**UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 93-1505
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN P. PORTWOOD,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
(4:92-CR-176-A)

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(May 6, 1994)

Before POLITZ, Chief Judge, DAVIS and SMITH, Circuit Judges.

PER CURIAM:*

Convicted on a guilty plea of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g) & 924(a), and sentenced to prison for 51 months, John P. Portwood appeals his sentence. For the reasons assigned we affirm.

Portwood first assigns error to the district court's decision

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to count several offenses as separate crimes in the calculation of his criminal history.[1] We briefly examine the relevant scenario. In 1983 Portwood pled guilty to five state counts: a January 24, 1983 forgery; a February 15, 1983 burglary involving the theft of a briefcase and checkbook from the auto of one William Webster; two February 16, 1983 forgeries for signing the names of the payee and Webster on a check; and a February 17, 1983 forgery of one of Webster's checks. The court found the two February 16 forgeries related and found the February 17 forgery related to the February 15 burglary, resulting in three countable felonies, placing Portwood in criminal history category IV.

Portwood contends that the burglary and all February forgeries were related as part of a common scheme or plan,[2] resulting in only two countable offenses and a criminal history category of III. The district court rejected Portwood's description of the criminal activity, finding that he broke into Webster's auto and stole Webster's briefcase with no knowledge that it contained the checkbook. On the record before us this finding is not clearly erroneous. The district court correctly concluded that there was no common scheme which bound together all of Portwood's February offenses.

In the alternative, Portwood urges that all of his crimes were

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[1]If offenses are "related," they are treated as a single offense for criminal history purposes. U.S.S.G. § 4A1.2(a)(2).

[2]U.S.S.G. § 4A1.2, cmt.3 (multiple offenses that are part of a common scheme or plan are related).

related because they were consolidated for sentencing.[3] Portwood bears the burden of proving consolidation.[4] The record contains no consolidation order or other dispositive evidence on this issue. Absent such evidence, the fact that Portwood's cases proceeded to sentencing under separate docket numbers is "a significant indication that the cases were not consolidated."[5]

Portwood next contests the district court's denial of a reduction in the offense level computation for acceptance of responsibility. Portwood contends that the denial of this reduction was based on a positive drug test, a predicate he insists is incorrect because of the 1992 amendment to U.S.S.G. § 3E1.1(a) which requires a defendant to accept responsibility for his offense and not his criminal conduct.[6]

The defendant's failure to withdraw voluntarily from criminal conduct remains an appropriate consideration under the amended guideline's application notes.[7] Portwood correctly observes that

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[3]U.S.S.G. § 4A1.2, cmt.3 (consolidation for sentencing indicates that multiple sentences are related).

[4]**United States v. Bryant**, 991 F.2d 171 (5th Cir. 1993).

[5]**Id.** at 178.

[6]Portwood's interpretation of revised section 3E1.1(a) has been expressly rejected after careful consideration of the same argument by our colleagues in the Eleventh Circuit. "The change to §3E1.1(a) . . . was made to ensure that the district court did not deny a defendant a decrease solely because the defendant did not voluntarily admit all criminal conduct. The change was not made to take from the district court the discretion to consider the defendant's continued criminal conduct when the government has adequate proof of such conduct." **United States v. Pace**, 17 F.3d 341, 344 (11th Cir. 1994).

[7]U.S.S.G. § 3E1.1, cmt.1(b).

the Sixth Circuit narrowed the latter factor to include only criminal conduct related to the charged offense.[8] We have rejected that reading, however, holding that any continued criminal conduct is a sufficient basis for denying a reduction for acceptance of responsibility.[9] The district court did not err in considering Portwood's drug use as evidence that he had not accepted responsibility warranting the reduction.

Finally, Portwood maintains that the district court erred by adopting the amended PSR without addressing his written objections thereto.[10] Portwood presented no evidence at sentencing to support his objections; the district court committed no error.[11]

AFFIRMED.

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[8]**United States v. Morrison**, 983 F.2d 730, 735 (6th Cir. 1993) (application note on withdrawal from criminal conduct only "refer[s] to that conduct which is related to the underlying offense.").

[9]**United States v. Watkins**, 911 F.2d 983, 985 (5th Cir. 1990) (voluntary withdrawal from criminal conduct factor "is phrased in general terms and does not specify that the defendant need only refrain from criminal conduct associated with the offense of conviction in order to qualify for the reduction."). See also **Pace** (adopting the reasoning of **Watkins** and rejecting the Sixth Circuit's **Morrison** analysis).

[10]Fed.R.Crim.P. 32.

[11]"When a defendant objects to his PSR but offers no rebuttal evidence to refute the facts, the district court is free to adopt the facts in the PSR without further inquiry." **United States v. Sherbak**, 950 F.2d 1095, 1099-1100 (5th Cir. 1992).