

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-2113
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GREGORY J. BOYENGA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(September 21, 1993)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:¹

Gregory J. Boyenga (Boyenga) appeals his sentence following his conviction on three counts of willful failure to file income tax returns. We affirm.

I.

A jury convicted Boyenga on three counts of willful failure to file income tax returns. Each count subjected Boyenga to a maximum sentence of one year. Two of these counts involved pre-Guidelines conduct. In calculating Boyenga's offense level for Count Three,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

covered by the Guidelines, the probation officer used the tax loss amounts for all three years, viewing the tax loss from Counts One and Two as relevant conduct.

In his objections to the PSR, Boyenga requested that the district court sentence him to concurrent sentences. At sentencing, the district court overruled Boyenga's objections and adopted the PSR. The district court sentenced him to a total of sixteen months imprisonment: ten months imprisonment on Count Three; six months imprisonment on Count One, to be served consecutively to Count Three; and six months imprisonment on Count Two, to be served concurrently with Count Three. In addition, the district court ordered Boyenga to pay a fine of \$1,000.

II.

A.

First, Boyenga argues that by using the dollar amount from Count One as relevant conduct in determining the guideline range for Count Three, the district court impermissibly double counted by imposing consecutive sentences. Three legal principles offer guidance:

- (i) pre-Guidelines conduct may be considered in arriving at a Guidelines offense level,
- (ii) district court's [sic] generally have broad discretion -- especially for pre-Guidelines offenses -- in deciding whether sentences should run concurrently or consecutively, so long as the overall sentence remains within statutory limits, and
- (iii) sentences for pre-Guidelines offenses may run consecutively to sentences for offenses which fall under the Guidelines.

United States v. Kings, 981 F.2d 790, 794-95 (5th Cir.) (footnotes

omitted), **cert. denied**, 113 S.Ct. 2450 (1993).

Boyenga focuses on the second of these principles by arguing that the total sentence, sixteen months, exceeded the statutory maximum, one year, thereby indicating an abuse of the district court's discretion. But the total sentence, sixteen months, does not exceed the statutory aggregate maximum, three years. **See United States v. Gaudet**, 966 F.2d 959, 963 (5th Cir. 1992).

Boyenga also argues that the use of the dollar loss in Count One as relevant conduct in Conduct Three, combined with the imposition of consecutive sentences, violates the Double Jeopardy Clause. We rejected this argument in **Gaudet**. **Gaudet**, 966 F.2d at 963. Therefore, Boyenga has failed to demonstrate any error in the district court's imposition of consecutive sentences.

B.

Boyenga argues next that because the district court, in imposing consecutive sentences, mentioned his refusal to disclose financial data to the probation officer, his Fifth Amendment privilege concerning self-incrimination was violated. Boyenga did not raise this argument in the district court so we review this assignment for plain error. **See United States v. Olano**, ___ U.S. ___, 113 S.Ct. 1770, 1776-79, 123 L.Ed.2d 508 (1993).

The Fifth Amendment, in relevant part, provides that no person "shall be compelled in any criminal case to be a witness against himself." It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where

the answers might incriminate him in future criminal proceedings."

Minnesota v. Murphy, 465 U.S. 420, 426, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (citation omitted).

At trial, Boyenga testified in his own behalf and answered questions about receiving money from companies in the years 1985 through 1987, and about his belief that what he received was not income. The PSR, adopted by the district court, lists two instances where Boyenga refused to give information to the probation officer. The PSR does not indicate that Boyenga's refusal was prefaced on his assertion of his Fifth Amendment right either explicitly or implicitly. "The Fifth Amendment privilege against compelled self-incrimination is not self-executing. At least where the Government had no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion." **Roberts v. United States**, 445 U.S. 552, 559, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980).

Here, the district court, in explaining why it sentenced Boyenga to the top of the sentencing range and to consecutive sentences, referred to Boyenga's deceptive practices, illustrated by his refusal to disclose his present financial situation. Because Boyenga never brought the Fifth Amendment issue to the attention of the district court, and in light of his testimony at trial, he has waived this privilege. **See Roberts**, 445 U.S. 559-60; **see also United States v. Pool**, 660 F.2d 547, 554-56 (5th Cir. 1981). Further, the explanation given by the district court is

consistent with the statutory goals of sentencing. **See** 18 U.S.C. § 3553(a).

As part of his Fifth Amendment argument, Boyenga mentions that the district court's judgment reflects additional orders relating to conditions of supervised release that violate his Fifth Amendment rights: "The defendant shall provide to the probation officer access to any financial information [and] [t]he defendant is required to cooperate with the Internal Revenue Service to resolve the tax matter subject to the criminal information in this case." Boyenga did not object to the conditions of supervised release. Therefore, this Court reviews for plain error. **See Olano**, 113 S.Ct. 1776-79. "There must be an `error' that is `plain' and that `affect[s] substantial rights.'" **Id.**, 113 S.Ct. 1776.

A condition of probation is not necessarily invalidated merely because it impairs a probationer's enjoyment of constitutional rights. **United States v. Stafford**, 983 F.2d 25, 28 (5th Cir. 1993). Discretionary conditions of probation, however, must be "reasonably related" to the goals of sentencing and involve "only such deprivations of liberty and property as are reasonably necessary for these purposes." 18 U.S.C. § 3563(b); **Stafford**, 983 F.2d at 28.

The condition of supervised release, requiring Boyenga to cooperate with the IRS in resolving the tax matters for the years covered by the conviction, is not plain error. A sentencing "court may not condition probation upon payment of a specified sum of taxes when that sum has not been acknowledged, conclusively

established in the criminal proceeding, or finally determined in civil proceedings.'" **Stafford**, 983 F.2d at 29 (quoting **United States v. Touchet**, 658 F.2d 1074, 1076 (5th Cir. 1981)). When Boyenga testified at trial, he acknowledged the amounts of money that the IRS determined that he earned during the years covered by the information. Therefore, the district court did not commit plain error in imposing this additional condition of supervised release.

Nor was it plain error to impose the condition of supervised release requiring Boyenga to provide access to any financial information to the probation officer. This is a "special" condition, meant to accompany a sentence of a fine, restitution, or forfeiture. U.S.S.G. § 5B1.4(b)(18). The district court imposed a \$1,000 fine on Stafford. Therefore, under our plain error standard of review, this condition of supervised release reasonably relates to the goals of sentencing and involves only such deprivations of liberty and property as are reasonably necessary for these purposes. **Stafford** is distinguishable because the district court, in that case, did not impose a sentence of a fine, restitution, or forfeiture. **Stafford**, 983 F.2d at 26, 28-29.

III.

For the reasons stated above, Boyenga's sentence is affirmed.
AFFIRMED.