him to a downward adjustment as a matter of right. See United States v. Baty, 980 F.2d 977, 979 (5th Cir.), cert. denied, 113 S.Ct. 2457 (1993). In denying a downward adjustment, the trial court noted that Speaks did not voluntarily surrender to authorities, he remained a fugitive in Oregon for nine months following his failure to appear at his sentencing hearing, and that but for an unanticipated traffic violation Speaks might still be at large. We find no clear error in this reasoning or result.

Speaks finally contends that the imposition of consecutive sentences exceeded both Guideline and constitutional authority. Both arguments fail. The Guidelines justified consecutive sentences because the total punishment required by the Guidelines exceeded the statutory maximum for either offense. U.S.S.G. § 5G1.2. The Guidelines also justified consecutive sentences because the statute criminalizing failure to appear explicitly states that its penalties shall run consecutively to other sentences. 18 U.S.C. § 3146(b)(2). See U.S.S.G. § 5G1.2 (comment). And as the

total Guidelines sentence of 108 months does not exceed the combined statutory maximum sentence of 108 months, no constitutional issue arose. United States v. Kings, 981 F.2d 790, 799 (5th Cir.), cert. denied, 113 S.Ct. 2450 (1993).

AFFIRMED