IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2957
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LARRY MASTERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 89-322)

(November 30, 1994)
Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Larry Masters appeals the revocation of his probation. Finding no error, we affirm.

I.

In September 1989, Masters and Alternative Health Care Services, Inc. ("Alternative"), of which Masters was president, and Richard Garza, Alternative's comptroller, were charged in a

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 Pursuant to that rule, the court has determined that this opinion should not be published.

criminal information with Medicare fraud. Masters pleaded guilty and, in 1990, the district court sentenced him to a term of five years' probation. Masters's sentence included a fine of $250,000 to be paid in monthly installments of $200 and restitution of $826,000 payable as determined by the probation department. The three defendants were made jointly and severally liable for the fine and restitution.

In August 1993, the probation office filed its fourth violation report against Masters, petitioning for the revocation of probation. Probation officer Michael Garcia alleged that Masters had violated the condition of probation prohibiting his commission of a crime, in that Masters allegedly had provided false statements to Garcia in violation of 18 U.S.C. § 1001.

Additionally, Garcia alleged that Masters had violated the condition of his probation that required him to provide access to any requested financial information. Masters allegedly had failed to provide complete and truthful information. Further, Masters allegedly had failed to make any payments on his fine or restitution since October 1992. The district court held a revocation hearing, then announced that it was revoking Masters's probation and sentencing him to serve thirty-six months in prison and two years on supervised release.

II.

After holding a hearing, a district court may revoke probation for a violation of a condition of probation. 18 U.S.C.

§ 3565(a)(2); United States v. King, 990 F.2d 190, 194 n.4 (5th Cir.), cert. denied, 114 S. Ct. 223 (1993). We review a revocation of probation for abuse of discretion. Id. at 193.

A.

Masters first argues that the evidence is insufficient to support the revocation. The evidence is sufficient if it is enough to satisfy the district court that the defendant did not meet the conditions of probation. United States v. Irvin, 820 F.2d 110, 111 (5th Cir. 1987). Masters's probation officer, an agent of the Department of Health and Human Services (HHS), a financial analyst for the U.S. Attorney's Office, Masters's CPA, and Masters himself testified at the revocation hearing.

1.

Garcia testified as follows: Masters was required to make total monthly payments of $700, $200 of which was for the fine and $500 of which was for restitution. Between March 1990 and November 1993, however, he paid only $6,900. Masters told Garcia that he did not have an income and supplied a financial statement in May 1993 in which he asserted the same.

In a schedule that Masters filed in his bankruptcy proceedings in April 1993, however, he claimed an average monthly income of $3,000. Occasionally, Masters would report to Garcia a monthly income of $200-500. In two nine-month periods, Masters made no payments, telling Garcia that he had no income. The financial

information that Garcia requested of Masters was not helpful in determining whether he actually had income.

2.

Special Agent Juanita de los Santos of the Inspector General's Office of HHS testified as follows: A company called Master Medical Equipment, Inc. ("Master Medical"), is Masters's alter ego. Additionally, Masters is Alternative's president, incorporator, and sole director. Master Medical operated out of a small room in Alternative's Offices.

After probation began, Master Medical leased certain property to ABC Home Health Services, Inc. The property appeared to be that which de los Santos had seen in Alternative's offices, far more than Master Medical had. Masters executed the lease on behalf of Master Medical, for monthly payments of $7,500.

Edwin S. Kuropata is an auditor and financial analyst working for the U.S. Attorney's Office. He determined that Masters was associated with three accounts at a certain Houston bank. One checking account was in the name of M Plus Care Health Services ("M Plus")[1] and another in the name of Master Medical, which also had a money market fund. Kuropata stated that Masters derived $30,000 from M Plus in 1990 and $4,000 in 1991.

Kuropata found that Masters had received $3,600 from the Master Medical checking account in 1990, $28,000 in 1991, $17,500

[1] De los Santos had briefly mentioned that Masters was associated with M Plus.

in 1992, and $4,000 in 1993. He received $7,000 from Master Medical's money market fund in 1993. Other than these funds, Kuropata found that Masters received $5,400 in 1991 and $2,300 in 1992. The total received by Masters while on probation was $102,000.

Masters wrote checks on the Master Medical checking account for personal expenses. Some of the Master Medical checks that were payable to Masters were marked as "loans" and "repayments of loans." Masters wrote, signed, and endorsed those checks; C.W. Masters endorsed some of the checks.

3.

John Daugherty is a CPA who provided professional accounting services to Masters. He testified that Master Medical had been indebted to Masters from 1987 to 1989. By the end of 1989, Masters owed money to Master Medical, primarily because the corporation was paying the premiums on his life insurance policy. Daugherty did not discover that debt, however, until May or June 1992.

Masters used funds that he withdrew from the Master Medical accounts to pay Master Medical's business expenses. As to the funds that Master Medical owed Masters, Daugherty stated that he had never seen any documentation evidencing that debt. Daugherty accepted Masters's representation that he had lent money to the corporation.

4.

Masters testified that the funds he received from his corporations were repayments of loans. In June 1993, Masters got a sales job and began making $200 payments. Money that Masters's corporations collected from Medicare during his probation was used to pay the businesses' overhead rather than restitution. Masters confirmed that no documentation evidencing his corporations' debts to him is easily accessible.

Masters's parents, he said, lent money to one of his corporations, and he took funds out of that corporation's account to repay his parents. He did not know that he would need to bring documentation of that debt with him to court but said that it could be found in his parents' canceled checks.

5.

