

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-9043  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERTO OLALDE,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:93-CR-42-A  
- - - - -  
(November 16, 1994)

Before JONES, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:\*

Roberto Olalde challenges the district court's refusal to reduce his base offense level for acceptance of responsibility under U.S.S.G. § 3E1.1. Olalde argues that he should not have been deprived of the reduction because of his drug use because that conduct was unrelated to the offense. He acknowledges that the law in this circuit supports a denial of the decrease in offense level for acceptance of responsibility, but he argues that there is a split in the circuits and urges the Court to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

follow the contrary result reached by the First and Second Circuits.

"A court's determination of acceptance of responsibility is a factual question subject to the clearly erroneous standard of review." United States v. Watkins, 911 F.2d 983, 984 (5th Cir. 1990). In Watkins, this Court held that the district court's refusal to grant a reduction for acceptance of responsibility because the defendant used cocaine while on pretrial release was not clearly erroneous. Id. at 985.

Olalde's suggestion that Watkins be rejected is not a feasible option. Olalde does not petition this Court for rehearing en banc, and "it is the firm rule of this circuit that one panel may not overrule the decisions of another." United States v. Taylor, 933 F.2d 307, 313, 112 S. Ct. 235 (1991). The district court's finding that Olalde had not accepted responsibility because he tested positive three times for drug during his pretrial release is not clearly erroneous.

Olalde next contends that, at his codefendant's sentencing hearing, the district court demonstrated a "policy" of refusing to allow the reduction for acceptance of responsibility if the defendant exercised his right to object to the presentence report. He argues that the district court applied this "policy" to his sentence, as well as his codefendant's, in violation of Fed. R. Crim. P. 32. Olalde did not object to the alleged "policy" in the district court.

Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an

error by failing to object, this Court may remedy the error only in the most exceptional case. United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. United States v. Olano, \_\_\_ U.S. \_\_\_, 113 S. Ct. 1770, 1777-79, 123 L. Ed. 2d 508 (1993).

First, an appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain ("clear" or "obvious"), and that it affects substantial rights. Olano, 113 S. Ct. at 1777-78; Rodriguez, 15 F.3d at 414-15; Fed. R. Crim. P. 52(b). This Court lacks the authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Olano, 113 S. Ct. at 1778 (quoting Fed. R. Crim. P. 52(b)). As the Court stated in Olano:

the standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, [297 U.S. 157] (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Olano, 113 S. Ct. at 1779 (quoting Atkinson, 297 U.S. at 160).

Thus, this Court's discretion to correct an error pursuant to Rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

Olalde's argument fails at the first step of the Olano analysis because there was no clear or obvious error. The district court refused the reduction for acceptance of responsibility because Olalde had used drugs while on pretrial release. There is no indication in the record that the district court followed a "policy" of denying acceptance of responsibility if a defendant filed objections to the presentence report. The claim is frivolous.

The appeal is frivolous and is DISMISSED. 5th Cir. R. 42.2.