

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5215

UNITED STATES of AMERICA,

Plaintiff-Appellee,

versus

SHANNON WHITE,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(6:88CR40 (14))

(November 4, 1994)

Before REYNALDO G. GARZA, DeMOSS, and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:*

Shannon White (White) appeals the sentence imposed after revocation of his supervised release. White contends that the policy statements in Chapter 7 of the sentencing guidelines are binding on the court and that the court erred in "departing upward." Finding that the district court properly sentenced White, we affirm.

I. FACTS AND PROCEDURAL HISTORY

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

White plead guilty to one count of conspiracy to manufacture, possession with intent to distribute, and distribution of controlled substances. 21 U.S.C. §§ 846 and 841(a)(1). After a downward departure on motion of the government based on White's cooperation, he was sentenced to 36 months imprisonment with a 3-year term of supervised release. As a condition of release, White was prohibited from using or possessing a controlled substance.

While White was on supervised release, his probation officer filed a petition alleging that White had violated the terms of his supervised release by testing positive for controlled substances on several occasions. After a hearing, the court ordered revocation of White's supervised release. At the sentencing hearing on the revocation of supervised release, the court stated that the "guideline range" was four to ten months and the statutory maximum was two years. The district court was referring to the range of imprisonment set forth in the policy statements of Chapter 7 of the sentencing guidelines. The court then stated that because White had possessed and used controlled substances, the statutory minimum was twelve months.¹ The court further stated that the maximum term of imprisonment was two years because the conviction was a class C felony. See 18 U.S.C. § 3583(e)(3). White's counsel

¹ 18 U.S.C. § 3583(g) provides that "[i]f the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release." Because White had received a 3-year term of supervised release, 1 year was the statutory minimum.

agreed that the statutory range was 1 to 2 years imprisonment.² The court sentenced White to the statutory maximum, 24 months imprisonment, and stated that "[t]he ground for departure upward is the fact that the Court departed downward before at sentencing and conditions of supervised release have been violated on a number of occasions."

II. WHETHER THE POLICY STATEMENTS IN CHAPTER 7 ARE BINDING.

As set forth above, the applicable range of imprisonment in the policy statement in Chapter 7 was 4-10 months. See U.S.S.G. §7B1.4(a), p.s. However, it is undisputed that the statutory minimum was 12 months because the court found that White possessed controlled substances while on supervised release. See 18 U.S.C. § 3583(g). Section 7B1.4(b)(2), p.s. provides that if the statutory minimum is greater than the maximum of the applicable range, the minimum term of imprisonment (in this case one year) shall be substituted for that range. Instead of making that substitution, the court sentenced White to the statutory maximum of two years. See 18 U.S.C. § 3583(e)(3).

White contends that the district court erred in sentencing him to two years rather than one year because the policy statements in Chapter 7 of the sentencing guidelines involving violations of supervised release are binding (as opposed to advisory) on the

² On appeal, White concedes that the statutory sentencing range is one to two years imprisonment.

district court.³ Recognizing that we previously rejected this precise contention,⁴ White relies on the analysis in an intervening decision of the Supreme Court in Stinson v. United States, 113 S.Ct. 1913 (1993). In Stinson, the Supreme Court held that a commentary that interprets or explains a sentencing guideline is binding unless the commentary violates the constitution or a statute or is plainly erroneous or inconsistent with the guideline. Unlike the instant case, policy statements were not at issue in Stinson. The Supreme Court nevertheless stated that "[t]he principle that the Guidelines Manual is binding on federal courts applies as well to policy statements." 113 S.Ct. at 1917.

Very recently, in United States v. Mathena, 23 F.3d 87, 93 (5th Cir. 1994), we examined the effect of Stinson on our previous determination that the policy statements in Chapter 7 were merely advisory. We explained that the Supreme Court had drawn an analogy between commentary written by the Sentencing Commission that interprets a guideline and an agency's interpretation of its own legislative rules. In contrast, the policy statements in Chapter 7 stand alone and do not interpret any guideline. We therefore

³ The introduction to Chapter 7 of the guidelines (Chapter 7 consists solely of policy statements) provides that the Sentencing "Commission views these policy statements as evolutionary and will review relevant data and materials concerning revocation determinations under these policy statements. Revocation guidelines will be issued after federal judges, probation officers, practitioners, and others have the opportunity to evaluate and comment on these policy statements." Part A-1.

⁴ See e.g., United States v. Headrick, 963 F.2d 777 (5th Cir. 1992) (policy statements in sentencing guidelines were advisory, not mandatory, and thus, district court could reject policy statements in light of other relevant factors).

concluded that the dicta in Stinson providing that policy statements were binding on federal courts had no bearing on the policy statements in Chapter 7. Mathena, 23 F.3d at 93.⁵ White is precluded from prevailing on his claim that the policy statements of Chapter 7 are binding on the courts.

III. WHETHER THE SENTENCE WAS PLAINLY UNREASONABLE.

White next argues that the district court erred in "departing upward" in sentencing him because the grounds to depart were unreasonable. As the government argues, because the sentencing range in the policy statement was not mandatory, it appears that the district court mischaracterized the sentence as an "upward departure."⁶ Consequently, White's claim that the court failed to state a valid ground for upward departure is without merit.

Moreover, White has not shown that the sentence imposed by the court was "plainly unreasonable." Mathena, 23 F.3d at 93. Here, the district court expressly considered the range of imprisonment set forth in the applicable policy statement (4-10 months) when it sentenced White. See Headrick, 963 F.2d at 782 ("district court was still required by § 3553(a)(5) to 'consider' any relevant policy statement when sentencing [defendant]").⁷ The district

⁵ We also noted that the overwhelming majority of circuits similarly have held that the policy statements of Chapter 7 are advisory. Mathena, 23 F.2d at 90 n.6 (citing cases).

⁶ Indeed, contrary to White's assertions, because the district court characterized the sentence as an upward departure, the district court apparently was under the impression it was bound by the range in the policy statements.

⁷ White did not argue at the sentencing hearing (as he does now) that §7B1.4(b)(2) required it to sentence him to a maximum of

court based the sentence of 24 months on "the fact that the Court departed downward before at sentencing and conditions of supervised release have been violated on a number of occasions."⁸ See Mathena, 23 F.3d at 94 (sentence not plainly unreasonable where defendant "repeatedly and willfully violated other conditions of his supervised release").

Finally, it is undisputed that the 24-month sentence is at the statutory maximum. White has failed to show that his sentence was "plainly unreasonable." Mathena, 23 F.3d at 94.

IV. CONCLUSION

For the foregoing reasons, the sentence imposed is AFFIRMED.

one year. Instead, counsel simply asked for leniency based on White's drug problem and his acceptance of responsibility.

⁸ The district court adopted the magistrate judge's recommended findings that White had possessed and used controlled substances numerous times from August 8, 1992, to February 10, 1993.