

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3355
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ERNEL REFUGE,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CR-92-525-E2
- - - - -
(January 5, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

The sentencing range applicable to Ernel Refuge was 97-121 months, U.S.S.G. Sentencing Table, and the district court sentenced him to 100 months. Refuge argues that his federal constitutional rights to due process and equal protection were violated by the disparate sentencing provisions for cocaine base (crack cocaine) and cocaine hydrochloride (cocaine powder) contained in the sentencing guidelines. Because Refuge failed to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

raise this issue before the district court, it is not reviewable by this Court absent plain error. United States v. Lopez, 923 F.2d 47, 49 (5th Cir.), cert. denied, 111 S.Ct. 2032 (1991).

"Plain error" is error which, "when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of judicial proceedings" and constitute a miscarriage of justice. Id. at 50; see United States v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993).

No miscarriage of justice will occur if the Court declines to consider Refuge's challenges to the sentencing guidelines. This Court has previously held that the disparate treatment of cocaine base and cocaine powder by the guidelines does not offend constitutional due process guarantees. United States v. Watson, 953 F.2d 895, 897 (5th Cir.), cert. denied, 112 S.Ct. 1989 (1992).

With regard to the equal protection claim, absent a showing by the defendant of a discriminatory intent on the part of the Sentencing Commission, the guidelines are subjected to only rationality review. Id. at 898. "[T]he fact that crack cocaine is more addictive, more dangerous, and can therefore be sold in smaller quantities is reason enough for providing harsher penalties for its possession." Id.; see also United States v. Galloway, 951 F.2d 64, 65-66 (5th Cir. 1992).

AFFIRMED.