

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1601

Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID W. HORROCKS,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
(3:93-CR-093-T)

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(January 21, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

I

David W. Horrocks plead guilty to one count of committing bank fraud in violation of 18 U.S.C. § 1344. The district court sentenced Horrocks to prison for three months followed by three months of home confinement. The court also imposed three years of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

supervised release to commence on completion of Horrock's prison term and ordered a special assessment of \$50.

In sentencing Horrocks, the district court assigned him an offense level of 10 and a criminal history category of I. The Sentencing Guidelines under these circumstances require imposition of a sentence of six to twelve months. U.S.S.G. Ch.5, P.A, Sentencing Table. The probation officer recommended that Horrocks was not eligible for probation under statute or under the guidelines. Horrocks objected, arguing that probation was available. The district court overruled Horrock's objection and adopted the probation officer's recommendation. Horrocks timely appeals.

## II

Horrocks claims that the law under which he was convicted conflicts with the statutory and Sentencing Guidelines prohibition on probation. He notes first that the law that he violated provides that a person convicted of bank fraud "shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both." 18 U.S.C. § 1344. As Horrocks observes, the statute does not require the imposition of a minimum jail sentence.

On the other hand, Horrocks' argument continues, the Sentencing Guidelines, and the statutory law which they incorporate, provide that a court cannot probate the sentence of a Class B felon. U.S.S.G. § 5B1.1(b) (citing 18 U.S.C. § 3561(a)(1)). The relevant statutory provisions characterize as a Class B felony any offense that results in a maximum term of 25

years or longer and is not classified by a letter grade. 18 U.S.C. § 3559(a)(1). Horrocks therefore committed a Class B felony and the court could not probate his sentence.

Horrocks describes the statutory provision that sets his sentence at up to thirty years and the prohibition on probation as at odds. He is mistaken. One can honor both strictures simply by complying with the Sentencing Guidelines, which require imposition of a sentence on Horrocks of at least six months, and by then refusing to grant probation. Such a sentence is shorter than thirty years, denies him probation, and falls within the parameters set by the Guidelines.

Horrocks asserts that denial of probation is inconsistent with a statute that requires no minimum sentence. For this proposition, he relies on United States v. Elliott, 971 F.2d 620 (10th Cir. 1992). The Tenth Circuit came to the opposite conclusion in Elliott. The court reasoned that a sentence of no months is not the same as probation. A prohibition on probation, therefore, did not mandate a nominal sentence where the Sentencing Guidelines otherwise allowed the court to impose no sentence at all. Id. at 622.

The conflict that Horrocks suggests does not arise. 18 U.S.C. § 1344 sets the range of punishments the court may impose upon Horrocks. In contrast, 18 U.S.C. § 3559(a)(1) prohibits probation of Class B felons once the court imposes sentence. The only possible conflict in the present case arises between the Sentencing Guidelines and 18 U.S.C. § 1344. The Sentencing Guidelines require

a minimum sentence of six months whereas 18 U.S.C § 1344 does not require a minimum sentence. In essence, Horrocks' objection amounts to the assertion that the Sentencing Guidelines conflict with federal criminal law wherever the Guidelines restrict the latitude of a sentencing judge.

This limitation of discretion is the purpose of the Guidelines. See U.S.S.G Ch.1, P.A, Introduction. Federal criminal law and the Guidelines do not conflict; they are complementary. By abiding the terms of each, we honor both. We AFFIRM.