IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-5293

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EFRAIN MARTINEZ,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Louisiana
(93-CR-20015-01)

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(July 12, 1994)

Before REAVLEY and JONES, Circuit Judge, and JUSTICE,[1] District Judge.

PER CURIAM:[2]

Defendant-Appellant Efrain Martinez was convicted on a plea of guilty of one count of aiding and abetting travel in interstate commerce to facilitate an unlawful activity, namely, possession with intent to distribute 245 kilograms of marijuana, all in violation of 18 U.S.C. §§ 2 & 1952(a)(3). Martinez appeals his sentence of 60 months' incarceration, followed by

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[1] District Judge of the Eastern District of Texas, sitting by designation.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

three years' supervised release, claiming that the district court incorrectly determined his criminal history category, and therefore arrived at an incorrect guideline range under the United States Sentencing Guidelines. We vacate Martinez's sentence and remand for resentencing.

In determining Martinez's criminal history category, the district court added one point for each of two convictions: (1) operating a motor vehicle with a suspended-revoked driver's license and (2) failure to appear. As a result of these two points, Martinez was placed in criminal history category II and given a guideline range of 51-63 months, which is capped by the statutory maximum of 60 months. Martinez objected in the district trial court, and urges on appeal, that neither criminal history point should have been counted in the computation of his criminal history category.

Driving with a Suspended-Revoked License

Martinez first claims that a point should not have been counted for his conviction of driving with a suspended or revoked license or without a license. This claim is without merit. The pre-sentence investigation indicates that Martinez pleaded guilty to this offense and was sentenced to 60 days' imprisonment and a fine of $330. The sentence of imprisonment was suspended, and Martinez was placed on one year of supervised probation. The sentencing guidelines provide a general rule that sentences for misdemeanor and petty offenses are counted in determining criminal history category. U.S.S.G. § 4A1.2(c). However, there

are exceptions to this general rule:

> Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:
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> . . . .
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> Driving without a license or with a revoked or suspended license . . .

U.S.S.G. § 4A1.2(c)(1). The evidence shows that Martinez was sentenced to a one-year term of probation for driving with a suspended or revoked license. Accordingly, under § 4A1.2(c)(1)(A), one point was properly added for this sentence.

Failure to Appear

The district court also added one point for Martinez's conviction, upon a plea of guilty, of "[f]ailure to appear" in Florida. Martinez's punishment for that offense was a fine of $217.50. Because of this minimal punishment, conviction for this offense will not result in the addition of a point if failure to appear is an offense similar to any one listed under U.S.S.G. § 4A1.2(c)(1), supra. Contempt of court, like driving with a suspended license, is an offense listed in U.S.S.G. § 4A1.2(c)(1), for which a point will not be assessed when, as here, only minimal punishment was imposed. Therefore, if Martinez's conviction for failure to appear is similar to a conviction for contempt of court, the district court erred in awarding a point for the former.[3]

[3] There is no dispute that if "failure to appear" is similar to "contempt of court," Martinez's conviction for the former

As an initial matter, the government "has the burden of proving the facts supporting an enhancement of a defendant's sentence," including prior convictions. United States v. Gadison, 8 F.3d 186, 194 n.3 (5th Cir. 1993) (citing United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991)).[4] The record in the instant action does not indicate which Florida statute forms the basis for Martinez's failure to appear conviction. As a result, the government has not sustained its burden of proof. This is true because Florida has many statutes authorizing convictions for "failure to appear," some of which squarely fall under the § 4A1.2(c)(1) exceptions. For example, under Fla. Stat. Ann. § 901.11 (West 1994), "[f]ailure to appear as commanded by a summons without good cause is an indirect criminal contempt of court . . . ." Failure to appear under this statute is obviously similar to contempt of court.[5] The Florida

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should not be counted. Since he was not sentenced to either imprisonment or probation, but rather only fined $217.50, § 4A1.2(c)(1)(A) does not apply. In addition, failure to appear is clearly not similar to the offense of travel in interstate commerce to facilitate possession of marijuana; therefore, § 4A1.2(c)(1)(B) is similarly inapplicable.

[4] The government may argue that it sustained its burden merely by proving that the defendant was convicted of a crime, and that Martinez failed to sustain his burden of showing any applicable exception under § 4A1.2(c)(1) to the general rule that convictions for misdemeanors are counted. But, this argument is belied by Gadison, 8 F.2d at 194 & n.3. In Gadison, the conviction was not disputed, and the court placed on the government the burden of proof with respect to the details which would determine whether the conviction fell under a § 4A1.2(c)(1) exception.

