IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 94-10112
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH RAY RAINEY,
a/k/a Kenny Reine,
a/k/a John Rainy,

Defendant-Appellant.

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Appeal from the United States District Court for the
Northern District of Texas
(4:93-CR-99-A-1)

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(September 8, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

PER CURIAM:

After waiving indictment, and pursuant to a plea agreement, defendant-appellant Kenneth Ray Rainey (Rainey), a/k/a Kenny Reine, a/k/a John Rainy, pleaded guilty to one of the two counts in the information charging him with wire fraud.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Rainey submitted four written objections to the PSR,[1] including an objection for the failure of the probation officer to reduce the offense level by two for acceptance of responsibility. The list of written objections concluded by stating "[i]n the event that the Government moves for downward departure, and the Court grants the same, the Defendant herein recognizes that some if not all of these objections may be rendered moot." In response to the objection, the probation officer maintained that the denial of the reduction was proper because Rainey had violated a special condition of his bondSQthat he refrain from the use of alcoholSQby being arrested for driving while intoxicated.

At the sentencing hearing, the court first heard evidence concerning the government's motion for downward departure based on Rainey's substantial assistance. Rainey's counsel then advised the district court that, in light of the court's consideration of a downward departure, Rainey was withdrawing all the objections to the PSR. The district court then noted on the record that Rainey did not have objections. Rainey's counsel subsequently twice affirmatively stated that all objections to the PSR had been withdrawn, once in response to a direct question by the district court.

The PSR calculated an offense level of 14, and a criminal history category of II, which produced a guidelines confinement

[1] The probation officer used the Nov. 1, 1992, edition of the sentencing guidelines.

range of 18 to 24 months.[2]

The district court made a downward departure from the applicable 18 to 24 months sentencing range, and imposed a sentence of 12 months.

Rainey's sole argument on appeal is that the district court erred by failing to adjust the offense level for acceptance of responsibility before departing downward. He argues that this was plain error. The government correctly points out that Rainey withdrew his objections to the PSR, objections encompassing this issue.

A forfeited error may be reviewed for plain error. *See United States v. Olano*, 113 S.Ct. 1770, 1777 (1993); FED. R. CRIM. P. 52(b). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 113 S.Ct. at 1777 (citations omitted); *see United States v. Rodriguez*, 15 F.3d 408, 415 (5th Cir. 1994) (relying on *Olano* in distinguishing waived error from error possibly amenable to plain error review).

> "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." *Olano*, 113 S.Ct. at 1777 (citations omitted).

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[2] Had a 2-level reduction for acceptance of responsibility been given, the offense level would have been 12, and with a criminal history category of II the guideline confinement range would have been 12 to 18 months.

It appears to us proper to treat the claimed error here as having been waived, and hence not subject to review.

Even if we were to treat this as a "mere forfeiture," the result would be no different. 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. *Rodriguez*, 15 F.3d at 414. The Supreme Court has directed the courts of appeal to determine whether a case is exceptional by using a two-part analysis. *Olano*, 113 S.Ct. at 1777-79.

First an appellant who raised 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).

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).

There is no plain error in this case because any error is not

plain or obvious. *Rodriguez*, 15 F.3d at 415. Based upon Rainey's arrest for driving while intoxicated, a violation of his bond conditions, the probation officer recommended no adjustment for acceptance of responsibility. In *United States v. Hooten*, 942 F.2d 878, 882-83 (5th Cir. 1991), this Court upheld the district court's determination not to adjust for acceptance of responsibility based on the defendant's failure to comply with conditions of bond. Nor do we conclude that the error, if any, would merit discretionary relief or could be properly considered as seriously affecting the fairness, integrity, or public reputation of judicial proceedings.

This appeals borders on the frivolous.

The conviction and sentence are

AFFIRMED.