UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10664
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUADALUPE DAVILA,
a/k/a Lupe Davila,

Defendant-Appellant.

* * * * * *

No. 94-10811
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUADALUPE DAVILA,
a/k/a Lupe Davila,

Defendant-Appellant.

Appeals from the United States District Court for the
Northern District of Texas
(4:93-CR-116-Y & 4:94-CR-9-1)

(April 17, 1995)

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

GARWOOD, Circuit Judge:

In these consolidated appeals, Guadalupe Davila (Davila) appeals his convictions and sentences imposed, in the United States District Court for the Northern District of Texas, Fort Worth Division, after Davila entered guilty pleas in two separate indictments to one count of conspiracy to possess with intent to distribute cocaine and heroin in violation of 21 U.S.C. §§ 841(a)(1) and 846 and one count of conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and 846. We affirm.

Facts and Proceedings Below

On September 21, 1993, a federal grand jury returned a multi-count indictment charging Davila, his wife Zulema, Rodolfo Lara Banda (Banda), Abel Benavides (Benavides), Adam Ramirez (Ramirez), and Jose Mosqueda-Cortez (Mosqueda-Cortez) with conspiracy to possess with intent to distribute cocaine and heroin in violation of 21 U.S.C. §§ 841(a)(1) and 846 from December 3, 1991 until September 21, 1993 (our cause No. 94-10664). The twenty-five substantive counts of the indictment alleged the overt acts forming the conspiracy.[1] The last overt act alleged in the indictment

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] The September 21, 1993 indictment also charged Davila with possession with intent to distribute cocaine and heroin (Counts

occurred on December 16, 1992.[2] On January 25, 1994, another federal grand jury returned a four-count indictment charging Davila, Reynaldo Garza (Garza), Jose Luis Hernandez (Hernandez), Augustin Almaguer, and Roberto Almaguer with conspiracy from October 29, 1993 to November 16, 1993 to possess with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and 846 (our cause No. 94-10811). The overt acts alleged in this second indictment occurred on October 29, 1993 (Count 2), November 10, 1993 (Count 3), and November 16, 1993 (Count 3).[3]

On March 24, 1994, at about 10:00 a.m., Davila appeared with his counsel before United States District Judge Terry Means and entered a guilty plea to Count one of the indictment in 94-10664 pursuant to a written plea agreement. The factual resume supporting the plea, signed by Davila, his counsel and the government, reflected that Davila and his wife sold cocaine from their Fort Worth, Texas residence from December 3, 1991 until

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2, 3, 4, 5, 6, and 7), using and carrying a firearm during the commission of the offenses alleged in Counts 1 and 7 (Count 8), unlawfully maintaining a place for the purpose of distributing cocaine, heroin, and marihuana (Counts 9 and 10), unlawful use of a communications facility to facilitate the distribution of heroin, cocaine, and marihuana (Counts 17 and 18), and the possession of a firearm by a convicted felon (Count 26). The offenses charged in these counts were alleged to have been committed on December 3, 1991, April 2, 1992, July 16, 20 and 31, 1992, December 16, 1992, from December 3, 1991 to May 1, 1992, from May 1, 1992 to December 16, 1992, and November 21 and 27, 1992.

[2] The Presentence Report (PSR) stated that the conspiracy in 94-10664 was interrupted by the execution of search warrants on December 16, 1992.

[3] Davila was not charged in Count 3.

December 16, 1992.[4] The factual resume recounted that Banda, Benavides, Ramirez, and Mosqueda-Cortez assisted the Davilas in their narcotics operation.[5] In return for Davila's plea of guilty to Count one, the government agreed to dismiss the remaining counts of the indictment in 94-10664 at sentencing. In addition, the government agreed not to prosecute Davila any further for his "participation in the conspiracy alleged in the Indictment and set out in the Factual Resume."

