

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8892
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HUEY BO NORVELL,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. W-90-CR-78-1

- - - - -
(September 22, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Huey Bo Norvell pleaded guilty to distribution of crack cocaine within a 1,000 feet of a public elementary school. The district court sentenced Norvell to a prison term of 262 months, imposed a six-year term of supervised release, and ordered him to pay a \$2,000 fine.

According to Norvell, the district court considered an illegal prior drug conviction in determining that he was a career offender. Norvell asserts that the drug conviction used by the district court as one of the predicate offenses necessary to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

classify him as a career offender, had been obtained in violation of his double jeopardy rights.

If Norvell had not been found to be a career offender, his applicable sentencing range would have been 21-27 months rather than 262-327 months. U.S.S.G. Ch.5, Pt.A, sentencing table.

Although Norvell objected to his classification as a career offender at the sentencing hearing, he did so on different grounds. Because Norvell's argument that double jeopardy barred consideration of the drug conviction for purposes of applying the career offender section of the guidelines is raised for the first time on appeal, it is reviewed for plain error. United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994).

Under Fed. R. Crim. P. 52(b), this Court may correct forfeited errors only when the appellant shows the following factors: (1) there is an error, (2) that is clear or obvious, and (3) that affects his substantial rights. Rodriguez, 15 F.3d at 415-16 (citing United States v. Olano, ___U.S.___, 113 S. Ct. 1770, 1777-79, 123 L. Ed. 2d 508 (1993)). If these factors are established, the decision to correct the forfeited error is within the sound discretion of the Court, and the Court will not exercise that discretion unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Olano, 113 S. Ct. at 1778.

There was no plain error in this case. Under this Court's holding in United States v. Shannon, 21 F.3d 77 (5th Cir 1994), collateral attacks of prior convictions at sentencing may be considered at the district court's discretion. Id. at 82-83. A

district court does not abuse its discretion to refuse to consider a contested prior state conviction where, among other factors: (1) the defendant possesses alternative means for relief in state court; (2) comity favors deferring to the state court; and (3) the alleged invalidity is not obvious from the record and the challenge is likely to be contested. See id. at 83. These three factors apply in this case. The district court did not commit plain error by considering Norvell's prior drug conviction.

Norvell also argues that the district court erred in denying him a decrease in his offense level for acceptance of responsibility. Between the commission of the offense and his subsequent arrest prior to trial, Norvell was a fugitive for more than two years. In determining whether a defendant is entitled to a downward adjustment for acceptance of responsibility, the district court considers, inter alia, whether the defendant promptly and voluntarily surrendered to the authorities after the commission of the offense. U.S.S.G. § 3E1.1, comment (n.1(d)). Flight from law enforcement officials seeking to arrest a suspect is inconsistent with acceptance of responsibility. See United States v. Faubion, 19 F.3d 226, 229-30 (5th Cir. 1994) (28 U.S.C. § 2255 case). Applying the heightened level of deference to the district court's findings, the court did not abuse its discretion. United States v. Brigman, 953 F.2d 906, 909 (5th Cir.), cert. denied, 113 S. Ct. 49 (1992).

AFFIRMED.