IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10732

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JUAN CARLOS VASQUEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:91-CR-244-D)

(May 2, 1995)

Before DAVIS, SMITH, and WIENER, Circuit Judges.

PER CURIAM:[*]

Juan Carlos Vasquez appeals his sentence after pleading guilty to one count of possession of a controlled substance with intent to distribute. He contends that the district court erred by counting two prior Texas "deferred adjudications" as felony convictions in order to classify him as a career offender. Because we agree with the district court's interpretation and application of the

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sentencing guidelines, we affirm.

I.

Vasquez pleaded guilty to one count of possession with intent to distribute. A presentence investigation report ("PSR") was prepared using the November 1993 edition of the sentencing guidelines. According to the PSR, the 327 grams of cocaine at issue established a base offense level of 22, with a four-level adjustment for Vasquez's leadership role. Moreover, the PSR determined that the base offense level was subject to enhancement, as Vasquez was a career offender))he twice had been arrested for drug possession with intent to distribute. Both times, however, he pleaded guilty to a state charge and was given a ten-year probationary sentence, know under Texas law as a "deferred adjudication." Applying the career offender enhancement provision, the PSR found that the guidelines set a base level of 32 and a criminal history category of VI. Under the 1993 guidelines, the sentencing range is 210 to 262 months.

Vasquez made two significant objections to the PSR's recommendations. First, he objected to the use of the 1993 version of the guidelines, because changes in certain definitions might create an ex post facto problem. The court agreed and applied the 1989 version.

Second, Vasquez objected to the PSR's use of deferred adjudications as if they were convictions to determine his career offender status. The district court, however, overruled this

objection, reasoning that it could find "no analytical or principled distinction between the use of a deferred adjudication for criminal history score and for purposes of career offender enhancement." Accordingly, under the 1989 guidelines, the district court found that Vasquez's total offense level was 29, and his criminal history category was VI. The appropriate range was 151 to 188 months. A 151-month sentence was imposed.

II.

The guidelines declare that a defendant is a career offender if

> (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1 (Nov. 1989). Application note 1 states that the term "two prior felony convictions" is defined in § 4B1.2, which states in relevant part that

> [t]he term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a crime of violence and one felony conviction of a controlled substance offense), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of Part A of this Chapter. The date that a defendant sustained a conviction shall be the date the judgment of conviction was entered.

Application note 4 under this section states that § 4A1.2 (Definitions and Instructions for Computing Criminal History) is "applica-

ble to the counting of convictions under § 4B1.1."

Section 4A1.2 provides that

> (1) The term "prior sentence" means any sentence previously imposed upon the adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.
>
> . . . .
>
> (3) A conviction for which the imposition of sentence was totally suspended or stayed shall be counted as a prior sentence under § 4A1.1.

Moreover, § 4A1.2(f) provides:

> Diversionary Dispositions
> Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted as a [prior] sentence . . . even if a conviction is not formally entered.

The commentary to this section adds that "diversionary dispositions [are counted] if they involve a judicial determination of guilt or an admission of guilt in open court. This reflects a policy that defendants who receive the benefits of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency." U.S.S.G. § 4A1.2(f) comment (n.9).

III.

Vasquez argues that § 4B1.1 provides the only definition of "prior conviction" for determining career offender status.[1] He contends that § 4B1.1's definition does not include "deferred

[1] He concedes that deferred adjudications are rateable in determining criminal history under § 4A1.2. See United States v. Giraldo-Lara, 919 F.2d 19, 22-23 (5th Cir. 1990).

adjudication," as that phrase on its face is not synonymous with the word "conviction." See McIntyre v. Texas, 587 S.W.2d 413, 417-18 (Tex. Crim. App. 1979) (defining deferred adjudication); see also TEX. CODE CRIM. PRO. ANN. art. 42.12 § 5(a) (West 1995) (statutory authority and procedure). He also contends that to read § 4A1.2's definitions into § 4B1.1 makes § 4B1.1 redundant and renders its provisions meaningless. Finally, he notes that the November 1992 guidelines changed § 4B1.2 explicitly to include pleas of nolo contendere.

Vasquez's arguments, while consistent with some language of § 4B1.2, are unavailing. The commentary to § 4B1.2 states that the provisions of § 4A1.2 are "applicable." Such commentary is "authoritative." Stinson v. United States, 113 S. Ct. 1913, 1915 (1993) (holding that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with or a plainly erroneous reading of, that guideline."). One such authoritative provisions is § 4A1.2(f), which allows diversionary adjudications to be counted as long as there has been an admission of guilt in open court. Vasquez did make such an admission.

Moreover, the district court's interpretation of the guidelines does not constitute a tortured reading. Section 4A1.2 supplements, not contradicts, § 4B1.2 definitions. Fairly read, § 4B1.2 states at what time two prior convictions will be counted as "prior"; § 4A1.2 defines generally what activities are to be

counted. Admittedly, some parts of the two sections are somewhat redundant. Section 4A1.2(f), however, is not one of those sections. Accordingly, the plain language of the guidelines and its commentary controls the outcome of this case.

AFFIRMED.