Also on March 24, 1994, at about 10:35 a.m., Davila appeared with his attorney before United States District Judge John McBryde and entered a plea of guilty to Count one of the indictment in 94-10811 pursuant to a written plea agreement. The factual resume supporting this plea agreement, signed by Davila, his counsel, and the government, reflected that Davila, Garza, Hernandez, and Augustin Almaguer sold one ounce of heroin to an undercover F.B.I. agent on November 10, 1993. In return for Davila's plea of guilty to Count one of this indictment, the government agreed to dismiss the remaining counts of the indictment in 94-10811 at the time of sentencing and promised not to prosecute Davila any further for his

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[4] The Davilas lived at 3700 Burnice Drive in Fort Worth until May 1, 1992, when they moved to 3121 Avenue K, also in Fort Worth. The factual resume stated that the Burnice Drive residence was located within one thousand feet of an elementary school.

[5] According to the factual resume, Banda and Ramirez were in charge of finding customers, weighing out the drugs, delivering them to buyers, and collecting drug debts for the Davilas. Benavides stored drugs and money and also weighed out drug orders, made deliveries, and collected payments due for drugs. Mosqueda-Cortez obtained the cocaine and heroin for the Davilas from various sources.

participation in the conspiracy alleged in the indictment and described in the factual resume.

One Presentence Report (PSR) was prepared for both convictions and was distributed to the two different district court judges. With respect to 94-10664, the PSR stated that the investigation determined that Davila was the leader and organizer of the conspiracy. In determining the amount of drugs attributable to Davila in 94-10664, the PSR considered the amount of drugs seized from the residences of the Davilas and their co-conspirators and also estimated the amount of drugs involved in other known distributions made during the relevant time period (not extending beyond December 16, 1992). The PSR recommended that Davila be held accountable in 94-10664 for 3-5 kilograms of heroin, at least 20 kilograms of cocaine, and at least 100 pounds of marihuana. With respect to 94-10811, the PSR recounted Davila's participation in the sale of 1 ounce of heroin to an undercover agent on November 10, 1993 and characterized his role in the second conspiracy as that of a middle man who knew sources who could obtain heroin. The PSR stated that the amount of heroin involved in 94-10811 was 31 grams.

The PSR recommended that Davila's convictions in 94-10664 and 94-10811 be grouped together for sentencing purposes pursuant to U.S.S.G. § 3D1.2(b). When U.S.S.G. § 3D1.2 produces a single group of closely related counts, "the combined offense level is the level corresponding to the Group determined in accordance with §3D1.3." U.S.S.G. § 3D1.4, Application Note 1. U.S.S.G. § 3D1.3(a) and (b) provide that the offense guideline that produces the highest

offense level should apply. The PSR calculated the base offense level to be 34 under either calculation. After adjustments were made for the use of a firearm, his leadership role, and a credit given for his acceptance of responsibility, the PSR determined that the recommended total offense level was 37. Davila filed three objections to findings in the PSR, arguing that his physical condition should be taken into consideration, that he was willing to accept treatment for his drug and alcohol addictions, and that he was entitled to a downward departure based on his age and physical condition. Davila, however, never objected to the suggested grouping of the offenses for purposes of sentencing.

On July 1, 1994, the district court (Judge McBryde) held a sentencing hearing in 94-10811. After finding that Davila's objections to the PSR did not require rulings because they were essentially only comments on the findings of the PSR, the district court adopted the findings of the PSR without objection. The district court then calculated that the Sentencing Guidelines would call for a sentencing range of 292-365 months but pointed out that the statutory maximum for the offense to which Davila pleaded guilty in 94-10811 was 240 months. Therefore, the district court sentenced Davila to 240 months imprisonment, 5 years of supervised release, and imposed a special assessment of $50. No fine was imposed. The government then moved to dismiss the remaining counts of the indictment against Davila in accordance with the plea agreement, and the district court granted the motion. Davila filed a timely notice of appeal.

On July 12, 1994, the district court (Judge Means) held a

sentencing hearing in 94-10664. After Davila conceded that his objections to the PSR were "more a request for a downward departure," the district court adopted the findings contained in the PSR. The district court determined that the Sentencing Guideline range for Davila's offense was 292-365 months of imprisonment and sentenced Davila to 292 months of imprisonment, to be served concurrently with his sentence in 94-10811. The district court also sentenced Davila to 5 years of supervised release (to run concurrently with the supervised release in No. 94-10811) and ordered him to pay a special assessment of $50. No fine was imposed. The government then moved to dismiss the remaining counts of the indictment against Davila in accordance with the plea agreement, and the district court granted the motion. Davila filed a timely notice of appeal. Causes 94-10811 and 94-10664 were subsequently consolidated on appeal.

