IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-7743

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MELVIN GREER, A/K/A "HARD ROCK",

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(CR-3:93-090)

(January 13, 1995)

Before JONES and DeMOSS, Circuit Judges, and BUNTON[1], District Judge.

PER CURIAM:*

Defendant entered a plea of guilty to a one-count indictment charging him with distribution of cocaine, and was sentenced to prison for a term of 57 months. Greer appeals, challenging § 4A1.2(c) of the Sentencing Guidelines. We AFFIRM.

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 Pursuant to that rule, the Court has determined this opinion should not be published.**

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

The amount of crack cocaine involved gave Greer an offense level of 24. Three points were deducted from the offense for acceptance of responsibility, and the adjusted level was 21.

The trial court considered five misdemeanor convictions in defendant's criminal history, which resulted in six criminal history points, and translated into a criminal history Category IV, with guidelines of 57 to 71 months as a range of imprisonment. The district court sentenced at the bottom of the Guidelines. The defendant did not object to the Presentence Report and, as a matter of fact, counsel for the defendant twice advised the trial court that Greer had no objection to it.

Since Greer did not object in the district court, the challenge to § 4A1.2(c) of the Guidelines is raised for the first time on appeal, and is reviewed for plain error. See Fed.R.Crim.P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court"). Citing United States v. Olano, __ U.S. ___, ___, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993), this court in United States v. Rodriquez, 15 F.3d 408, 415 (5th Cir. 1994) and in U.S. v. Cabral-Castillo, 35 F.3d 182 (5th Cir. 1994), explained what the factors considered when trying to decide whether there has been "plain error." The factors are (1) an error, (2) plain, (3) that affects substantial rights, and (4) only if fairness, integrity, or public reputation of judicial proceedings are seriously affected. The latest, hot-off-the-press opinion on this very subject is U.S. v. Calverley, _ F.3d __, 1994 WL 574181 (5th Cir., Oct. 20, 1994) (No. 92-1175).

We find that plain error does not exist because the defendant has not borne the

burden of persuasion with respect to showing prejudice in this matter. Section 4A1.2(c) relates to sentences for misdemeanor and petty offenses which can be counted in the criminal history. The Guidelines read, in part, as follows:

> **(1) 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 or imprisonment of at least 30 days, or (B) the prior offense was similar to an instant offense:**

Greer maintains that the court considered uncounseled misdemeanor convictions in arriving at the six-point criminal history. In one of the previous convictions, the defendant indicated he was not represented by counsel. The case was tried in a municipal court, and the defendant did not face imprisonment, but was ordered to pay $200 in restitution and was sentenced to five days of community service work. In another, the defendant waived his right to counsel in the matter. Of the three remaining convictions, two were for simple assault, one was tried in municipal court, and one was tried in justice court. One conviction resulted in five days in jail and the other a fine of $247. The defendant was also convicted in a municipal court of trespassing and given 60 days in jail, but in those three convictions there was no information available as to whether or not an attorney represented the defendant. It could be presumed that, if the defendant had not been represented by counsel, he would have informed the Probation Officer of this fact, particularly in view of the fact that on one previous conviction, the defendant told the Probation Officer he was not represented by counsel, and did not tell him on any of the other convictions.

The defendant contends it is constitutionally impermissible to permit misdemeanor convictions to be used in calculating a defendant's criminal history score in a Presentence Report. He also contends that § 4A1.2 of the Federal Sentencing Guidelines promotes discrimination against indigent defendants because it allows inclusion of uncounseled misdemeanor convictions for which the indigent defendant was unable to obtain a lawyer due to his poverty. A panel of this court, in United States v. Eckford, 910 F.2d 216 (1990), discussed the Sixth Amendment guarantee of counsel and recognized it was one of the

"fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Powell v. Alabama, 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158 (1932).

There seems to be little doubt that the defendant was indigent, but the law in this Circuit is against him. In U.S. v. Eckford, 910 F.2d 216, a panel of this Court relying on Wilson v. Estelle, 625 F.2d 1158 (5th Cir. 1980), cert. denied, 451 U.S 912, 101 S.Ct. 1985, 68 L.Ed.2d 302 (1981) found "no error in the admission of evidence of the defendants to prior uncounseled misdemeanor convictions during the punishment phase of a murder trial." This is not the situation here. The uncounseled misdemeanor convictions, if in fact they were uncounseled, were not used as a punishment enhancer, which was forbidden in Baldasar v. Illinois, 446 U.S. 222 (1980). While Greer may have been sentenced for some trivial offenses, nevertheless the law in this circuit is that they may be used to determine his criminal history.

The Sixth Amendment does not guarantee an unlimited right to counsel in all criminal cases, and Circuit Judge Johnson held in Eckford, supra, that if criminal defendants were guaranteed lawyers in insignificant criminal prosecutions where no possibility of imprisonment arose, an "already overburdened criminal justice system would face crippling costs, congestion and confusion." Scott v. Illinois, 440 U.S 367, 373, 99 S.Ct. 1158, 1162, 59 L.Ed.2d 383 (1979). Eckford held the "conviction of an uncounseled criminal defendant is constitutionally permissible, so long as the defendant is not sentenced to a term of imprisonment."

We hold, therefore, that the trial judge in this case committed no error in following the mandates of § 4A1.2 of the Federal Sentencing Guidelines. Appellant encourages us to change this particular section, but this we are legally unable to do.

Greer maintains that his Fifth Amendment rights are being violated, and that the panel in U.S. v. Eckford, supra, addressed only Sixth Amendment rights. This argument, however, cannot stand because our circuit in U.S. v. Guajardo, 950 F.2d 203, cert. denied __ U.S. _, 112

S.Ct. 1173, 118 L.Ed.2d 432 (1992), specifically held that: "a district court's consideration of past offenses is related to the goal of having dangerous criminals serve longer sentences; using these prior offenses to calculate another sentence is rationally related to achieving that goal and promotes respect for the law, provides deterrence and protects the public from further crimes."

The counsel for appellant is to be commended for his valiant efforts to have the sentence overturned but, unfortunately, the law of this circuit is against him in all respects. Greer's sentence is, therefore, in all respects AFFIRMED.