

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8471
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KEITH VERNON HOSTER,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(W-91-CR-168-1)

(February 17, 1994)

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

PER CURIAM:*

I
A

Keith Vernon Hoster has been before this court on an earlier appeal of his sentence. After pleading guilty to aiding and abetting and possession with intent to distribute amphetamine, the district court sentenced Hoster to a term of imprisonment of 170 months, to be followed by a five-year term of supervised release.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

He appealed the sentence and we held that the district court plainly erred in determining Hoster's base offense level. See U.S. v. Hoster, 988 F.2d 1374, 1380 (5th Cir. 1993). It was in that case that Hoster argued for the first time in his reply brief that he was entitled to a reduction in his offense level for the acceptance of responsibility. Id. at 1383. We noted that ordinarily we do not address an issue initially raised in a reply brief, but further said that, even if we chose to address the issue, we would not disturb the district court's finding because Hoster had declined to discuss any of his prior or subsequent drug activities on the advice of counsel. We determined that the district court did not clearly err under the 1991 version of the guidelines. Id. His sentence was vacated and we remanded the case for resentencing. Id.

B

Prior to the resentencing hearing, Hoster filed a motion for a three-level reduction of his offense level for acceptance of responsibility. Hoster argued that he was entitled to the reduction under the amended version of U.S.S.G. § 3E1.1. Hoster attached letters to his motion from prison officials stating that Hoster has an exemplary prison record that should be considered during resentencing.

During the resentencing hearing, Bill Moore, a probation officer, testified that during the presentence investigation, Hoster had discussed his behavior involved in the offense of

conviction, but he had declined to discuss any previous involvement or involvement occurring after commission of the offense.

During the hearing, Hoster's counsel acknowledged that Hoster did not plead guilty until the date that his trial was scheduled to begin. Counsel argued, however, that Hoster would have pleaded guilty earlier if he had been aware that his co-defendant was pleading guilty because the plea affected Hoster's trial strategy.

The district court applied the amended version of § 3E1.1, but denied Hoster's request for a downward reduction for the acceptance of responsibility. The district court found that Hoster's guilty plea was not timely and did not reflect his remorse. The district court determined that Hoster's counsel's admissions reflected that Hoster entered the plea because he learned that his co-defendant was going to testify against him. The district court also determined that Hoster's prison conduct was not relevant to a determination of acceptance of responsibility.

The district court imposed a prison term of 78 months, followed by a five-year term of supervised release, and a \$5000 fine.

II

On appeal, Hoster argues that he has clearly accepted personal responsibility for the commission of the offense because, in a timely manner, he 1) pleaded guilty; 2) confirmed the factual basis before the Court at his arraignment; and 3) admitted his involvement in the offense of conviction to the probation office

and at his original sentencing. Hoster also argues that his conduct since his incarceration is a relevant factor. Hoster points out that the only reason given in the PSR for the initial denial of a reduction was that he declined to discuss his prior and subsequent drug activities, which is not a valid reason under the November 1, 1992, version of U.S.S.G. § 3E1.1. Hoster argues that the district court misapplied the guidelines by refusing to consider his good behavior and exemplary conduct in prison and in relying solely on the timeliness factor.

Hoster also argues that he is entitled to the additional one-level decrease under § 3E1.1(b) because he entered a guilty plea less than 90 days from the date of the commission of the offense.

III

A

"Review of sentences imposed under the guidelines is limited to a determination whether the sentence was imposed in violation of law, as a result of an incorrect application of the sentencing guidelines, or was outside of the applicable guideline range and was unreasonable." U.S. v. Matovsky, 935 F.2d 719, 721 (5th Cir. 1991).

The Sentencing Guidelines in effect on the date that a defendant is sentenced are to be applied in determining a defendant's offense level, unless the use of a guideline would violate the Ex Post Facto Clause of the U.S. Constitution, U.S.S.G. § 1B1.11(a), (b)(1), which is not the case here. The guideline in

effect on the date of resentencing has been held to be the applicable provision even if the guideline has been amended since the original sentencing. U.S. v. Gross, 979 F.2d 1048, 1052 (5th Cir. 1992).¹

This court has not "ultimately defined what standard applies in reviewing a district court's refusal to credit acceptance of responsibility." U.S. v. Cartwright, 6 F.3d 294, 304 (5th Cir. 1993). The court has applied a "clearly erroneous" standard, "without foundation," and "great deference," and has found that there is "no practical difference between the standards." Id. (citations omitted).