In her closing argument, defense counsel urged the court to allow Masters to remain on probation and assign a substantial portion of the ten remaining $7,500 lease payments to the government. At the conclusion of the hearing, the court stated that such an assignment had sounded interesting but that, off the record, Garcia had told the court that the debtor corporation was in financial trouble, meaning that the remaining lease payments might not be made. The court went on to state that Masters had committed "very serious" violations.

The court then discussed Masters's withholding from Garcia the fact of the lease payments. The court stated that Masters had

created the lease to conceal funds that were actually available to him. The court revoked probation.

6.

The evidence shows that Masters failed to make most of the fine and restitution payments. His receipt of the lease proceeds and his access to other funds indicate that he had the ability to make the required payments and that he failed to provide Garcia with financial information as required. The discrepancy between the information that Masters provided to Garcia and that which he provided to the bankruptcy court is another indication that he provided incomplete or untruthful information to Garcia. The evidence is sufficient. See Irvin, 820 F.2d at 111.

B.

Masters argues that he was denied due process because he had no notice that the government would put on testimony about the equipment lease. "Had he been aware of the allegations he would have prepared the proper documentation."

A probation revocation hearing must afford the probationer the opportunity to be heard and to show that he did not violate the conditions of probation or, if he did, that revocation is not warranted. United States v. Holland, 850 F.2d 1048, 1050 (5th Cir. 1988). Due process generally requires written notice of the alleged violations, disclosure of evidence, the opportunity to be heard in person and to present documentary evidence, confrontation

of adverse witnesses, a neutral and detached hearing body, and a written statement of facts and reasons by the factfinder. Id.

Masters's argument that he was denied notice that the lease payments would be a factor is disingenuous. The revocation hearing occurred in two sessions, on December 3 and 8, 1993; de los Santos revealed the lease on December 3; Masters did not testify until December 8.

There was no complaint, at the hearing, that Masters had inadequate time to prepare a response to the allegation. In fact, both Masters and his counsel complained at the hearing that he did not have sufficient opportunity to respond to allegations about the financial relationships among himself, his corporations, and his parents. Counsel objected to testimony about the lease, asserting that she had not had discovery on "this underlying case." The court allowed the testimony to "understand the facts."

Masters did not complain to the district court that he had inadequate time to respond to allegations about the lease, nor does he argue on appeal that he had inadequate opportunity to respond to allegations about the dealings with his parents. When the court stated that it had discussed the financial status of the lessee with Garcia, there was no objection.

The disingenousness is apparent when Masters argues that the lease issue "arose at the end of the hearing," citing the court's explanation of its reasons for revocation. The issue arose early on December 3, not late on December 8, as Masters argues. Additionally, Masters has not alleged how he would have responded

to the allegation had he had more time.

C.

Masters argues that the district court did not adequately consider the applicable policy statement of the Sentencing Guidelines. Masters concedes that he did not raise this issue in the district court and that, accordingly, review is for plain error only.

Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, we may remedy the error only in the most exceptional case. United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. United States v. Olano, 113 S. Ct. 1770, 1777-79 (1993).

First, an appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain ("clear" or "obvious"), and that it affects substantial rights. Olano, 113 S. Ct. at 1777-78; Rodriguez, 15 F.3d at 414-15; FED. R. CRIM. P. 52(b). This court lacks the authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order

correction, but is not required to do so." Olano, 113 S. Ct. at 1778 (quoting FED. R. CRIM. P. 52(b)). As the Court stated in Olano:

> The standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, [297 U.S. 157] (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Olano, 113 S. Ct. at 1779 (quoting Atkinson, 297 U.S. at 160). Thus, our discretion to correct an error pursuant to rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17. See United States v. Calverley, No. 92-1175, slip op. 475 (5th Cir. Oct. 20, 1994) (en banc).

The guidelines applicable to revocation of probation are U.S.S.G. §§ 7B.1-7B1.4, which are policy statements. As such, they are advisory but not mandatory, meaning that the district court must consider them but is not bound by them. United States v. Mathena, 23 F.3d 87, 93 (5th Cir. 1994).

The guidelines delineate three categories of probation violations, A, B, and C. U.S.S.G. § 7B1.1(a). As this issue was not raised in the district court, the record contains no findings as to which category applies in this case. The district court, however, expressly relied upon Masters's violations of "two very serious provisions of his probation." Violations of conditions of supervision come within category C. § 7B1.1(a)(3). With a criminal history category of I, assuming that category C is correct, the sentence upon revocation, pursuant to the policy statement, would be imprisonment for three to nine months.

§ 7B1.4(a).

When the court announced the revocation at the conclusion of the hearing, it made no reference to the guidelines in imposing the thirty-six-month sentence. In its written reasons, the court stated, "After considering the Chapter VII Revocation Policy Statements, the Court chooses to sentence the defendant under the original applicable sentencing guidelines instead of applying the policy statements."

"This Court has held previously that a district court's failure to follow the policy statements of Chapter 7 is not plain error." United States v. Headrick, 963 F.2d 777, 779 (5th Cir. 1992) (citing United States v. Ayers, 946 F.2d 1127, 1130-31 (5th Cir. 1991)). This court stated in Ayers, in which the sentence imposed was within the district court's discretion, "The failure to articulate a consideration of the policy statements was not plain error." Ayers, 946 F.2d at 1131.

Ayers and Headrick hold that the failure to consider the policy statements when imposing an otherwise lawful sentence is not plain error. Consequently, the district court's unexplained assertion that it considered the policy statements cannot be plain error, either.

Although Masters argues that the sentence is harsh because of the excess of the prison term over that prescribed in the guidelines, he does not argue that its imposition was not within the discretion of the district court. Masters has identified no plain error.

AFFIRMED.