UNITED STATES COURT OF APPEALS
Fifth Circuit

No. 93-7321
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

VERSUS

MICHAEL DWAYNE ROGERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(3:93-CR-1)

(April 27, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Michael Dwayne Rogers pleaded guilty to bank robbery in violation of 18 U.S.C. § 2113(a) (1988), and the district court sentenced him to 63 months imprisonment. Rogers appeals his sentence, contending that (1) the district court's finding that he possessed a firearm during the robbery was clearly erroneous; and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(2) the district court erred by increasing his criminal history score, under U.S.S.G. §§ 4A1.1(c) and (d).[1] Finding no reversible error, we affirm.

I

The district court increased Rogers' offense level by five points for possession of a firearm during the robbery. *See* U.S.S.G. § 2B3.1(b)(2)(C) (providing for increase of five levels if firearm was brandished, displayed, or possessed during robbery). According to Rogers, the district court's finding that he possessed a firearm is clearly erroneous. *See United States v. Franco-Torres,* 869 F.2d 797, 799-800 (5th Cir. 1989) (reviewing for clear error district court's finding at sentencing that defendant had a gun during commission of crime). We disagree.

The probation officer who prepared Rogers' presentence investigation report interviewed a teller from the bank. She said Rogers presented her with a hold-up note and then opened his jacket to reveal a pistol in a holster. The teller stated that she attended gun shows with her husband, and that Rogers' pistol appeared to be a nickel-plated .38 caliber revolver. Rogers, on the other hand, testified at sentencing that he did not have a gun when he entered the bank. According to Rogers, he merely had a stick in the waistband of his pants, which he put there to create the appearance of a gun.

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[1] *See* United States Sentencing Commission, *Guidelines Manual,* § 4A1.1(c), (d) (1993).

This conflict in the evidence merely presented a credibility question which the district court was entitled to resolve. Clear error is not shown.

II

Rogers also contends that the district court erred by increasing his criminal history score on account of a sentence of probation which he was serving at the time of the bank robbery. Rogers contends that the prior sentence does not count for criminal history purposes because it resulted from a proceeding in which adjudication of guilt was withheld. We disagree.

In Florida Rogers entered a plea of nolo contendere to a charge of grand theft auto. The Florida court withheld adjudication of guilt and sentenced Rogers to probation. At sentencing, the district court assessed Rogers one criminal history point under U.S.S.G. § 4A1.1(c) on account of the "prior sentence" imposed in Florida.[2] The district court assessed two criminal history points because Rogers committed the bank robbery "while under [a] criminal justice sentence," pursuant to U.S.S.G. § 4A1.1(d).

Rogers contends that the district court erred because his Florida sentence of probation is neither a "prior sentence," for the purposes of § 4A1.1(c), nor a "criminal justice sentence" for the purposes of § 4A1.1(d). A "prior sentence" is defined in § 4A1.2 as a sentence "previously imposed upon adjudication of

[2] *See* U.S.S.G. § 4A1.1(c) (adding 1 point for each prior sentence, other than a sentence of imprisonment for at least sixty days).

guilt, whether by guilty plea, trial, or plea of nolo contendere." U.S.S.G. § 4A1.2(a)(1). A "criminal justice sentence" is any "sentence countable under § 4A1.2." U.S.S.G. § 4A1.1, comment. (n.4). Rogers argues that his Florida sentence meets neither of these definitions, because adjudication of guilt was withheld in the Florida proceeding.[3]

Where adjudication is withheld, a resulting sentence is not "imposed upon adjudication of guilt," as required by § 4A1.2(a)(1). *See United States v. Rockman,* 993 F.2d 811, 813 (11th Cir. 1993) ("Under section 4A1.2(a)(1), `prior sentence' means a sentence imposed upon `adjudication of guilt.' Sentences imposed wherein adjudication of guilt is withheld do not fall under the definition of section 4A1.2(a)(1)."), *cert. denied,* ___ U.S. ___, 114 S. Ct. 900, 127 L. Ed. 2d 92 (1994); *United States v. Giraldo-Lara,* 919 F.2d 19, 22 (5th Cir. 1990) (stating that "it is clear under Texas law that `deferred adjudication probation' does not involve a finding of guilt by the state court").

Nevertheless, Rogers' Florida sentence is counted under § 4A1.1(c), because U.S.S.G. § 4A1.2(f) explicitly provides that a "diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere,* in a judicial proceeding is counted as a sentence under § 4A1.1(c)." U.S.S.G. § 4A1.2(f); *see Rockman,* 933 F.2d at 813-14 ("Rockman pleaded *nolo contendere* to the prior offense and the state court withheld adjudication of

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[3] Rogers also refers to the Florida proceeding as a "nonadjudication of guilt."

guilt. Accordingly, the prior offense is a diversionary disposition and properly calculated into Rockman's criminal history category under section 4A1.1(c)." (applying § 4A1.2(f))); *Giraldo-Lara,* 919 F.2d at 22 (holding that under § 4A1.2(f) deferred adjudication probation "could be counted as a prior sentence"). Furthermore, because Rogers' Florida sentence is counted under § 4A1.2(f), it also counts as a "criminal justice sentence" under § 4A1.1(d). *See* U.S.S.G. § 4A1.1, comment. (n.4) (defining "criminal justice sentence" as any "sentence countable under § 4A1.2"). Therefore, the district court did not err by increasing Rogers' criminal history score on account of his Florida sentence.

III

For the foregoing reasons, we **AFFIRM**.