

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 93-2688

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CARLOS CANALES,

Defendant-Appellant.

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

(CR-H-92-187)

(December 14, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

This is a direct appeal in which the Appellant complains that his trial counsel was ineffective for failing to lodge objections to his pre-sentence report (PSR). We address and reject one of

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appellant's claims, decline to address his remaining claims, and affirm the judgement of the trial court.

RELEVANT PROCEDURAL HISTORY

Appellant Carlos Canales was convicted by a jury of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). Prior to the trial, the Government had filed a notice of intent to proceed under 18 U.S.C. § 924(e)(1) (West Supp. 1994), the Armed Career Criminal Act, based on Canales's prior convictions. As shown in the PSR, Canales's adult criminal history included three convictions for burglary of a habitation, a conviction for unauthorized use of a motor vehicle, and three convictions for delivery of a controlled substance, heroin. Accordingly, the PSR recognized Canales as an armed career criminal and recommended his offense level under U.S.S.G. § 4B1.4 be set at 33 rather than 12.

No objections relevant to this appeal were made by either the Government or the Appellant to the PSR. The district court adopted the PSR, determining Canales's total offense level at 31 (decreased two points as recommended for acceptance of responsibility), his criminal history category VI, and his imprisonment range 188 to 235 months. Canales was sentenced to 235 months on September 7, 1993.

ANALYSIS OF APPELLANT'S CLAIMS

"The general rule in this circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court since no opportunity existed to develop the record on the merits of

the allegations." U.S. v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988). If the defendant fails to raise the claim before the district court, this Court will reach the merits of the claim only in the rare case where the record is well-developed. Id.

In Canales's original appellate brief, he argued that he was denied effective assistance of counsel because his counsel failed to challenge his prior convictions or to object to the convictions listed in the PSR, resulting in an increase in his offense level from 12 to 33. He asserted that the 1990 guidelines manual did not contain § 4B1.4, but, rather, that the amendment appeared first in the 1991 manual. He argued that

[u]nder the 1990 U.S.S.G. Manual, [offense level 33] did not exist. Had defendant's trial counsel objected, it is possible the district court would have modified the level. Under the 1990 U.S.S.G. Manual the base offense level would be a level 12 which is significantly lower than the level that [Canales] was sentenced. Counsel's error had an effect on [Canales's] sentence which [was] so serious as to deprive [Canales] of a fair trial.

Thus, he originally suggested that but for counsel's ineffectiveness, he would have been sentenced under the 1990 guidelines manual, which purportedly did not contain § 4B1.4.

But, as the Government correctly notes, § 4B1.4 does appear in the manual published by the U.S. Government Printing Office effective November 1, 1990 on page 4.13; the 1991 and 1993 editions of the guidelines manual also include § 4B1.4. In his supplemental reply brief, Canales acknowledges that his assertion "regarding the

guidelines manual was based on the 1990 edition of the United States Guidelines published by West Publishing Company." Canales also argues, contradicting his earlier argument that the 1990 version of the guidelines should have been applied to him, that the 1990 version of the guidelines should not have been applied to him, and that "[t]he proper guideline would have been the 1991 or 1993 guideline."

The PSR provided that the 1990 United States Sentencing Guidelines Manual was used. Section 4B1.4, which adopted the Armed Career Criminal Act, 18 U.S.C. § 924(e), became effective November 1, 1990. Section 924(e)(1) provides that

[i]n the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than \$25,000 and imprisoned not less than 15 years....

§ 924(e)(1) (West Supp. 1994). Section 4B1.4 provides that

(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from §4B1.1 (Career Offender) if applicable; or

(3) (A) 34, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled

substance offense....
or if the firearm
possessed by the
defendant was of a type
described in 26 U.S.C.
§ 5845(a)[]; or
(B) 33, otherwise.[]

§4B1.4.

The general rule is that "[t]he guideline provision in effect at the time of sentencing dictates which version of the guidelines [this Court] must apply." U.S. v. Ainsworth, 932 F.2d 358, 362 (5th Cir.) (citing 18 U.S.C. 3553(a)(4)), cert. denied, 112 S. Ct. 327 and 112 S. Ct. 346 (1991). Canales was sentenced on September 7, 1993. The PSR provided that the 1990 version of the guidelines was applied. Nevertheless, because Canales's argument on appeal pertains only to § 4B1.4 of the guidelines, and the language of §4B1.4 is the same in the 1990, 1991, and 1993 versions of the guidelines, Canales's argument that the 1990 version of the guidelines should not have been applied to him, and that "[t]he proper guideline would have been the 1991 or 1993 guideline," lacks merit. Thus, the record is sufficiently developed to show that counsel was not ineffective for failing to object to the application of § 4B1.4.

The record is not adequately developed to address other ineffective assistance of counsel claims, including the contention raised in Canales's supplemental brief that through objections to the PSR, "perhaps some of [the prior] convictions could have been attacked." There is no evidence in the record regarding why counsel failed to file objections to the PSR attacking the prior

convictions. See U.S. v. Freeze, 707 F.2d 132, 139 (5th Cir. 1983). Nor is there any evidence in the record suggesting that any of the convictions relied upon in sentencing Canales were invalid. This issue was not raised in the district court, and an analysis of counsel's performance on appeal would be based on speculation. Accordingly, we decline to address Appellant's remaining issues on direct appeal, although without prejudice to Canales's right to raise such issues in a 28 U.S.C. § 2255 motion. See Higdon, 832 F.2d at 316. The judgement of the district court is AFFIRMED.