

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-3666

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

COREY S. WILSON,

Defendant-Appellant.

No. 93-3882

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

COREY S. WILSON,

Defendant,

HARRY E. CANTRELL, JR.,

Movant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CR-93-106-N)

(December 12, 1994)

Before DAVIS, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:¹

Corey S. Wilson appeals the sentence imposed by the district court after his guilty plea to one count of distributing cocaine. Wilson contends that the district court erroneously cumulated the total quantity of drugs involved in six separate drug transactions when calculating his Sentencing Guidelines range after the government dismissed the charges representing five of these transactions. Wilson's appeal is consolidated with the appeal of his counsel, Harry E. Cantrell, Jr. Cantrell appeals the district court's imposition of a \$3,500 sanction for failing to file a timely notice of appeal. We affirm.

I.

Corey S. Wilson was indicted on six counts of distributing cocaine in violation of 21 **U.S.C.** § 841(a)(1). These six counts represented six separate drug transactions occurring between June 18, 1992 and February 5, 1993:

JUNE 19, 1992-- Wilson sold 25.23 grams of crack to Officer Rodney Perkins at the 2000 block of Third Street.

JULY 10, 1992-- Wilson sold 31.24 grams of crack to Perkins at the intersection of Third and Williams.

DECEMBER 10, 1992-- Wilson sold 11.07 grams of crack to Officer Blaine Hebert at the 3300 block of Williams.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

JANUARY 7, 1993-- Wilson sold 10.82 grams of crack to Hebert at the 3300 block of Williams.

JANUARY 21, 1993-- Wilson sold 17.63 grams of crack to Hebert at the 3300 block of Williams.

FEBRUARY 5, 1993-- Wilson sold 5.5 grams of crack and 12.81 grams of cocaine hydrochloride to Hebert at the 3300 block of Williams.

In each of these transactions, Wilson sold cocaine base ("crack") to undercover officers from the Kenner, Louisiana Police Department. The total amount of crack cocaine involved in the six transactions was approximately 101.48 grams. One of the transactions also involved the sale of approximately 12.81 grams of cocaine hydrochloride.

Wilson pled guilty to one count of distributing approximately 31 grams of crack cocaine on July 10, 1992, in exchange for the government's agreement to dismiss the remaining five counts. In calculating Wilson's base-offense level, the presentence report cumulated the quantities of drugs involved in all six drug transactions charged in Wilson's indictment. Applying the guidelines' conversion chart, the report determined that the total quantity involved in the six transactions was equivalent to approximately 10.16 Kg of cocaine hydrochloride. Based on this quantity, the report assigned Wilson a base-offense level of 32 under § 2D1.1 of the guidelines. The report then applied a three-point reduction for "acceptance of responsibility" under § 3E1.1(a)-(b). This resulted in a total offense level of 29, which translates to a sentencing guidelines range of 87 to 108 months. The district court adopted the report's recommendations and

sentenced Wilson to 90 months imprisonment followed by five years of supervised release.

On September 23, 1993, Wilson's counsel filed a notice of appeal with this court. The court subsequently ruled that this notice was filed three days late under Federal Rule of Appellate Procedure 4(b). The court then remanded the case to the district court with the instruction that the appeal was to be dismissed unless Wilson could show "excusable neglect" in failing to file his notice of appeal timely. The district court ruled that excusable neglect had occurred because Wilson received ineffective assistance of counsel in lodging his appeal. The district court also sanctioned Wilson's counsel by directing him to return the \$3,500 retainer Wilson paid his counsel prior to sentencing. Both Wilson and Cantrell timely appeal the district court's application of the sentencing guidelines and the district court's sanction.

II.

Wilson contends that the district court erred in cumulating the total quantity of drugs involved in all six drug transactions because the charges involving five of those transactions had been dismissed pursuant to the plea agreement. Wilson concedes that § 1B1.3 allows the district court to consider relevant conduct that is "part of the same course of conduct, or common scheme or plan, as the offense of conviction," even though this relevant conduct does not result in additional charges or convictions. However, Wilson argues that the court erred in concluding that all six drug

transactions were part of the same course of conduct. Wilson maintains that the six drug transactions are factually unrelated.

Wilson's claim must fail, however, because he did not raise this issue to the district court. The district court's sentencing report indicates that Wilson failed to raise any written objections to the district court's sentence. Also, the record does not contain a sentencing hearing transcript. Wilson is therefore unable to demonstrate that his counsel lodged any oral objection to the sentence. Consequently, the court's sentence cannot be disturbed absent plain error. **United States v. Calverley**, 37 F.3d 160, 162 (5th Cir. 1994)(**en banc**).

The U.S. Supreme Court recently announced a three-part test for determining whether plain error exists: (1) the district court must have committed error, (2) the error must be "plain" or "obvious," and (3) the error must affect the "substantial rights" of the defendant. **United States v. Olano**, ___ U.S. ___, 113 S.Ct. 1770, 1777-1779 (1993). Section 1B1.3 of the Sentencing Guidelines allows the district court to consider "quantities of drugs not specified in the count of conviction if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction." **United States v. Mir**, 919 F.2d 940, 943 (5th Cir. 1990). Examining the details of the six transactions clearly show that the district court did not err in finding that the transactions were part of the same course of conduct. The transactions were similar, regular, and occurred over a relatively short span of time.

Even if the district court's factual finding that the six transactions were part of the same transaction was erroneous, the error was not obvious. In fact, in previous cases this court has held that "questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." **United States v. Lopez**, 923 F.2d 47, 50 (5th Cir.), **cert. denied** ___ U.S. ___, 111 S.Ct. 2032 (1991). **See also United States v. Pofahl**, 990 F.2d 1456, 1479 (5th Cir. 1993). Wilson's claim of error involves a factual question that could have been resolved had he raised the issue to the district court. Because Wilson has failed to demonstrate that the district court committed plain error, we reject this argument.

III.

Cantrell's sole issue on appeal is whether the district court's \$3,500 sanction for failing to file a timely notice of appeal on Wilson's behalf was excessive. Cantrell does not challenge the district court's power to impose the sanction, rather he argues that the \$3,500 sanction was excessive. Cantrell contends that the full refund of his \$3,500 retainer is excessive because he allegedly devoted in excess of 100 hours on Wilson's criminal representation and the accompanying civil forfeiture action. In support of his argument, Cantrell cites several civil cases in which courts have imposed smaller sanctions for failing to meet trial deadlines. In response, the government contends that the sanction was appropriate. The government points out that the failure to meet deadlines in the context of a criminal trial has

much more serious implications than in the civil context. The government also notes that this was the second time that Cantrell had failed meet an appeals deadline.

We conclude that the district court did not abuse its considerable discretion in imposing this sanction. **Williams v. Leach**, 938 F.2d 769, 775 (7th Cir. 1991). The amount set by the court was not arbitrary, but rather reflected the court's judgment that Cantrell's carelessness threatened to seriously impair his client's rights. Given the stakes involved and Cantrell's prior history of neglect, the sanction was not clearly excessive.

AFFIRMED.