UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-2640
No. 93-2646

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SAM AHMAD KHEIR,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR-H-93-136 & CR-H-90-121-01)

(April 13, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Sam Ahmad Kheir pled guilty to failing to appear for sentencing, *see* 18 U.S.C. § 3147(a)(1) (1988). The district court imposed a sentence of fifteen months' imprisonment and three years' supervised release, to run consecutively to the sentence for his underlying offense. Kheir appeals from his sentence for failure to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

appear; we affirm.

I

After Kheir pled guilty to and was convicted of conspiracy to commit robbery against the United States, *see* 18 U.S.C. § 371 (1988), and unlawful possession with intent to distribute heroin, *see* 21 U.S.C. § 841(a)(1),(b)(1)(C) (1988), he failed to appear for sentencing. He was arrested at the United States-Canadian border and returned to the Southern District of Texas. The district court sentenced Kheir to seventy-five months' imprisonment on the conspiracy count, and a concurrent sixty months' imprisonment on the heroin count. The court also sentenced him to three years of supervised release.

Immediately following that sentencing hearing, the district court rearraigned Kheir on a failure-to-appear charge. Kheir pled guilty. The court found his total offense level under the Sentencing Guidelines to be fifteen and his criminal history to be category II, resulting in a guideline range of twenty-one to twenty-seven months. Kheir did not object to these findings. The court then sentenced him to twenty-one months' imprisonment and three years' supervised release, stating that "[t]he sentence for the conviction is consecutive to the prior sentence imposed for [the conspiracy and drug convictions]." Kheir did not object to the sentence.

Kheir now appeals his sentence on the failure-to-appear conviction, contending that the district court erred in (1) finding his criminal history to be category II, (2) failing to group the

failure-to-appear charge with the counts for the underlying offenses, and (3) imposing consecutive terms of supervised release.

II

Parties must object to errors in the district court in a timely manner, otherwise they risk forfeiture of the right impinged upon by the error. *United States v. Calverley*, 37 F.3d 160, 162 (5th Cir. 1994) (en banc) ("[T]he failure of a litigant to assert a right in the trial court likely will result in its forfeiture."), *cert. denied*, 63 U.S.L.W. 3643 (U.S. Feb. 27, 1995). Kheir failed to object to either the district court's findings or his sentence. "In exceptional circumstances, appellate courts may, in the interests of justice, notice errors to which no objection has been made. Such circumstances are sharply circumscribed by the plain error standard . . . ." *Id.* Accordingly, we review his sentence for plain error. *See* Fed. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

In determining whether the district court committed plain error, we conduct a two-part analysis. *United States v. Olano*, ___ U.S. ___, ___, 113 S. Ct. 1770, 1777, 123 L. Ed. 2d 508 (1993). First, we determine if there was error at all,[1] and if so, whether

[1] *Olano*, ___ U.S. at ___, 113 S. Ct. at 1777 ("The first limitation on appellate authority under Rule 52(b) is that there indeed be an `error.'"); *see also Calverley*, 37 F.3d at 162 (stating that first element of analysis requires that there be error); *United States v. Rodriguez*, 15 F.3d 408, 415 (5th Cir. 1994) (same).

that error was plain[2] and affected substantial rights.[3] If a party can satisfy this first requirement, the appellate court has discretion to correct the error,[4] but "only if the [error] `seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Calverley*, 37 F.3d at 164 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936)); *Rodriguez*, 15 F.3d at 416 (same).

Kheir contends first that the district court plainly erred in finding that his criminal history should be classified as category II under the Sentencing Guidelines.[5] Under § 2J1.6 of the Sentencing Guidelines:

> [T]he defendant may be sentenced on the underlying offense (the offense in respect to which the defendant failed to appear) before being sentenced on the failure to appear offense. In such cases, criminal history points for the sentenced imposed on the underlying offense are to be counted in determining the guideline range on the failure to appear offense only where the

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[2] *Olano*, ___ U.S. at ___, 113 S. Ct. at 1777 (requiring plain error and stating that "`[p]lain' is synonymous with `clear' or, equivalently, `obvious.'"); *Calverley*, 37 F.3d at 162-63 (stating that plain , `[a]t a minimum,' contemplates an error which was `clear under current law' at the time of trial." (quoting *Olano*, ___ U.S. at ___, 113 S. Ct. at 1777)).

[3] *Olano*, ___ U.S. at ___, 113 S. Ct. at 1777-78 ("The third and final limitation on appellate authority under Rule 52(b) is that the plain error `affec[t] substantial rights.'" (quoting F.R. Crim. P. 52(b))); *Calverley*, 37 F.3d at 164 ("*Olano* counsels that in most cases the affecting of substantial rights requires that the error be prejudicial; it must affect the outcome of the proceeding."); *Rodriguez*, 15 F.3d at 415 (requiring a "specific showing of prejudice").

