

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-4924  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES SLOAN,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Louisiana  
(CR 93-50019-01)

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(February 22, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:<sup>1</sup>

James Sloan appeals the sentence he received upon pleading guilty to one count of possession of a firearm by a convicted felon. We **AFFIRM**.

I.

Sloan and his uncle, Howard Glover, met at a restaurant on the night of March 21, 1992 (a Saturday). While they were outside, Sloan saw Glover's Ruger revolver in Glover's truck. When Glover left the restaurant, some time after Sloan, a window of his truck

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<sup>1</sup> 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 Pursuant to that rule, the court has determined that this opinion should not be published.

had been broken, and the firearm stolen. He reported the theft to the police. Less than two days later, on Monday at 9:00 a.m., Sloan pawned a revolver, which the police identified as Glover's by its serial number. When questioned about the revolver, Sloan denied stealing it, and said he had instead bought it from a "rock head" (a crack addict) for either \$15 or \$20.<sup>2</sup>

Sloan pleaded guilty to a one-count information charging him with violating 18 U.S.C. § 922(g)(1) (felon in possession of a firearm). After the PSR was completed, but before sentencing, Sloan pleaded guilty to unrelated state charges of attempted burglary of an inhabited dwelling (the state charge). On the state charge, he was sentenced to two years hard labor, the first six months to be served without parole, probation, or suspension of sentence.

After Sloan was sentenced on the state charge, the PSR was revised to reflect that charge. Its addition increased Sloan's criminal history category from V to VI. His offense level was determined to be 16, calculated using a base offense level of 14 for the § 922(g)(1) violation, see U.S.S.G. § 2K2.1(a)(6), with a two-point enhancement because the firearm was stolen.<sup>3</sup> U.S.S.G. §

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<sup>2</sup> The probation officer who prepared the Presentence Investigation Report (PSR) found this statement unconvincing, especially in light of strong circumstantial evidence that Sloan had stolen the gun (e.g., several people reportedly told Glover that they had seen Sloan near the truck on the night of the theft, carrying a hammer and a paper bag).

<sup>3</sup> At sentencing, Sloan objected to this addition, contending that because he did not know the firearm was stolen, the two point addition was erroneous. The district court overruled this objection, and Sloan does not raise the issue on appeal.

2K2.1(b)(4). Because Sloan persisted in denying that he had stolen the gun from Glover, despite strong evidence to the contrary, the PSR recommended that Sloan not be granted an adjustment for acceptance of responsibility, despite his guilty plea.

With a criminal history category of VI and an offense level of 16, the guideline range of imprisonment is 46-57 months. The PSR suggested that the court consider an upward departure, because Sloan's criminal history score did not adequately reflect the seriousness of his past criminal conduct, nor the strong likelihood that he would commit other crimes. See U.S.S.G. § 4A1.3.

At the sentencing hearing, Sloan objected to being denied a two-point reduction in his offense level for acceptance of responsibility. See U.S.S.G. 3E1.1(a). In fact, he contended that he should have received an additional one-point reduction under U.S.S.G. § 3E1.1(B)(2) (providing for additional reduction when a two-point reduction is made under § 3E1.1(a), and other conditions are satisfied). And, Sloan requested that the district court take into account the sentence he had recently received on the state charge. He requested that the court impose the federal sentence concurrently with his state sentence.

The district court refused to make an acceptance of responsibility adjustment, but declined to depart upward. The district court calculated Sloan's sentence by determining what the sentence would be if his criminal history category were V instead of VI (*i.e.*, if the state charge had not been added). This resulted in a range of 41 to 51 months. Sloan was sentenced to 51

months imprisonment, to be served consecutively to the state sentence, followed by three years supervised release.

II.

Sloan contends that the district court erred in failing to award him a three-point reduction for acceptance of responsibility under U.S.S.G. §§ 3E1.1(a) and (b)(2), and in applying U.S.S.G. § 5G1.3(c), which, he urges, mandates that most of his federal sentence run concurrently to his state sentence.

A.

The district court refused to reduce Sloan's offense level by two points for acceptance of responsibility under § 3E1.1(a), because Sloan had falsely denied relevant conduct, *i.e.*, that he stole the firearm from Glover. We review the district court's determination of relevant conduct for clear error. ***United States v. Bryant***, 991 F.2d 171, 177 (5th Cir. 1993). But, its ruling on acceptance of responsibility receives even more deferential review, under a standard more lenient than clear error. ***United States v. Ainsworth***, 932 F.2d 358, 362 (5th Cir.), *cert. denied*, \_\_ U.S. \_\_, 112 S. Ct. 346 (1991).

1.

Sloan contends that he was entitled to an acceptance of responsibility reduction because he pleaded guilty. Pleading guilty "prior to the commencement of trial[,] combined with truthfully admitting the conduct comprising the offense of conviction" is "significant evidence" of acceptance of responsibility. U.S.S.G. § 3E1.1, comment. (n.3). Nevertheless,

"this evidence may be outweighed by conduct ... that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment [for acceptance of responsibility] as a matter of right." *Id.*, quoted in *United States v. Calverly*, 11 F.3d 505, 514 (5th Cir. 1993).