Discussion

Davila's first argues that he was subjected to multiple punishments for the same conduct in violation of the Double Jeopardy Clause. Davila asserts that, because his convictions were sufficiently similar to be grouped for sentencing purposes, he received multiple punishments for the same offense.[6] Davila never raised this issue in the district court. When a defendant fails to

[6] Initially, we address whether Davila can establish that he received multiple punishments because his terms of imprisonment were to run concurrently. Two sentences, however, are not considered wholly concurrent if separate special assessments are imposed on each conviction. *United States v. Berry*, 977 F.2d 915, 920 (5th Cir. 1992). Because a separate special assessment was imposed in each case, Davila's sentences were not technically wholly concurrent.

raise a timely objection in the district court, he may not raise it on appeal absent plain error. *United States v. Calverley*, 37 F.3d 160, 162 (5th Cir. 1994) (en banc), *cert. denied*, 115 S.Ct. 1266 (1995). In *United States v. Olano*, 113 S.Ct. 1770, 1776 (1993), the Supreme Court posited the three requirements for showing plain error under Federal Rule of Criminal Procedure 52(b). In order to obtain relief under the plain error standard, a defendant must show that (1) the district court deviated from a legal rule in the absence of a waiver, (2) the error was clear or obvious, and (3) the error affected substantial rights and influenced the district court proceedings. *Id.* at 1777-78. Even if all three requirements are satisfied, "the Court of Appeals has authority to order correction, but is not required to do so." *Id.* at 1778.

Prior to *Olano*, we held that multiple sentences in violation of double jeopardy constitute plain error. *United States v. Pineda-Ortuno*, 952 F.2d 98, 105 (5th Cir.), *cert. denied*, 112 S.Ct. 1990 (1992). We have not considered whether *Olano* requires us to re-examine the holding in *Pineda-Ortuno*. In *Pineda-Ortuno*, Border Patrol agents found cocaine and two guns in the vehicle in which the two defendants were travelling. Because the indictment charged each weapon as a separate offense, the defendants were convicted of two offenses of carrying a firearm in connection with a single drug trafficking offense. *Id.* at 104-05. *See United States v. Privette*, 947 F.2d 1259, 1262 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1279 (1992) (convictions for possessing two firearms, found in the same search of defendant's premises, in a single drug trafficking offense violate double jeopardy). Although one

defendant did not raise a double jeopardy objection at trial or on appeal, the *Pineda-Ortuno* court held that it constituted plain error. 952 F.2d at 105. Without determining whether *Pineda-Ortuno* survives *Olano*, we find that the facts of the instant case are distinguishable. In *Pineda-Ortuno*, the double jeopardy violation was evident from the face of the indictment. By contrast, the indictments returned against Davila reflect that he was charged with participating in two different conspiracies during different time periods and with different co-conspirators. Because it is not evident from the face of the indictments (or otherwise from the record) that Davila was charged twice for the same offense, we hold that any alleged error in this case was not plain.

Furthermore, we find significant the fact that Davila pleaded guilty to both counts. In *United States v. Broce*, 109 S.Ct. 757 (1989), two separate indictments charged the defendants with various violations of the Sherman Act. After entering plea agreements with the government, the defendants pleaded guilty to the two indictments in a single proceeding, and the district court sentenced the defendants on both convictions. The defendants did not appeal, and their convictions became final. Subsequently, the defendants sought to have their sentences set aside, arguing that their convictions violated double jeopardy because there was only a single conspiracy. The Supreme Court held that the defendants, by pleading guilty to two indictments that on their face described separate conspiracies, waived their double jeopardy argument that there was only one conspiracy. *Id.* at 766. Under *Broce*, a defendant who pleads guilty to criminal charges may assert a claim