Section 3E1.1 provides for a two-level reduction of the offense level of a defendant who "clearly demonstrates acceptance of responsibility for his offense." § 3E1.1(a). The defendant

¹However, the guidelines "in effect on a particular date shall be applied in its entirety" and the district court "shall not apply" a guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the manual. § 1B1.11(b)(2). In Gross, the question concerning the application of two versions of the guidelines was not an issue. The amended version of the guidelines was not applied because it would have resulted in an ex post facto violation. Gross, 979 F.2d at 1052-53. In this case, the government argued at the sentencing hearing that a portion of Hoster's base offense level had been determined under the unamended guidelines and, therefore, that the amended version of 3E1.1 should not be applied solely to determine whether Hoster accepted responsibility. However, the government has not asserted the argument on appeal, and, therefore, the issue is not properly before this court. Nor has the government reasserted its argument that the denial of the reduction of Hoster's offense level for acceptance of responsibility was affirmed during the first appeal and, therefore, the issue was not subject to reconsideration at the time of resentencing.

bears the burden of showing his entitlement to the downward adjustment. U.S. v. Lghodaro, 967 F.2d 1028, 1031 (5th Cir. 1992).

In determining whether a defendant qualifies for an adjustment under subsection (a), consideration may be given to whether the defendant truthfully admitted the conduct comprising the offense of conviction and whether he truthfully admitted or falsely denied any additional relevant conduct for which he was accountable. § 3E1.1 comment. (n.1(a)). Under the 1992 version of the provision, a defendant is not required to volunteer or affirmatively admit relevant conduct in order to obtain the reduction. Id. Some of the other relevant factors to be considered are post-offense rehabilitative efforts, including obtaining counseling or drug treatment, and the timeliness of the defendant's conduct in manifesting the acceptance of responsibility. See § 3E1.1 comment. (n.1 (g),(h)).

A defendant who enters a guilty plea is not entitled to an adjustment "as a matter of right." § 3E1.1 comment. (n.3). "Entry of a guilty plea prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional conduct for which he is accountable . . . will constitute significant evidence of acceptance of responsibility." Id. Such evidence may be outweighed by the defendant's conduct that is inconsistent with the acceptance of responsibility. Id.

B

Hoster's admission that he entered a guilty plea because he learned of his codefendant's plea reflected that Hoster was pleading guilty for reasons other than a desire to accept responsibility for his actions. Further, Hoster's guilty plea made on the date that his trial was scheduled to begin was not a "timely" manifestation of an acceptance of responsibility.

Hoster may be correct in his argument that the district court misapplied the guidelines in refusing to consider Hoster's participation in a psychology and drug treatment program since his imprisonment. Because the application of the Sentencing Guidelines is a question of law, it is subject to de novo review. U.S. v. Castro-Perpia, 932 F.2d 364, 365 (5th Cir. 1991).

Post-offense rehabilitative effort, such as seeking counseling or drug treatment, is a valid factor to be considered under the guidelines. § 3E1.1 comment (n.1(g)). However, even if the district court erred in not considering Hoster's post-rehabilitative effort, the defect does not require reversal if there is some other valid reason for denying the reduction for acceptance of responsibility. U.S. v. Tello, 9 F.3d 1119, 1128 (5th Cir 1993).

As previously discussed, Hoster's guilty plea did not reflect remorse on his part and was not timely made. In spite of the possible legal error concerning Hoster's rehabilitative efforts, there were other relevant factors that supported the district

court's denial of a reduction for the acceptance of responsibility. The finding, consequently, was not clearly erroneous or without foundation.

Because Hoster did not qualify for a decrease under § 3E1.1(a), he was not entitled to the additional one-level decrease. See § 3E1.1(b) (if the defendant qualified for a decrease under subsection (a), he may be entitled to an additional one-level decrease under certain conditions).

IV

For the reasons set forth above, the judgment of the district court is

A F F I R M E D.