The district court determined that Sloan had acted inconsistently with acceptance of responsibility by not admitting that he had stolen the firearm. It determined that the theft was relevant conduct under U.S.S.G. § 1B1.3(a).<sup>4</sup> Further, it determined that Sloan had falsely denied stealing the gun, stating that he had bought it from a drug addict. The court applied U.S.S.G. § 3E1.1, comment. (n.1) (Defendant who "falsely denies ... relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility."), and denied the reduction.<sup>5</sup> Whether Sloan "clearly demonstrate[d] acceptance of responsibility is a question of fact, and the district court's finding on that issue will be overturned only if it is without foundation." *Calverly*, 11 F.3d at 513-14 (citing *United States v. Perez*, 915 F.2d 947, 950 (5th Cir. 1990)). That is not the case here.

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<sup>4</sup> U.S.S.G. § 1B1.3(a) defines relevant conduct as "all acts... committed... by the defendant... that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense...."

<sup>5</sup> The court stated that Sloan's denying that he stole the gun, despite "strong circumstantial evidence,... causes him to lose those two points [for acceptance of responsibility]."

2.

Sloan also contends that the district court erred in failing to grant him an additional one-point reduction for acceptance of responsibility, pursuant to § 3E1.1(b)(2). That section provides for the additional point *if, inter alia*, the defendant qualifies for a reduction for acceptance of responsibility under § 3E1.1(a). U.S.S.G. § 3E1.1(b)(1); see **United States v. Tello**, 9 F.3d 1119, 1123-24 (5th Cir. 1993) (discussing § 3E1.1(b)). Because Sloan did not so qualify, § 3E1.1(b) is inapplicable.

B.

Sloan maintains that the district court erred in applying U.S.S.G. § 5G1.3(c), in that it imposed a consecutive, rather than a concurrent, sentence. We "will uphold a sentence unless it was imposed in violation of law; imposed as a result of an incorrect application of the sentencing guidelines; or outside the range of the applicable sentencing guideline and ... unreasonable." **United States v. Howard**, 991 F.2d 195, 199 (5th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 395 (1993), *quoted in United States v. Haymer*, 995 F.2d 550, 552 (5th Cir. 1993). Sloan claims an incorrect application of the guidelines; we disagree.

When sentenced in district court, Sloan was subject to an undischarged term of imprisonment (approximately 23 of 24 months remained to be served on his state charge, the first six to be without parole). Accordingly, Guidelines § 5G1.3(c) applied.<sup>6</sup> It

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<sup>6</sup> U.S.S.G. § 5G1.3 provides for sentencing a defendant subject to an undischarged term of imprisonment. It has three subsections, of which only subsection (c) applies. Subsection (a) deals with

states:

(Policy Statement) ... the sentence for the instant offense shall be imposed to run consecutively to the prior undischarged term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense.<sup>7</sup>

The PSR had increased Sloan's criminal history category to VI because of the state charge, resulting in a range of 46-57 months. As stated, however, the court calculated Sloan's 51-month sentence using a criminal history category of V -- effectively removing the state charge from Sloan's guideline calculation. As also stated, a 51-month sentence is at the top end of the range applicable to a criminal history category of V and an offense level of 16. Based on our review of the record, this appears to be a "reasonable incremental punishment" under § 5G1.3(c).

Finally, the fact that the district court imposed this sentence consecutively to the state sentence is not error. As we recently stated, "it is within the district court's discretion to impose a consecutive sentence" under § 5G1.3(c). **United States v. Warren**, No. 93-4227, at 2 (5th Cir. Dec. 22, 1993) (unpublished).

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offenses committed *while* the defendant was serving a term of imprisonment; subsection (b), with undischarged terms of imprisonment resulting from offenses "fully taken into account in the determination of *the offense level* for the instant offense". U.S.S.G. § 5G1.3(b) (emphasis added). To the extent that the state offense was taken into account in calculating Sloan's sentence, it was used to increase his *criminal history* category, *not* his offense level. This court recently held that § 5G1.3(b) does not apply when the offense resulting in the undischarged sentence is taken into account only in the defendant's criminal history calculation. In such cases, § 5G1.3(c) applies. **United States v. Warren**, No. 93-4227 (5th Cir. Dec. 22, 1993) (unpublished).

<sup>7</sup> At the sentencing hearing, the district court heard testimony from the probation officer, regarding the application of § 5G1.3.

And, "[w]hile note 4 of the commentary to § 5G1.3(c) offers some direction on the determination of a defendant's sentence, the extent to which the sentence runs consecutively to the unexpired term is ultimately within the district court's discretion." *Id.* at n.1 (citing *United States v. Headrick*, 963 F.2d 777, 782 (5th Cir. 1992)).

III.

For the foregoing reasons, the sentence imposed by the district court is

**AFFIRMED.**