IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10541
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

OSMIDE REVE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CR-215-H)

(March 31, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Osmide Reve appeals the sentence he received for possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). Finding no plain error, we affirm.

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Reve was convicted of the above offense and sentenced to 168 months' imprisonment and five years' supervised release. In the pre-sentence investigation report (PSR), the probation officer noted that Reve was serving a twenty-year undischarged term of imprisonment resulting from his arrest by state authorities. Because that offense was included in relevant conduct in Reve's recommended guideline range, the probation officer determined that, under U.S.S.G. § 5G1.3(b), Reve's sentence should be imposed to run concurrently with the undischarged term of imprisonment.

In response to Reve's objections to the PSR, the sentencing court excluded matters other than those charged in count six. Because of this adjustment to matters considered under relevant conduct, Reve's undischarged term of imprisonment was no longer taken into account in the offense level determination.

The court did not state that Reve's term of imprisonment was to run concurrently with his undischarged state term. Nevertheless, the court did expressly adopt the guideline application in the PSR. The sentencing court excluded the state arrest and conviction from the relevant-conduct calculation.

"Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." 18 U.S.C. § 3584(a). Under these circumstances, it is presumed that Reve's sentences were imposed consecutively. See United States v. Torrez, 40 F.3d 84, 86 (5th Cir. 1994). Because of the ambiguity created by the exclusion of the relevant conduct

and the silence of the commitment order, the presumption that the sentence is consecutive controls.

II.

Reve argues that the sentencing court committed plain error in failing to apply § 5G1.3(c) to determine whether his federal sentence should run concurrently with, or consecutively to, the undischarged state sentence. Because Reve failed to make this challenge before the district court, his argument is reviewed under the plain-error standard.

Under FED. R. CRIM. P. 52(b), we 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 substantial rights. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc) (citing United States v. Olano, 113 S. Ct. 1770, 1776-79 (1993)), cert. denied, 1995 WL 36679 (1995). If these factors are established, the decision to correct the forfeited error is within our sound discretion, and we 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.

Parties are required to challenge errors in the district court. When a criminal defendant has forfeited an error by failing to object, we may remedy the error only in the most exceptional case. Calverley, 37 F.3d at 162. The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by

using a two-part analysis. Olano, 113 S. Ct. at 1777-79.

First, a defendant 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, and that it affects substantial rights. Olano, 113 S. Ct. at 1777-78; United States v. Rodriguez, 15 F.3d 408, 414-15 (5th Cir. 1994); FED. R. CRIM. P. 52(b). Plain error is one that is "clear or obvious, and, at a minimum, contemplates an error which was clear under current law at the time of trial." Calverley, 37 F.3d at 162-63 (internal quotation and citation omitted). "[I]n most cases, the affecting of substantial rights requires that the error be prejudicial; it must affect the outcome of the proceeding." Id. at 164. This court lacks the authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781.

Second, the 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, 56 S. Ct. 391, 80 L. Ed. 555 (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, our discretion to correct an error pursuant to Rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

Reve correctly contends that the district court committed error in failing to use the methodology prescribed in § 5G1.3(c). See United States v. Bell, No. 94-10196, 1995 U.S App. LEXIS 3020, at *10 n.8 (5th Cir. Feb. 17, 1995); see also Torrez, 40 F.3d at 86-87. Because Reve's state conviction was part of the record and the PSR, the district court's failure to consider the guideline rules regarding concurrent and consecutive sentences was also clear and obvious. See Torrez, id. at 87.

In Torrez, this court found that although Torrez had shown error that was plain and obvious, he had failed to show that the error affected his substantial rights. Id. At the time of his arraignment in federal court, Torrez was serving four six-year undischarged terms of imprisonment. Id. at 85. His federal term of imprisonment was sixty months. Id. The court found that Torrez had failed to show that his substantial rights were affected by the error for several reasons, including: (1) the district court's discretion to determine the incremental punishment that was appropriate; (2) the permissive nature of application note 3 of § 5G1.3; (3) the fact that a consecutive sentence was in keeping with the policy expressed in U.S.S.G. § 7B1.3, which applies when the defendant's term of federal probation or supervised release is revoked;[1] and (4) Torrez's multiple state sentences were all imposed to run concurrently, increasing the likelihood that the sentencing judge would expressly impose a consecutive sentence upon

[1] Application note 4 of § 5G1.3 was not applicable to Torrez because of the date of his sentencing. See Torrez, 40 F.3d at 88 n. 2.

remand. Id. at 87-88.

In contrast to Torrez's case, Reve's does not involve a probation-revocation situation. Id. at 87-88. Section 5G1.3(c), p.s., provides that "the sentence for the instant offense shall be imposed to run consecutively to the prior undischarged term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense." The commentary following the policy statement states that

> [t]o the extent practicable, the court should consider a reasonable incremental penalty to be a sentence for the instant offense that results in a combined sentence of imprisonment that approximates the total punishment that would have been imposed under § 5G1.2 . . . had all of the offenses been federal offenses for which sentences were being imposed at the same time.

§ 5G1.3, comment. (n.3).

Pursuant to § 5G1.2, the total sentence applicable to Reve's multiple counts should be determined in accordance with part D of chapter 3. Under § 3D1.4, the combined offense level for multiple counts is determined by initially determining the offense level applicable to the offense group with the highest offense level. All counts involving substantially the same harm are grouped together in a single group. See § 3D1.2. The offense level for that group is then increased by the number of levels indicated for the other offense groups, having lesser offense levels, in a table set out in § 3D1.4. See United States v. El-Zoubi, 993 F.2d 442, 451 (5th Cir. 1993).

In Reve's case there was only one group of offenses, both his

state and federal offenses were drug-trafficking offenses. The offense level for the federal offense was found by the district court to be 32, based upon seven kilograms of cocaine. Aggregation of the amount of cocaine involved in the federal and state offense would result in a total amount of eight kilos. Offense level 32 covers transaction of five to fifteen kilos of cocaine. See § 2D1.1(c)(6).

Reve's reasonable incremental punishment was 168 to 210 months' imprisonment; he received a 168-month term. Had all of Reve's offenses been federal offenses that were being imposed at the same time, his guideline range would have been the same had he been facing sentencing on the federal conviction alone. Instead, Reve is facing a twenty-year state term that, upon completion, will be followed by his 168-month federal term. Accordingly, Reve has shown that the error has affected his substantial rights.

The final question, however, is whether we should exercise our discretion to correct the error))i.e., whether the error "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings." Olano, 113 S.Ct. at 1779 (internal quotations and citation omitted). We exercise our wide latitude in this area by deciding that the error is not of the required magnitude. The integrity of these proceedings is not undermined by a result that causes state and federal sentences to be served consecutively to one another. So, there is no plain error.

AFFIRMED.