[5] Note, however, that it appears that this was not the crime of which Martinez was convicted because he was fined $217.50 while the fine authorized by Fla. Stat. Ann. § 901.11 cannot

statute which specifically authorizes fines for failure to appear in traffic cases provides only for a "noncriminal" fine of $32. See Fl. St. §§ 30.56 & 318.18(2). A sentence under this provision would not be counted towards criminal history, because it is noncriminal in nature. See U.S.S.G. § 4A1.2(a)(1).

Even if the government had satisfactorily proved that Martinez had been convicted under one of Florida's more general statutes making failure to appear a criminal offense,[6] such a "failure to appear" is likewise similar to contempt of court, thus falling under the § 4A1.2(c)(1) exception. Whether or not an offense is sufficiently "similar" to one listed in § 4A1.2(c)(1) is judged by a "common sense" approach, outlined in United States v. Hardeman, 933 F.2d 278, 280-83 (5th Cir. 1991). The factors to be considered are: (1) punishments for the two offenses, (2) perceived seriousness of the two offenses, (3) the elements of each offense, (4) the level of culpability involved, and (5) the degree to which the offense indicates a possibility of recidivism. Gadison, 8 F.3d at 193; Hardeman, 933 F.2d at 281.

Contempt of court and failure to appear in Florida fulfill the requirements of similarity. In Florida, criminal contempt is punishable by up to a $500 fine and one year imprisonment.

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exceed $100. But see Aron v. Huttoe, 258 So.2d 272, 273-74 (Fla. Dist. Ct. App.) (finding failure to appear in response to a summons in a civil case to be a direct criminal contempt of court and approving a $300 fine as punishment therefor), adopted by 265 So.2d 699 (Fla. 1972).

[6] See, e.g., Fl. St. § 843.15(1)(b).

Thomas A. Edison College, Inc. v. State Bd. of Indep. Colleges & Universities, 411 So.2d 257, 258 (Fla. Dist. Ct. App. 1982); see also Soven v. State, 622 So.2d 1123, 1126 (Fla. Dist. Ct. App. 1993) (reiterating that the maximum fine is $500 and citing Thomas A. Edison). Failure to appear on a misdemeanor charge is a first degree misdemeanor, the maximum punishment for which is $1,000 fine, or one year's incarceration. See Fla. Stat. Ann. §§ 775.082(4)(a), 775.083(1)(d), & 843.15(1)(b) (West 1994). Although a higher fine is possible for failure to appear, the maximum penalties are similar, and the penalty assessed against Martinez, a $217.50 fine and no incarceration, was well within the ranges for both. The perceived seriousness of the two offenses is thus similar. See Gadison, 8 F.3d at 194; Hardeman, 933 F.2d at 282 (holding that a "sentence of one day in jail and a $250 fine indicate[s] that the offense should not be included in [the] criminal history score").

The elements of both offenses are also similar. Failure to appear involves failure to obey a summons to appear in court to defend against charges. Such acts are similar to acts which constitute contempt, including failure to answer a summons, Fl. St. § 901.11, and failures by attorneys to appear in court as ordered. Beasley v. Girten, 61 So.2d 179, 180-81 (Fla. 1952). The level of culpability involved appears to be the same, as both offenses involve failure to obey a simple order of the court.

Finally, failure to appear, especially in the context of answering a charge for a relatively simple (albeit criminal)

traffic violation, does not indicate a likelihood of recidivism -- certainly less so than writing bad checks. Cf. Gadison 8 F.3d at 195. Thus, analysis under Hardeman shows that failure to appear is similar to contempt of court, given the facts in the instant case. This conclusion is bolstered by Gidden v. State, 613 So.2d 457, 458 (Fla. 1993) (noting, without further comment, that a defendant who failed to appear for arraignment on charges of resisting an officer was additionally charged with contempt of court, rather than under any of Florida's more specific statutes regarding failure to appear). As a result, Martinez's failure to appear is similar to contempt of court, and a criminal history point was erroneously awarded. This error is not harmless, since it resulted in raising Martinez's criminal history category to category II. This, in turn, resulted in a guideline range which included the 60-month sentence actually imposed. That sentences falls outside the correct guideline range of 46-57 months, which ensues from using criminal history category I.

Conclusion

Because of our disposition of the issues above, we need not reach the question of whether the charges for driving with a suspended license and failure to appear are "related cases" under U.S.S.G. § 4A1.2(a)(2). Accordingly, the sentence imposed by the district court is **VACATED**, and this action **REMANDED** to the district court for resentencing.