IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8259
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REGINALDO ESPARZA-FERNANDEZ,
a/k/a Jose Rubio-Herrera,

Defendant-Appellant.

- - - - - - - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-92-CR-445-3
- - - - - - - - - - -
(January 5, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Reginaldo Esparza-Fernandez was sentenced as a "career offender" because the district court found that his two prior convictions were not "related cases" under U.S.S.G. §§ 4A1.2 and 4B1.1. Esparza-Fernandez argues that his two prior convictions for intentional delivery of cocaine should be considered "related" because they were part of a common scheme or plan.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

"This [C]ourt will review de novo the district court's finding that [defendant's] prior convictions were unrelated." United States v. Ford, 996 F.2d 83, 85 (5th Cir. 1993).

The sentencing guidelines provide for an enhanced penalty for "career offenders." § 4B1.1. One criterion for classification as a career offender is that "the defendant has at least two prior felony convictions of . . . a controlled substance offense." Id. Section 4B1.2(3) defines "two prior felony convictions" as convictions the sentences for which are counted separately under § 4A1.1(a)-(c).

Section 4A1.2(a)(2) provides that "[p]rior sentences imposed in unrelated cases are to be counted separately. Prior sentences in related cases are to be treated as one sentence for purposes of § 4A1.1(a),(b), and (c)."

> Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing.

§ 4A1.2, comment. (n.3); see United States v. Metcalf, 898 F.2d 43, 46 n.6 (5th Cir. 1990) (recognizing the legal force of this definition).

Esparza-Fernandez's prior state convictions were based on two separate indictments. An indictment filed May 13, 1991, charged Esparza-Fernandez with delivering less than 28 grams of cocaine to an undercover officer on May 8, 1991. He was

convicted on August 7, 1991. On May 15, 1991**, Esparza-Fernandez delivered cocaine to a different undercover officer. An indictment was filed May 15, 1991. He was convicted June 28, 1991.

Esparza-Fernandez argues that his prior convictions were part of the same scheme or plan because they "involved almost identical conduct, occurred in the same are[a], and within days of each other." His argument "would lead to the illogical result that a defendant who is repeatedly convicted of the same offense on different occasions could never be considered a career offender under the guidelines." United States v. Garcia, 962 F.2d, 479, 482 (5th Cir. 1992) (internal quotation and citation omitted).

The district court found that the cases were not part of a single scheme or plan and were not related. "[I]t appears that there were two separate sales of controlled substances to two different individuals, both apparently undercover officers on two different dates. There were two different indictments. Sentences were imposed separately, even though the second one was made to run concurrently with the first."

The district court's finding was correct under Garcia and Ford. In Garcia, the defendant "executed two distinct, separate deliveries of heroin." 962 F.2d at 482. This Court concluded that "[a]lthough the crimes may have been temporally and

** The judgment erroneously states that the offense was committed February 21, 1991. D. exh. 1; R. 2, 9.

geographically alike, they are not part of a common scheme or plan." Id. In Ford, this Court concluded that although "all four of [the defendant's] charges arose from sale to the same undercover officer during a six-day period . . . [e]ach sale was a separate transaction, separated by hours, if not days." 996 F.2d at 86.

Esparza-Fernandez argues that the term "related case" is analogous to "relevant conduct" defined under § 1B1.3. In Garcia, this Court did not reach the issue whether the language of § 4A1.2 should be broadly construed because the facts underlying the two convictions did not establish a common scheme or plan. 962 F.2d at 482. Similarly, this Court need not address the issue now.

Esparza-Fernandez also argues that the prior convictions should be considered consolidated for purposes of calculating his criminal history level because the sentences ran concurrently. "This court has already rejected the proposition that cases must be considered consolidated simply because two convictions have concurrent sentences." Garcia, 962 F.2d at 482 (internal quotation and citation omitted).

Esparza-Fernandez's prior convictions were not consolidated. He was sentenced on different days, under separate docket numbers, and there is no order of consolidation in the record. See United States v. Ainsworth, 932 F.2d 358, 361 (5th Cir.), cert. denied, 112 S.Ct. 346 (1991).

The district court did not err in finding Esparza-Fernandez's prior convictions were unrelated and in classifying him as a "career offender."

AFFIRMED.