UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3557
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS MICHAEL SIMON,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 93-112 "N" (1))

(January 19, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Thomas Michael Simon appeals from the sentence imposed following his guilty plea. We **REVERSE** the term of incarceration, **MODIFY** the sentence, and **AFFIRM** as modified.

I.

Pursuant to a plea agreement, Simon pleaded guilty to two counts of bank fraud, in violation of 18 U.S.C. §§ 1344 and 2.[2]

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 Pursuant to that rule, the court has determined that this opinion should not be published.

[2] The judgment erroneously reflects that Simon also was convicted of misrepresentation of a social security number, in violation of 42 U.S.C. § 408(a)(7)(B). However, the two counts

The PSR recommended a two-level reduction for Simon's acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a). The PSR also assessed three criminal history points for each of Simon's two prior California state convictions for non-sufficient funds checks.

The district court accepted the recommendations in the PSR, finding that Simon had "accepted responsibility sufficiently to merit the two point reduction for acceptance of responsibility" under § 3E1.1(a). Simon objected, asserting that he should receive an additional one-level reduction pursuant to U.S.S.G. § 3E1.1(b)(2). The district court overruled his objection, finding that although he "may have technically satisfied" § 3E1.1(b)(2) by "pleading guilty early enough for the Government to avoid trial preparation", the additional one-level reduction was "inappropriate" for a defendant who engaged in additional criminal conduct during the Government's pre-indictment investigation into his activities, requiring the Government to investigate further and incur additional expenses. It found further that Simon's two prior California state convictions were unrelated for purposes of determining his criminal history category. Accordingly, Simon's final offense level was 14 and his criminal history category IV, yielding a sentencing range of 27-33 months. He was sentenced to 33 months imprisonment.

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charging misrepresentation of a social security number were dismissed on motion of the Government, pursuant to the agreement.

II.

Simon contends that the district court erred by assessing three criminal history points for each of his two prior state convictions, and by failing to grant an additional one-level reduction in his offense level for acceptance of responsibility.

A.

Simon asserts that his prior California convictions are sufficiently related to warrant treatment as only a single sentence for purposes of determining his criminal history category. "Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of [determining the criminal history category under] § 4A1.1(a), (b), and (c)". U.S.S.G. § 4A1.2(a)(2). Related cases are defined as 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". ***Id***., comment. (n.3). We review *de novo* the district court's determination of relatedness of prior convictions under § 4A1.2(a)(2). ***United States v. Fitzhugh***, 984 F.2d 143, 146-47 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 259 (1993).

Between April 30 and August 7, 1987, Simon engaged in a "check kiting" scheme involving several banks in Ventura County, California (first offense). And, on August 25, 1987, he attempted to pass two worthless checks at yet another financial institution in Los Angeles County, California (second offense). These two offenses were committed on different occasions, in different

jurisdictions, against different victims, and had different docket numbers and dispositions. "Although the facts surrounding the cases may be similar, similar crimes are not necessarily related crimes". ***United States v. Garcia***, 962 F.2d 479, 482 (5th Cir.) (internal quotation marks, brackets, and citation omitted), *cert. denied*, ___ U.S. ___, 113 S. Ct. 293 (1992). "A relatedness finding requires more than mere similarity of crimes". ***Id***. (internal quotation marks, brackets, and citation omitted). The facts underlying Simon's two state convictions do not establish that the cases are sufficiently related for purposes of § 4A1.2(a)(2).

B.

Next, Simon contends that the district court erred in refusing to grant an additional one-level reduction for acceptance of responsibility pursuant to § 3E1.1(b)(2). Appellate review of sentences imposed under the Guidelines is limited to a determination whether the sentence "was imposed in violation of law; imposed as a result of an incorrect application of the sentencing guidelines; or outside of the applicable sentencing guideline and is unreasonable". ***United States v. Howard***, 991 F.2d 195, 199 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 395 (1993). "Application of the guidelines is a question of law subject to *de novo* review". ***Id***.

