IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3184
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM PRINE,

Defendant-Appellant.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3196
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES MCDONALD,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CR 92 208 D)

(October 20, 1993)

Before JOLLY, WIENER, and EMILI M. GARZA, Circuit Judges.

PER CURIAM:[*]

In a superseding indictment, William Prine and Charles E. McDonald were charged with conspiracy to possess with intent to distribute approximately 100 pounds of marihuana.[1] Both Prine and McDonald pleaded guilty. The district court sentenced Prine to prison for thirty-four months and imposed a supervised-release term of three years. McDonald was sentenced to prison for forty-six months to be followed by supervised release for three years.

I

In Prine's presentence report (PSR), to which Prine filed no objections, the probation officer made no adjustments to the offense level based on Prine's role in the offense. The sentencing court adopted this and the other recommended findings in the PSR. Prine now argues that the sentencing court erred in not finding that he was a minimal participant. Minimal-participant status is

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

[1]The government has moved to consolidate both appeals (No. 93-3184 and No. 93-3196). This motion is granted because the convictions arose from the same indictment, and the appeals involve overlapping facts.

a factual determination reviewed for clear error. U.S. v. Franco-Torres, 869 F.2d 797, 801 (5th Cir. 1989).

Because Prine failed to object to the PSR before the district court, this Court can review for plain error only. See U.S. v. Lopez, 923 F.2d 47, 49 (5th Cir.), cert. denied, 111 S.Ct. 2032 (1991). Plain error amounts to error that is "clear" or "obvious" and that affects "substantial rights." U.S. v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1777-78, 123 L. Ed. 2d 508 (1993). Questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error. Lopez, 923 F.2d at 50.

Under section 3B1.2(a) of the sentencing guidelines, a sentencing court may decrease the offense level by four levels if the defendant was a minimal participant in the criminal activity. This section is intended "to cover defendants who are plainly among the least culpable of those involved in the conduct of a group." U.S.S.G. § 3B1.2, comment. (n.1). In determining whether such a reduction is warranted, the sentencing court may consider the defendant's lack of knowledge or understanding of the scope and structure of the criminal enterprise or of the activities of the other participants. Id. According to the sentencing guidelines, this downward adjustment should be used "infrequently." § 3B1.2, comment. (n.2). "It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case

where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs." Id.

In making factual determinations, a sentencing court may rely on evidence that has "sufficient indicia of reliability," such as a PSR. U.S. v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990). According to Prine's PSR, a confidential informant (CI) for the Drug Enforcement Administration negotiated with Donald Friloux to purchase 100 pounds of marihuana. The CI met Friloux and Don Boudreaux the next day and provided them with a van. On the same day, Friloux and Boudreaux furnished the van to Prine, who drove it to a house where he and another person loaded a large object into it. Prine then returned the van to Boudreaux, who drove it to the general area where the CI and Friloux met again. After this meeting, Friloux made a phone call to try to finalize the deal. During this conversation, Friloux stated that the marihuana was in the van. Boudreaux and Friloux then departed in the van with Prine in another vehicle. The two vehicles were subsequently stopped. Prine admitted that he was travelling with Boudreaux and Friloux. A search of the van revealed two black metal drums containing 44.04 kilograms of marihuana. Agents later lifted Prine's latent fingerprints from a bag found in one of the metal drums.

Prine asserts that he should have received minimal-participant status because he was "clearly less culpable than Friloux, who arranged the deal, and McDonald, who supplied the marijuana." According to Prine, "his only role involved putting Friloux in

contact with McDonald and riding with Friloux during the transaction." Prine, however, overlooks that he drove the van; loaded a large object into the van; and remained with Friloux and Boudreaux during the negotiations with the CI. Prine also fails to note that his fingerprints were found on a bag inside of a metal drum containing marihuana.

The PSR's factual statements do not obviously or clearly reflect "minimal participation" by Prine as that term is explained in section 3B1.2 and its application notes. Accordingly, the district court's failure to find that Prine was a minimal participant does not amount to plain error.

II

Prine argues that his former counsel was ineffective because he failed to object to the PSR, "particularly as it related to the appellant's role in the offense." The general rule in this Circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal unless it has been first raised before the district court. U.S. v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991), petition for cert. filed, (U.S. Jun. 9, 1993) (No. 92-8999). This requirement exists because this court cannot fairly evaluate the merits of such a claim unless the district court had developed a record on the claim. Id. Despite the general rule, this court occasionally resolves claims of ineffective assistance if the record provides "substantial details" about the attorney's conduct. Id. (citations omitted).

Although the merits of Prine's ineffective-assistance claim appear frail, we decline to address the merits of the claim at this time. Accordingly, this part of the appeal is dismissed without prejudice.

III

McDonald complains of his characterization as a "career offender" under U.S.S.G. § 4B1.1. A defendant is considered a "career offender" if (1) he "was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." § 4B1.1. McDonald specifically argues that his two prior convictions should have been treated as one because they were based on the same scheme and plan.

The defendant has the burden of proving the constitutional invalidity of a prior conviction. U.S. v. Howard, 991 F.2d 195, 199 (5th Cir. 1993), petition for cert. filed, (U.S. Aug. 9, 1993) (No. 93-5540). Whether a prior conviction is covered under the sentencing guidelines is reviewed de novo, but factual matters concerning the prior conviction are reviewed for clear error. Id.

In determining McDonald's career-offender status, the probation officer considered two convictions: a federal conviction in Louisiana for firearm and drug offenses dating back to 1980 and

a 1981 federal conviction in Missouri for distribution of methaqualone. McDonald objected to this finding. In the response to McDonald's objections, the probation officer explained that the two offenses were not related because they occurred on different dates and involved different codefendants. The first offense took place in May and June 1980. This offense involved a conspiracy to import methaqualone tablets from South America for distribution in the Western District of Missouri. The second offense occurred in July 1980 and took place in the Middle District of Louisiana. This offense involved the purchase by McDonald of approximately 165 automatic weapons, five silencers, six hand grenades, and 200 pounds of explosives. McDonald traded approximately 280,000 methaqualone tablets for these weapons.

At the sentencing hearing the Government concurred with McDonald's objection. The district court, however, ruled that the two cases were not related. The district court nevertheless gave McDonald a downward departure for substantial assistance and sentenced him to prison for forty-six months. This sentence did not exceed the statutory maximum of sixty months. See 21 U.S.C. § 841(b)(1)(D). Had the district court agreed with McDonald's objection, McDonald's criminal-history category would have fallen to a III, resulting in a guideline-imprisonment range of 30 to 37 months.

Prior sentences may be "related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single

common scheme or plan, or (3) were consolidated for trial or sentencing." § 4A1.2, comment. (n.3). Similar crimes, however, are not necessarily "related." U.S. v. Garcia, 962 F.2d 482 (5th Cir.), cert. denied, 113 S.Ct. 293 (1992). In Garcia, for example, the defendant had pleaded guilty to two separate indictments for delivery of heroin. Id. at 481. The deliveries were made to different undercover officers, on different days within a nine-day period, and in the same area. Id. This court determined that the offenses were similar but not "part of a common scheme or plan." Id. at 482.

In this case, the methaqualone tablets involved in both offenses were found to have been from the same pill press and shipment, but the different offense behavior in each case, the different offense dates, the different codefendants and locations reflect two separate criminal episodes. McDonald's reference to the fact that he received concurrent sentences for the two convictions is not relevant because the two cases were not consolidated for sentencing. McDonald's classification as a career offender, therefore, does not amount to reversible error.

IV

For the reasons stated herein, the sentence of William Prine and the sentence of Charles E. McDonald are

A F F I R M E D.