UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-3881
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOSEPH DITCHARO,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 93 313 N)

(August 10, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:[1]

Appellant pleaded guilty to one count of a drug offense and was sentenced as a career offender under § 4B1.1 of the Guidelines. He appeals his sentence and moves to file a supplemental brief. We deny his motion and affirm his sentence.

DISCUSSION

Appellant's brief adequately frames the issues he wishes to raise on appeal and provides us with citation to relevant

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

authority. He suggests no reason why additional briefing would be helpful and we discern none. Accordingly, we deny his motion.

Appellant was sentenced as a career offender under § 4B1.1 because of prior felony convictions. He argues that he was not notified in advance that the government would seek an enhanced penalty. He contends that 21 U.S.C. § 851(a)(1) requires such notice. This precise issue was decided against Appellant's position in United States v. Marshall, 910 F.2d 1241, 1244-45 (5th Cir. 1990), cert. denied, 498 U.S. 1092 (1991). Section 851(a)(1) does not apply to sentencings pursuant to the Guidelines when the sentenced imposed is within the statutory range.

Appellant next argues that his sentence violates the Ex Post Facto Clause because the state convictions included in determining his sentence occurred before the November 1991 amendment to the application note to § 4A1.2. He overlooks, however, that his sentence punishes him for the federal crime he committed, not the state crimes, and his federal crime was committed after the effective date of the November 1991 amendment, therefore, the amended version was properly applied.

In a related argument, Appellant claims that his criminal history category was incorrectly calculated because the prior state convictions used in the calculation were related because they were consolidated for trial and, therefore, should have been considered as one. Consolidation for trial, however, is not the determining factor under § 4A1.2 comment n.3 which refers to separate arrests. Appellant was separately arrested on separate dates for separate

crimes. His criminal history category was properly calculated.

Appellant also argues that the government manipulated his plea proceedings so that he would be subject to additional criminal history points provided by § 4A1.1(d) (committing an offense while on probation). This argument rests on the erroneous premise that the application of that guideline depends upon when the defendant pleads rather than when the crime is committed. It is the later date that controls. Therefore, the government could not have manipulated the date of his plea to his detriment.

Finally, Appellant claims entitlement to a downward departure for his participation and progress in a court-ordered counseling. We do not review a district court's refusal to depart from the guidelines unless that refusal was in violation of law. United States v. Mitchell, 964 F.2d 454, 462 (5th Cir. 1992). A violation of law occurs if the district court refuses to depart under the mistaken assumption that it does not have the authority to do so. United States v. Burleson, 22 F.3d 93, 95 (5th Cir. 1994). The district court's refusal to depart was based upon a finding of no circumstances warranting a downward departure, not upon any mistaken belief about the court's authority to depart.

AFFIRMED.