[4] *See Olano*, ___ U.S. at ___, 113 S. Ct. at 1778 ("[T]he Court of Appeals has authority to order correction, but is not required to do so."); *Calverley*, 37 F.3d at 164 (noting that an appellate court may decide to correct the error if "the facts of the particular case warrant remediation").

[5] Kheir argues that, "though [its method was] not articulated, the district court apparently computed [his] criminal history category by adding three points for the sentence of imprisonment [on the conspiracy and drug charges] imposed only moments before."

> offense level is determined under subsection (a)(1) (*i.e.*, where the offense constituted a failure to report for service of sentence).

United States Sentencing Commission, *Guidelines Manual*, § 2J1.6, comment. (n.4) (Nov. 1992). Kheir did not fail to report for service of his sentence, he failed to appear for sentencing. Accordingly, the district court erred in assessing a criminal history of category II, *see United States v. Lechuga*, 975 F.2d 397, 400 (7th Cir. 1992) (finding error where court increased criminal history for failure to appear for proceedings other than for service of sentence), and this error is plain.

However, Kheir must also show that the district court's error affected his substantial rights. One way a party may show that an error in sentencing has affected substantial rights is by demonstrating that the sentence imposed lies outside the correct guideline range. *See United States v. Franks*, ___ F.3d ___, 1995 WL 63152, at *23 (5th Cir. Feb. 15, 1995) (finding plain error because sentence outside correct range and substantially longer than correct range). Such is not the case here, however. The district court found the guideline range to be twenty-one to twenty-seven months. Kheir's range under the correct category, that is, criminal history category I, would have been eighteen to twenty-four months. Kheir's sentence of twenty-one months is therefore within the correct guideline range.

To demonstrate an effect on substantial rights, Kheir must show that, although the imposed sentence falls within the correct guideline range, the district court would nonetheless have imposed

a lesser sentence had she known of the error. Kheir points to nothing in the record indicating that the district court intended to sentence him to the minimum of the range; therefore, he has failed to show that the district court's error resulted in a substantially longer sentence than if the district court had used the correct range. Consequently, Kheir has not shown that his substantial rights were affected. *United States v. Bullard*, 13 F.3d 154, 159 (5th Cir. 1994) (refusing to find plain error when incorrect sentence nonetheless fell within correctly-calculated guideline range and "exceeded the minimum of the correct range by only three months").[6]

Kheir contends next that the district court should not have sentenced him separately on the failure-to-appear charge, but instead should have grouped it with the underlying offenses and calculated only one guideline range. According to Kheir's calculation, the proper guideline range would be 87 to 108 months' imprisonment. The district court actually sentenced him to 96 months.[7] Kheir concedes that the sentenced imposed falls within the guideline range he proposes. As with his earlier contention, Kheir points to nothing in the record indicating that the district

[6] *United States v. Avalos-Zarate*, 986 F.2d 378, 379 (7th Cir. 1993), which found plain error in an incorrect calculation even though sentence within correct range and which Kheir cites to support his position, is not the law of this Circuit.

[7] The 96-month total results from the consecutive 75-month sentence for the underlying offenses followed by the 21-month failure-to-appear sentence.

court intended a minimum sentence.[8] Accordingly, even if the district court erred in not grouping his offenses, he has failed to satisfy his burden to show an affect on substantial rights.

Lastly, Kheir argues that the district court impermissibly sentenced him to consecutive terms of supervised release. *See* 18 U.S.C. § 3624(e) (1988) (instructing that multiple terms of supervised release run concurrently). The district court orally stated that the sentence for the failure-to-appear conviction should run consecutively to the sentence for the underlying convictions. Although this may have implied that the terms of supervised release also ran consecutively, the court's written judgment clearly ordered that while the terms of imprisonment should run consecutively, the term of supervised release on the failure-to-appear conviction should "run concurrently with the term of supervised release imposed in [the underlying offense case]." "When the oral pronouncement of sentence does not resolve whether a sentence runs consecutively or concurrently, the clearly expressed intent of the sentencing judge discerned from the entire record controls." *United States v. McAfee*, 832 F.2d 944, 946 (5th Cir. 1987); *see also United States v. Davidson*, 984 F.2d 651, 656 n.9 (5th Cir. 1993) (refusing to apply oral pronouncement over written statement because oral pronouncement was "cryptic"). The record as a whole, particularly the written judgment, demonstrates that the district court imposed concurrent, not consecutive, terms

[8] Indeed, Kheir concedes that he only "assumes" that the district court intended to impose the minimum sentence.

of supervised release. We find no error, plain or otherwise, in the district court's imposition of terms of supervised release.

III

For the foregoing reasons, we AFFIRM the judgment of the district court.