

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7089
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN ANGEL ORTIZ,

Defendant-Appellant.

- - - - -
Appeals from the United States District Court
for the Southern District of Texas
USDC No. CR-L92-244-01
- - - - -
(September 20, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Juan Angel Ortiz appeals the sentence imposed following entry of his guilty plea to count 2 of an indictment charging him with possession with intent to distribute approximately 17 pounds of cocaine. The district court determined that Ortiz has an offense level 29 and a criminal history category I resulting in a guideline imprisonment range of 87 to 108 months. Because the statutory minimum sentence exceeded the guideline range, however, Ortiz was sentenced to serve the statutory minimum term of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

imprisonment of 120 months. Ortiz argues that the district court mistakenly assumed that it did not have the authority to depart downward because the offense conduct was a single act of aberrant behavior.

We review this issue for plain error because Ortiz did not raise it in the district court. Under Fed. R. Crim. P. 52(b), this Court may correct forfeited errors only when the appellant shows the following factors: (1) there is an error, (2) that is clear or obvious, and (3) that affects his substantial rights. United States v. Rodriguez, 15 F.3d 408, 415-16 (5th Cir. 1994) (citing United States v. Olano, ___ U.S. ___, 113 S. Ct. 1770, 1777-79, 123 L. Ed. 2d 508 (1993)). If these factors are established, the decision to correct the forfeited error is within the sound discretion of the Court, and the Court will not exercise that discretion unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Olano, 113 S. Ct. at 1778.

"A district court's authority to sentence below the statutory minimum is circumscribed by 18 U.S.C. § 3553(e). . . ." United States v. Brown, ___ F.3d ___ (5th Cir. Aug 10, 1994, No. 92-2947), 1994 WL 416451 at *7. The district court may not depart below the statutory minimum sentence unless the Government files a U.S.S.G. § 5K1.1 motion. Id.; see United States v. Santa Lucia, 991 F.2d 179, 180 (5th Cir. 1993); see also U.S.S.G. § 5G1.1(b) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the

statutorily required minimum sentence shall be the guideline sentence.").

Even if this case did not involve a statutory minimum sentence, a downward departure would not be available on grounds of "aberrant behavior" because the transportation of 17 pounds of cocaine in the fender of an automobile "suggests a conscious and deliberate act and not an aberrant or exceptional one." United States v. Burleson, 22 F.3d 93, 94 (5th Cir. 1994), petition for cert. filed, (U.S. Aug. 15, 1994) (No. 94-5688). (citing United States v. Williams, 974 F.2d 25, 26 (5th Cir. 1992), cert. denied, 113 S. Ct. 1320 (1993)); see U.S. v. O'Brien, 18 F.3d 301, 303 (5th Cir. 1994), petition for cert. filed, (U.S. July 18, 1994) (No. 94-159). In Williams, we stated, "[a]lthough the Guidelines do not define 'aberrant behavior', we are most certain that it requires more than an act which is merely a first offense or 'out of character' for the defendant. Instead, those considerations are taken into account in calculating the defendant's criminal history category." 974 F.2d at 26 (citation omitted). Ortiz's act was neither spontaneous nor thoughtless. See id. at 27. The district court's failure to depart downward was not plainly erroneous.

Ortiz contends, without citation, that the imposition of the statutory minimum sentence, rather than the guideline sentence, was unfairly discriminatory. Ortiz argues that sentences for drug convictions are ordinarily calculated on the basis of drug quantities and that he is entitled to be treated in the same manner as other similarly situated defendants. This argument is

frivolous. When the statutory minimum sentence exceeds the guideline sentencing range, the statutory minimum sentence is the guideline sentence. § 5G1.1(b).

AFFIRMED.