of multiple punishments in violation of the Double Jeopardy Clause "only if the violation is apparent on the face of the indictment or record." *Taylor v. Whitley*, 933 F.2d 325, 328 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1678 (1992) (collateral attack on a guilty plea) (citations omitted). *See, e.g., United States v. Pollen*, 978 F.2d 78, 84 (3d Cir. 1994), *cert. denied*, 113 S.Ct. 2332 (1993) (applying the rule of *Broce* in a direct criminal appeal). We find the facts surrounding Davila's convictions analogous to *Broce*. Davila, like the defendants in *Broce*, pleaded guilty to two indictments that on their face charged separate conspiracies. We thus find that, under *Broce*, Davila has waived any double jeopardy challenge based on his argument that there was only one conspiracy.

Even if Davila could raise his double jeopardy argument, we find that it is meritless. In determining whether a defendant has been prosecuted twice for the same conspiracy charged in separate indictments in violation of double jeopardy, we must determine whether the two conspiracies are factually distinct. *United States v. Vasquez-Rodriguez*, 978 F.2d 867, 870 (5th Cir. 1992). Five factors guide our analysis in making this determination: (1) time; (2) persons acting as co-conspirators; (3) the statutory offenses charged in the indictment; (4) the overt acts charged or any other description of the offense that indicates the nature and scope of the activity sought to be punished; and (5) the places where the alleged events occurred. *Id.*

Applying these factors to the facts of record surrounding Davila's indictments, we hold that the two conspiracies constitute separate offenses. At the time of his guilty pleas, Davila

stipulated to the factual resumes contained in the plea agreements. Davila does not dispute these factual findings on appeal. Both the indictment and the factual resume supporting Davila's guilty plea in 94-10664 describe a conspiracy with overt acts occurring from December 3, 1991 until December 16, 1992, involving co-conspirators Banda, Benavides, Ramirez, and Mosqueda-Cortez.[7] By contrast, the indictment and factual resume supporting Davila's guilty plea in 94-10811 recount a conspiracy from October 29, 1993 until November 10, 1993, involving Garza, Hernandez, Augustin Almaguer, and Roberto Almaguer. While the indictment in 94-10664 charged a conspiracy occurring over the course of one year in which Davila sold large amounts of drugs from his home and used firearms for protection, the indictment in 94-10811 alleged a conspiracy in which Davila participated in the sale of a small amount of heroin to an undercover agent.[8] The PSR reflects (consistently with the indictments and factual resumes) that Davila acted as the leader in the 94-10664 conspiracy and as a middle man in the 94-10811 conspiracy. Although both indictments were based on violations of the same statutory provisions, each conspiracy involved a separate set of overt acts performed by Davila at different times and places with a different set of co-conspirators. Thus, we reject Davila's

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[7] The PSR does state that there was some suggestion that Garza was also involved (but without giving any indication of how) in the 94-10664 conspiracy. However, he was not mentioned in the indictment. Neither the factual resume nor anything else of record (apart from this statement in the PSR) indicates that Garza was involved in the 94-10664 conspiracy.

[8] The indictment in 94-10811 did not that allege any firearms were involved.

argument that his two conspiracy convictions violate double jeopardy.

Davila next challenges the sentences imposed for his two convictions. Davila apparently argues that the grouping of both convictions for purposes of sentencing was improper and that he was improperly sentenced as a kingpin in both cases. Because Davila did not raise these objections in the district court, our review is limited to plain error. *Calverley*, 37 F.3d at 162. We hold that the district court properly grouped Davila's two convictions for purposes of sentencing. U.S.S.G. § 3D1.2(b). To the extent that Davila challenges the classification of his role in the offenses, we will not consider such an argument raised for the first time on appeal because it requires resolution of fact issues. *United States v. Guerrero*, 5 F.3d 868, 871 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1111 (1994) (holding that questions of fact that could have been resolved by the district court upon proper objection can never constitute plain error). Based on our review of the record, the PSR and the sentences imposed in 94-10664 and 94-10811, we hold that the district courts did not commit any error, much less plain error.

Conclusion

For the foregoing reasons, Davila's convictions and sentence are

AFFIRMED.