Section 3E1.1(b) establishes a tripartite test to determine entitlement to the additional one-level decrease for acceptance of

responsibility.[3] ***United States v. Mills***, ___ F.3d ___ (5th Cir. Dec. 8, 1993, No. 93-1011), 1993 WL 503274, at *3. The sentencing court is directed to grant the additional one-level decrease in the defendant's offense level if (1) the defendant qualifies for the basic two-level decrease for acceptance of responsibility under § 3E1.1(a); (2) the defendant's offense level is 16 or higher before the two-level reduction under § 3E1.1(a); and (3) the defendant timely "assisted authorities" by taking either or both of the steps in subparagraphs (b)(1) and (2). ***United States v. Tello***, ___ F.3d ___ (5th Cir. Dec. 8, 1993, No. 92-7809), 1993 WL 503272, at *4. To satisfy § 3E1.1(b)(2),[4] the defendant must timely notify the authorities that he will enter a guilty plea, thereby permitting

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[3] Section 3E1.1(b) provides:

> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
>
> (1) timely providing complete information to the government concerning his own involvement in the offense; or
>
> (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,
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> decrease the offense level by **1** additional level.

[4] Section 3E1.1(b)(1) is not at issue in this case.

the Government to avoid trial preparation and the court to manage its calendar efficiently without taking the defendant's trial into consideration. ***Id***. at ___, 1993 WL 503272, at *6; U.S.S.G. § 3E1.1(b)(2). If the defendant satisfies all three prongs of the tripartite test, the district court is "without any sentencing discretion whatsoever" to deny the additional one-level decrease. ***Mills***, ___ F.3d at ___, 1993 WL 503274, at *6.

Because the district court found that Simon was entitled to the basic two-level decrease under § 3E1.1(a) and because Simon's offense level prior to that decrease was 16, the first two prongs of the test were satisfied. With regard to the third prong, the district court found that Simon had "technically satisfied" § 3E1.1(b)(2) by "pleading guilty early enough for the Government to avoid trial preparation". Further, as in ***Mills***, formal entry of Simon's guilty plea occurred less than a month after his arraignment. *See* ***Mills***, ___ F.3d at ___, 1993 WL 503274, at *5. Accordingly, the third prong of the test was satisfied. Having satisfied all three prongs, Simon was entitled as a matter of right to the additional reduction in his offense level. *See* ***id***. at ___, 1993 WL 503274, at *6.

The reason expressed by the district court for denying the reduction is not authorized by the Guidelines. ***Tello***, ___ F.3d at ___, 1993 WL 503272, at *9. The fact that Simon may have engaged in additional criminal conduct during the Government's investigation, prior to the indictment, did not cause the Government to prepare for trial or prevent the court from managing

its calendar efficiently. *See* ***id***. at ___, 1993 WL 503272, at *6. The timeliness of step (b)(2) does not implicate time efficiency for any other governmental function. ***Id***. Accordingly, the district court had no authority to deny the additional decrease on this ground. *See* ***id***. at ___, 1993 WL 503272, at *8.

Had the proper offense level of 13 been used to calculate Simon's sentencing range, the range would have been 24-30 months rather than 27-33 months. Because the sentence imposed (33 months) reflects the sentencing court's intent that Simon should be incarcerated for the maximum term permitted under the applicable guidelines range, it would be a waste of judicial resources for us to vacate Simon's sentence and remand for rote imposition of the highest term of incarceration permissible under the correct sentencing range of 24-30 months. We therefore apply the methodology used in ***Mills*** and modify Simon's sentence. *See* ***id***. at ___, 1993 WL 503274, at *6.

III.

The term of incarceration imposed by the district court is **REVERSED**; the sentence is **MODIFIED** to a 30-month term; and the sentence, as modified, is **AFFIRMED**.

REVERSED and **MODIFIED** in part and, as modified, **AFFIRMED**.