

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-7222  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DEREK BYARS,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Northern District of Mississippi  
(CR 4:92 121)

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October 1, 1993

Before DAVIS, JONES and DUHE, Circuit Judges.

PER CURIAM:<sup>1</sup>

Derek Byars appeals his sentence. Because we find no error, we affirm.

I.

Derek Byars pleaded guilty to possession with intent to distribute and distribution of crack cocaine, in violation of 21 U.S.C. § 841(b)(1)(B). Byars' offense level was calculated at 25 and his criminal history category was determined to be IV based on prior convictions in Mississippi municipal court. The district

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court sentenced Byars to 84 months of imprisonment, followed by five years of supervised release.

Byars argues that the district court improperly calculated his criminal history category by adding five points for three Mississippi municipal court convictions that are currently on appeal in county court. Byars contends that the effect of an appeal from a conviction in municipal court in Mississippi to county court is a stay of the judgment and the receipt of a trial **de novo**. Because he is entitled to a trial **de novo**, Byars argues, the sentences have not been fully adjudicated, and therefore, are not "prior sentences" for purposes of calculating Byars' criminal history category.

The government argues that only two of the three municipal court convictions have been appealed. Furthermore, the government contends that the Sentencing Guidelines clearly state that sentences under appeal are counted in determining criminal history, without making any distinction between cases that may be tried **de novo** on appeal and those which may not.

## II.

This court upholds a sentence unless it is imposed in violation of law, was a result of an incorrect application of the sentencing guidelines, or was outside the range of the applicable sentencing guideline and is unreasonable. **U.S. v. Howard**, 991 F.2d 195, 199 (5th Cir. 1993), **petition for cert. filed**, Aug. 9, 1993. Whether a prior conviction is covered under the sentencing guidelines is reviewed **de novo**, while the factual matters concerning the prior conviction are reviewed for clear error. **Id.**

The Sentencing Guidelines require a court to consider "prior sentences" for purposes of calculating a criminal history category. A "prior sentence" is "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of **nolo contendere**, for conduct not part of the instant offense." U.S.S.G. § 4A1.2(a)(1). If the execution of the sentence has been stayed pending appeal, the pertinent subsections of § 4A1.1 apply "as if the execution of such sentence had not been stayed." U.S.S.G. § 4A1.2(1). While the appeal of Byars' municipal court convictions to the county court stayed the sentences, the stay does not eliminate those sentences for purposes of calculating Byars' criminal history category. Prior sentences clearly include sentences under appeal, and the Guidelines make no exception for cases that may be tried **de novo**.

Therefore, the district court's determination of Byars' sentence is affirmed.

AFFIRMED.