IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8667
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIE FLOYD MIMS, JR.,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. W-93-CR-10 (1)

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(July 19, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

Willie Floyd Mims, Jr., argues that the district court erred by increasing his base offense level pursuant to U.S.S.G. § 3B1.1(c) for his role in the offense. He contends that the evidence did not support the court's finding that he was an organizer, leader, manager, or supervisor of the conspiracy.

Section 3B1.1(c) authorizes an enhancement to a defendant's offense level if the defendant "was an organizer, leader, manager, or supervisor in any criminal activity . . . ." Factors for consideration include the exercise of decision-making authority, the degree of participation in planning or organizing

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, and the degree of control and authority over others. United States v. Watson, 988 F.2d 544, 550 (5th Cir. 1993), cert. denied, 114 S. Ct. 698 (1994); § 3B1.1, comment (n.3).

This Court will not disturb a district court's findings with regard to a defendant's role in a criminal activity unless those findings are clearly erroneous. Watson, 988 F.2d at 550. A finding is not clearly erroneous so long as it is plausible in light of the record read as a whole. United States v. Adams, 996 F.2d 75, 78 (5th Cir. 1993).

Testimony at Mims' sentencing hearing established that Mims and two other individuals were distributing crack cocaine from Mims' residence, that the two individuals received their cocaine from Mims, that Mims was the "connection to the distributor," and that Mims was the one with the knowledge of how to "re-rock" the cocaine to make the quantity larger. The PSR also indicated that Mims set the price for the cocaine and received a greater share of the profits than one of the other individuals. The district court found that Mims "was the person in charge" and "more culpable" than the other two individuals involved. The district court did not clearly err by increasing Mims' offense level for his role as an organizer, leader, manager, or supervisor. See also United States v. Vaquero, 997 F.2d 78, 84 (5th Cir.), cert. denied, 114 S.Ct. 614 (1993).

Mims next argues that the district court plainly erred by assessing two criminal history points for his prior sentence

pursuant to § 4A1.1(b). He contends that he should have received only one criminal history point for this sentence pursuant to § 4A1.1(c) because he had not served any time for the offense. This Court reviews the district court's application of the sentencing guidelines de novo. United States v. Radziercz, 7 F.3d 1193, 1195 (5th Cir. 1993), cert. denied, 114 S. Ct. 1575 (1994).

Because Mims did not raise this issue before the district court, it is not reviewable by this Court absent plain error. United States v. Lopez, 923 F.2d 47, 49 (5th Cir.), cert. denied, 500 U.S. 924 (1991). "`Plain error' is error which, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of judicial proceedings" and constitute a miscarriage of justice. Id. at 50; see United States v. Olano, ___ U.S. ___, 113 S. Ct. 1770, 1779, 123 L.Ed.2d 508 (1993).

In determining a defendant's criminal history category, § 4A1.1 directs the sentencing court to add "3 points for each prior sentence of imprisonment exceeding one year and one month," "2 points for each prior sentence of imprisonment of at least sixty days not counted in (a)," and "1 point for each prior sentence not counted in (a) or (b) . . . ." §§ 4A1.1(a)-(c) (Nov. 1992). A "prior sentence" means a sentence imposed prior to sentencing on the instant offense. § 4A1.2, comment. (n.1). "Sentence of imprisonment" means a "sentence of incarceration" that was not suspended. §§ 4A1.2(b)(1) and (2).

To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence. § 4A1.2, comment. (n.2). A sentence of probation is to be treated as a sentence under § 4A1.1(c) "unless a condition of probation requiring imprisonment of at least sixty days was imposed." Id.

Although the presentence report (PSR) indicates that Mims' probation was revoked on his prior sentence, the PSR states that the bench warrant was still outstanding when the PSR was prepared. Thus, there is a factual question whether Mims had begun to serve his original sentence and whether he had served at least 60 days of the 365 imposed. Because there is a factual question whether Mims ever "actually served a period of imprisonment on such sentence" and thus should have received only one criminal history point pursuant to § 4A1.1(c), the error, if any, is not "obvious" and thus not "plain." Olano, 113 S. Ct. at 1777. Mims' counsel demonstrates, perhaps inadvertently, that the asserted error is less than "obvious" by arguing that "Presumably [Mims] never served any time for this offense, since he was supposedly revoked for failing to report in November and thereafter, thus implying he was out on probation and reporting prior to November." Blue brief, 11 (citing PSR ¶ 40) (emphasis added). The district court thus did not plainly err by assessing two criminal history points for Mims' prior sentence pursuant to § 4A1.1(b).

AFFIRMED.